COURT FILE NUMBER	2201-02948
COURT	COURT OF QUEEN'S BENCH OF ALBERTA
JUDICIAL CENTRE	CALGARY
APPLICANT	CROWN CAPITAL PARTNER FUNDING LP, by its manager, CROWN PRIVATE CREDIT PARTNERS INC.
RESPONDENTS	RBee AGGREGATE CONSULTING LTD.
DOCUMENT	**BRIEF OF THE APPLICANT IN SUPPORT OF THE BANKRUPTCY OF RBee AGGREGATE CONSULTING LTD.**
ADDRESS FOR SERVICE AND CONTACT INFORMATION OF PARTY FILING THIS DOCUMENT	MLT Aikins LLP 2100, 222 3rd Avenue SW Calgary, Alberta T2P 0B4 Phone: 403.693.5420 Fax: 403-508-4349 Attention: Ryan Zahara/Brian Catalano Email: rzahara@mltaikins.com File: 0151020.00013

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I. INTRODUCTION

1. These are the written submissions of the Applicant, Crown Capital Partner Funding LP (formerly Crown Capital Fund IV, LP) (the "**Fund**"), by its manager, Crown Private Credit Partners Inc. ("**CPCPI**", collectively with the Fund, "**Crown Capital**"), in support of its Application, filed May 2, 2022 (the "**Bankruptcy Application**"), for an Order, among other things, assigning the Respondent, RBee Aggregate Consulting Ltd. ("**RBee**") into bankruptcy.

2. On March 11, 2022, the Honourable Justice A.D. Grosse pronounced an Order appointing FTI Consulting Canada Inc. as receiver (the "**Receiver**") over RBee.[1] RBee is unable to meet its debts generally as they become due.

3. The two-part test for the granting of a bankruptcy order under section 43(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, as amended (the "**BIA**") is satisfied. Crown Capital is owed in excess of $22.7 million by RBee and RBee has committed at least one act of bankruptcy within the last 6 months.

4. There is no factual or legal basis for any objection by RBee to a Bankruptcy Order. Crown Capital seeks a Bankruptcy Order of this Honourable Court in respect of RBee.

II. BACKGROUND

5. Pursuant to an Assignment and Assumption Agreement dated November 9, 2017 (the "**Assignment Agreement**"), RBee assumed certain indebtedness in the principal amount of $17,255,000.00 (as adjusted, the "**Assumed Indebtedness**") owing by Petrowest Corporation and its related entities (collectively, the "**Petrowest Entities**") to the Fund, as consideration for the purchase of certain assets of the Petrowest Entities' receivership (the "**Transaction**").[2]

6. Also on November 9, 2017, RBee:

   (a) issued a Promissory Note (the "**Original Note**") to the Fund in respect of the Assumed Indebtedness;[3]

[1] The Receivership Order pronounced by Justice Grosse March 11, 2022 and filed March 14, 2022, the Affidavit of Tim Oldfield, sworn April 29, 2022, at Exhibit B (the "**Oldfield Affidavit**").
[2] The Receivership Affidavit at para 6 and Exhibit B, the Oldfield Affidavit at Exhibit A.
[3] The Receivership Affidavit at para 7 and Exhibit C, the Oldfield Affidavit at Exhibit A.

(b) granted a General Security Agreement in favour of Crown Capital as security for all amounts owing by RBee (which was registered against RBee on the same day in the Personal Property Registry);[4] and

(c) entered into a Priority, Postponement, Subordination and Standstill Agreement (the "**Priority Agreement**") with Canadian Western Bank ("**CWB**") and Crown Capital, whereby the parties agreed that the obligations of RBee to Crown Capital under the Amended Note and GSA would be postponed and subordinated to RBee's obligations to CWB under RBee's loan agreement and security granted in favour of CWB, subject to any waiver in writing executed by CWB.[5]

7. The Assumed Indebtedness was subject to further adjustments upon the closing of the Transaction and, as a result, the Original Note was amended and restated in its entirety by an Amended and Restated Promissory Note, effective November 9, 2017 (the "**Amended Note**"). The Assumed Indebtedness in the Amended Note was adjusted to $18,807,490.10.[6]

8. Pursuant to the Amended Note, the Assumed Indebtedness was repayable by RBee to Crown Capital in full, on demand, with interest accruing at a rate of 12% per annum.[7]

9. As of March 7, 2022, the indebtedness outstanding under the Amended Note amounted to $22,734,432.15, exclusive of legal and professional fees, costs, charges, disbursements, and expenses incurred by Crown Capital (collectively, the "**Outstanding Indebtedness**").[8]

10. On March 7, 2022, Crown Capital issued a demand letter (the "**RBee Demand**") demanding payment in full of the Outstanding Indebtedness and a Notice of Intention to enforce its security pursuant to section 244 of the BIA.[9] Accordingly, the entire amount of the Outstanding Indebtedness is due and owing. RBee is unable to repay the Outstanding Indebtedness.

11. CWB provides operating financing to RBee and prior to the appointment of the Receiver had capped the operating line of RBee at $7,900,000.00.

[4] The Receivership Affidavit at para 12 and Exhibit E, the Oldfield Affidavit at Exhibit A.
[5] The Receivership Affidavit at paras 14 & 15 and Exhibit G, the Oldfield Affidavit at Exhibit A.
[6] The Receivership Affidavit at para 8 and Exhibit D, the Oldfield Affidavit at Exhibit A.
[7] The Receivership Affidavit at para 11 and Exhibit D, the Oldfield Affidavit at Exhibit A.
[8] The Oldfield Affidavit at para 7.
[9] The Receivership Affidavit at para 35 and Exhibit L, the Oldfield Affidavit at Exhibit A.

12. As of March 11, 2022, RBee was indebted to CWB in the amount of $8,654,694.00.[10]

13. To the best knowledge of Crown Capital, RBee also has outstanding liabilities owing to the Canada Revenue Agency for unpaid source deductions and outstanding GST remittance.[11]

14. On March 11, 2022, the Receiver was appointed over all of the assets, undertakings, and properties of RBee.[12]

III. ISSUES

15. The sole issue before this Honourable Court is whether it is appropriate to assign RBee into bankruptcy.

IV. BANKRUPTCY ORDERS

16. Section 43(1) of the BIA provides that one or more creditors may file an application for a Bankruptcy Order if (a) the debt owing to the applicant creditor amounts to one thousand dollars, and (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.[13]

17. The Outstanding Indebtedness owed to the Applicant, Crown Capital, is greater than $1,000.00.

18. As outlined in detail below, RBee has committed an act of bankruptcy within the six months preceding the filing of the within Bankruptcy Application. RBee has had a Receiver appointed over it and has ceased meeting its liabilities generally as they become due.

19. As of March 11, 2022, RBee is indebted to multiple creditors, as follows:[14]

(a) RBee has outstanding amounts due and owing under the Amended Note in the amount of $22,734,432.15, plus interest accruing at a contractual rate of 12% per annum;

(b) RBee is indebted to CWB in the amount of $8,654,694.00;

[10] List of Creditors, the Oldfield Affidavit at Exhibit D.
[11] The Receivership Affidavit at para 30, the Oldfield Affidavit at Exhibit A.
[12] The Receivership Order, the Oldfield Affidavit at Exhibit B.
[13] BIA at section 43(1) at **TAB 1**.
[14] List of Creditors, the Oldfield Affidavit at Exhibit D.

(c) RBee is indebted to Komatsu International (Canada) Inc. in the amount of $3,030,397.00; and

(d) RBee is indebted to a large number of unsecured creditors in the total amount of $7,692,416.00.

20. As of March 11, 2022, the total claims of all creditors against RBee is $42,111,939.00.

21. The applicant in a bankruptcy application will have satisfied its obligation to demonstrate that the respondent has ceased meeting its liabilities generally as they become due if the applicant can satisfy the court that the respondent has claims (i.e. two or more) of other creditors that are unpaid.[15]

22. Crown Capital values its security at approximately $21,000,000.00 and expects to suffer a shortfall of at least $1,000,000.00 on its recovery of the Outstanding Indebtedness. RBee is unable to repay the Outstanding Indebtedness, which has become due and owing.

23. As outlined above, RBee has a significant number of unpaid creditors with unpaid claims. Based on the foregoing, RBee has ceased meeting its liabilities generally as they become due.

V. THERE IS NO CAUSE TO DENY THE APPLICATION

24. Ordinarily, once the elements of an application for a Bankruptcy Order have been proved and there is no improper conduct on the part of the applicant creditor, a court should, in the absence of exceptional circumstances, grant the Bankruptcy Order.[16]

25. Although all of the facts which justify granting the Application are established, the Court may nevertheless refuse to grant a Bankruptcy Order pursuant to section 43(7) of the BIA if the Court is of the opinion that for "sufficient cause", the Bankruptcy Order ought not to be made.

26. There are generally two instances where a Bankruptcy Order will be denied. First, where an applicant has an ulterior motive in pursuing the application and second, where there is no

[15] *Re Mastronardi*, 2000 CarswellOnt 4792 (ONCA) at paragraph 24 at **TAB 2**.
[16] *484030 Ontario Ltd., Re,* 1992 CarswellOnt 171 at para 56 at **TAB 3**

meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. Neither of these circumstances are present in this case.[17]

A. Necessity of the Application

27. Where a debtor has ceased meeting its obligations as they become due, a creditor's only hope for recovery will often be through the appointment of a trustee, who has additional powers to review transactions previously undertaken by a debtor, including utilizing available longer look-back periods surrounding when those transactions occurred with "related parties" (as that term is defined in the BIA).

28. Moreover, once the bankruptcy process is engaged and the receivership process has been completed, if there are any other creditors of RBee that exist, then the bankruptcy process will serve as the framework for the collection and distribution of any funds collected after the discharge of the Receiver. At this stage, any priority claims to funds of RBee will be done in accordance with the scheme of distribution set out in the BIA.

B. No Improper Purpose

29. Courts will dismiss a bankruptcy application if it is shown that the applicants brought the application for an improper purpose, such as out of spite or vengeance, or in order to obtain a business advantage such as the elimination of a competitor or the termination of a contract. [18] None of these circumstances are present in this case.

30. Assigning RBee into bankruptcy will have the effect of reversing the priority of RBee's liabilities to the CRA and will improve Crown Capital's prospects of recovering its secured debt. Courts have held that such a reversal of priorities is a proper use of the bankruptcy process.[19]

31. Crown Capital respectfully submits that the Bankruptcy Application is for a proper and legitimate purpose. The statutory requirements for the Bankruptcy Order have been satisfied and there is no sufficient cause for which the Court can deny this Application.

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[17] *Ivaco Inc.,* 2005 CarswellOnt 3445 (ONSC) at paragraph 14 at **TAB 4**; *Dallas/North Group Inc., Re,* 1999 CarswellOnt 4720 (Ont Gen Div) at paragraph 14 at **TAB 5**.
[18] *Vipond, Re,* 1939 CarswellQue 18 (Que Sup Crt, Bankruptcy) at paragraphs 18 to 19 at **TAB 6**, aff'd in 1941 CarswellQue 4; *De La Hooke, Re,* 1934 CarswellOnt 95 (ONSC, Bankruptcy) at paragraph 22 at **TAB 7**.
[19] *Chartrand, Re*, 2010 ONCA 456 at para 8 at **TAB 8**; *Bank of Nova Scotia v. Huronia Precision Plastics Inc.*, 2009 CarswellOnt 374 at para 13 (Ont SCJ [Commercial List]) at **TAB 9**.

VI. ORDER REQUESTED

32. The Applicant respectfully requests that this Court grant the Bankruptcy Order as requested by the Applicant.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 9th DAY OF MAY, 2022.

MLT AIKINS LLP

Brian Catalano

Ryan Zahara/Brian Catalano
Counsel for the Applicant: Crown Capital Partner Funding LP, by its manager, Crown Private Credit Partners Inc.

LIST OF AUTHORITIES

TAB 1

CANADA

CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency Act

Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to February 23, 2022

Last amended on November 1, 2019

À jour au 23 février 2022

Dernière modification le 1 novembre 2019

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(f) if he exhibits to any meeting of his creditors any statement of his assets and liabilities that shows that he is insolvent, or presents or causes to be presented to any such meeting a written admission of his inability to pay his debts;

(g) if he assigns, removes, secretes or disposes of or attempts or is about to assign, remove, secrete or dispose of any of his property with intent to defraud, defeat or delay his creditors or any of them;

(h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(i) if he defaults in any proposal made under this Act; and

(j) if he ceases to meet his liabilities generally as they become due.

f) si, à une assemblée de ses créanciers, il produit un bilan démontrant qu'il est insolvable, ou présente ou fait présenter à cette assemblée un aveu par écrit de son incapacité de payer ses dettes;

g) s'il cède, enlève ou cache, ou essaie ou est sur le point de céder, d'enlever ou de cacher une partie de ses biens, ou en dispose ou essaie ou est sur le point d'en disposer, avec l'intention de frauder, frustrer ou retarder ses créanciers ou l'un d'entre eux;

h) s'il donne avis à l'un de ses créanciers qu'il a suspendu ou qu'il est sur le point de suspendre le paiement de ses dettes;

i) s'il fait défaut à toute proposition concordataire faite sous le régime de la présente loi;

j) s'il cesse de faire honneur à ses obligations en général au fur et à mesure qu'elles sont échues.

Unauthorized assignments are void or null

(2) Every assignment of an insolvent debtor's property other than an assignment authorized by this Act, made by an insolvent debtor for the general benefit of their creditors, is void or, in the Province of Quebec, null.

R.S., 1985, c. B-3, s. 42; 1997, c. 12, s. 26; 2004, c. 25, s. 27.

Les cessions non autorisées sont nulles

(2) Toute cession de ses biens, autre qu'une cession consentie conformément à la présente loi, faite par un débiteur insolvable au profit de ses créanciers en général, est nulle.

L.R. (1985), ch. B-3, art. 42; 1997, ch. 12, art. 26; 2004, ch. 25, art. 27.

Application for Bankruptcy Order

Bankruptcy application

43 (1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that

(a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and

(b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

If applicant creditor is a secured creditor

(2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

Requête en faillite

Requête en faillite

43 (1) Sous réserve des autres dispositions du présent article, un ou plusieurs créanciers peuvent déposer au tribunal une requête en faillite contre un débiteur :

a) d'une part, si la ou les dettes envers le ou les créanciers requérants s'élèvent à mille dollars et si la requête en fait mention;

b) d'autre part, si le débiteur a commis un acte de faillite dans les six mois qui précèdent le dépôt de la requête et si celle-ci en fait mention.

Cas où le créancier requérant est un créancier garanti

(2) Lorsque le créancier requérant est un créancier garanti, il doit, dans sa requête, ou déclarer qu'il consent à abandonner sa garantie au profit des créanciers dans le cas où une ordonnance de faillite est rendue contre le débiteur, ou fournir une estimation de la valeur de sa garantie; dans ce dernier cas, il peut être admis à titre de créancier requérant jusqu'à concurrence du solde de sa créance, déduction faite de la valeur ainsi estimée, comme s'il était un créancier non garanti.

TAB 2

Most Negative Treatment: Distinguished
Most Recent Distinguished: Sphere Resources Inc., Re | 2009 YKSC 11, 2009 CarswellYukon 20, 175 A.C.W.S. (3d) 326 | (Y.T. S.C., Feb 17, 2009)

2000 CarswellOnt 4792
Ontario Court of Appeal

Mastronardi, Re

2000 CarswellOnt 4792, [2000] O.J. No. 4734, 101 A.C.W.S. (3d) 871, 140 O.A.C. 392, 195 D.L.R. (4th) 631, 21 C.B.R. (4th) 107

In the Matter of the Bankruptcy of Ollie Mastronardi

Charron, MacPherson, Sharpe JJ.A.

Heard: September 25, 2000
Judgment: December 15, 2000
Docket: CA C31611

Counsel: *John MacDonald*, *Steven Golick*, for Appellant, John Brabander, Administrator of the Estate of Scott Brabander, deceased
Robert Reynolds, for Respondent, Ollie Mastronardi

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.b Act of bankruptcy
III.1.b.i Ceasing to meet liabilities generally
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.b Act of bankruptcy
III.1.b.v Assignment for benefit of creditors
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.v Improper purpose of creditor
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy — Ceasing to meet liabilities generally
Judgment awarded against respondent in favour of estate of petitioner's son, petitioner and his wife, in civil action in Ohio — Petitioner told to contact respondent's attorney regarding judgment — Petitioner contacted respondent's attorney to collect on judgment but received no satisfactory response — No payment was made to petitioner — Petitioner brought petition for receiving order on basis that within six months preceding petition, respondent had ceased to meet his liabilities as they became due — Petition was dismissed and petitioner appealed — Appeal allowed — Petitioner attempted to contact respondent to

collect on judgment but was unsuccessful — Although there was no attempt to execute judgment in Ontario, petitioner does not need to exhaust all other remedies before proceeding with petition for receiving order — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 43(1), 42(1)(j).

Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy — Assignment for benefit of creditors

Judgment awarded against respondent in favour of estate of petitioner's son, petitioner and his wife, in civil action in Ohio — Petitioner told to contact respondent's attorney regarding judgment — Petitioner contacted respondent's attorney but received no satisfactory response — No payment was made to petitioner — Petitioner brought petition for receiving order on basis that within six months preceding petition, respondent had ceased to meet his liabilities as they became due — Petition was dismissed and petitioner appealed — Appeal allowed — Respondent had three separate creditors, being petitioner, petitioner's wife and estate of petitioner's son — Special circumstances need to be considered only where respondent has sole creditor.

Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Improper purpose of creditor

Judgment awarded against respondent in favour of estate of petitioner's son, petitioner and his wife, in civil action in Ohio — Petitioner told to contact respondent's attorney regarding judgment — Petitioner contacted respondent's attorney but received no satisfactory response — No payment was made to petitioner — Petitioner brought petition for receiving order on basis that within six months preceding petition, respondent had ceased to meet his liabilities as they became due — Petition was dismissed and petitioner appealed — Appeal allowed — Respondent made several suspicious transfers of assets which would be reviewed by trustee in bankruptcy — Petitioner acted to collect debt owing to him — Not improper to commence petition for collection of debt or to gain remedies not available outside bankruptcy.

Table of Authorities

Cases considered by *MacPherson J.A.*:

Bombardier Credit Ltd. v. Find (1998), 107 O.A.C. 127, 37 O.R. (3d) 641, 2 C.B.R. (4th) 1 (Ont. C.A.) — referred to

Cappe, Re (1993), 18 C.B.R. (3d) 229 (Ont. Gen. Div. [Commercial List]) — applied

Chu, Re (1995), 30 C.B.R. (3d) 78 (Ont. Gen. Div.) — referred to

Four Twenty-Seven Investments Ltd., Re (1985), 55 C.B.R. (N.S.) 183 (Ont. S.C.) — applied

Four Twenty-Seven Investments Ltd., Re (1985), 58 C.B.R. (N.S.) 266 (Ont. C.A.) — applied

Giusto, Re (1994), 25 C.B.R. (3d) 227 (Ont. Bktcy.) — applied

Holmes, Re (1975), 9 O.R. (2d) 240, 20 C.B.R. (N.S.) 111, 60 D.L.R. (3d) 82 (Ont. Bktcy.) — considered

Joyce, Re (1984), 51 C.B.R. (N.S.) 152 (Ont. Bktcy.) — applied

Statutes considered:

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

Generally — referred to

s. 42(1)(j) — considered

s. 43(1) — considered

s. 43(1)(b) — considered

APPEAL by petitioner from decision of court dismissing petition for receiving order.

The judgment of the court was delivered by *MacPherson J.A.*:

OVERVIEW

1 Three Ohio plaintiffs obtained a huge civil judgment in the Ohio courts because of the negligence in Ohio of an Ontario resident. The Ohio plaintiffs sought unsuccessfully for several months to collect on the judgment. There was evidence that the judgment debtor may have conveyed assets for nominal consideration. Eventually, one of the Ohio creditors turned to the Ontario courts and brought a petition for a receiving order under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 ("*BIA*"). This appeal invites a consideration of the statutory prerequisites of the *BIA* in the context of a foreign petitioner whose principal motivation for bringing the petition is a desire to collect money owed to him pursuant to an order of a foreign court.

A. FACTS

2 On a summer day in 1995 two pleasure boats were on Lake Erie, on the American side. The Brabander family of Broadview Heights, Ohio was in one boat. The other boat, a very fast cigarette type boat, was operated by Ollie Mastronardi, a resident of Leamington, Ontario. As the cigarette boat bore down on the Brabander boat, John and Susan Brabander jumped into the water. They survived. Unfortunately, their 24 year old son Scott was killed in the collision of the two boats.

3 The tragedy on the water gave rise to both criminal and civil proceedings in the Ohio courts. Mr. Mastronardi ("Mastronardi") was convicted in May 1996 of a serious criminal offence in relation to the death of Scott Brabander. He spent several years in an Ohio prison, but is now free.

4 The Brabander family initiated a civil action against Mastronardi in Ohio. The plaintiffs were successful. On February 12, 1998, following a trial with judge and jury, the three named plaintiffs were awarded damages against Mastronardi as follows:

> (1) for John Brabander, administrator of the estate of Scott Brabander, on his survivorship claim on behalf of the estate - $581,705.84 U.S.;
>
> (2) for John Brabander, administrator of the estate of Scott Brabander, on his wrongful death claim on behalf of the next of kin and survivors of Scott Brabander - $1,829,287.56 U.S.;
>
> (3) for John Brabander, personally, for negligent infliction of serious emotional distress - $581,705.83 U.S.; and
>
> (4) for Susan Brabander, personally, for negligent infliction of serious emotional distress - $581,705.83 U.S.

5 An appeal from this judgment was dismissed by the Court of Appeals of Ohio on June 25, 1998 for failure by the appellant Mastronardi to file the record.

6 In the Ohio civil proceedings, the Brabander family was represented by Thomas Schrader and Mastronardi was represented by Matthew O'Connell. On February 12, 1998, when the Ohio court's final judgment was rendered, Mastronardi was present with O'Connell and Arthur Barat, a lawyer from Windsor, Ontario. Barat was identified to Schrader as Mastronardi's corporate or personal attorney. Schrader was told that any further communication regarding the final judgment should be addressed to Barat.

7 On February 24, 1998, Barat wrote to Schrader questioning whether the Brabanders would be able to enforce such a large judgment in Ontario. He invited Schrader "to discuss this with us on review".

8 Schrader telephoned Barat in March 1998 to discuss the payment of the judgment. Barat informed Schrader he would discuss the matter with Mastronardi's wife Ann and get back to him.

9 On June 17, 1998, Schrader wrote to Barat as follows:

> Last March I made a demand upon you as the attorney for Ollie Mastronardi regarding payment of the outstanding judgment against your client. No payment of any kind has been made, and you have not returned my calls. The judgment was due and payable at the time of the jury verdict on February 12, 1998.

10 Schrader followed up this correspondence with another call to Barat. Barat did not return the call or respond to the letter.

11 On June 22, 1998, John Brabander, acting as administrator of the estate of Scott Brabander, filed a Petition for a Receiving Order in the Ontario Court (General Division) in Bankruptcy in London, Ontario. The petition stated that "Ollie Mastronardi is justly and truly indebted to Brabander in the sum of at least $2,842,738.40 (U.S.)".

12 The stated ground for the bankruptcy petition was that, contrary to s.43(1)(b) of the *BIA*, "Ollie Mastronardi, within the six months next preceding the date of the filing of the petition, has committed the following act of bankruptcy, namely, he has ceased to meet his liabilities generally as they become due".

13 The petition was heard by Hockin J. sitting in London on September 21, 1998. The petitioner called three witnesses, John Brabander, Thomas Schrader and Susan Brabander. The respondent placed in evidence the cross-examination of John Brabander on his Affidavit of Verification, which had been conducted on September 20, 1998, the day before the bankruptcy hearing.

14 Hockin J. dismissed the petition in a written judgment released February 15, 1999. He found that the petitioning creditor had proved that the debt exceeded the threshold figure of $1,000. However, he held that "there is no evidence that the debtor has ceased to meet his liabilities generally as they become due". In reaching this conclusion, he regarded all the Brabanders as a single creditor and said that there were no 'special circumstances', within the meaning of the case authorities, to permit this single creditor to invoke the *BIA* as a means of collecting on its debt. The essence of his reasoning is contained in this passage in the final paragraph of his judgment:

> The evidence is that a demand was made of the debtor but there has really been no attempt to collect on this debt beyond the issuance of the petition. Without more, I am concerned that the Bankruptcy Court would become in this case a collection agency for a single creditor. I do not find that the petitioner has made a serious effort to collect on the debt. The circumstances of the case are otherwise compelling, but I may not for that reason only depart from the cases and the language of the Act.

15 The petitioner appeals from Hockin J.'s judgment. He seeks an order setting aside Hockin J.'s order, adjudging Mastronardi a bankrupt, and appointing Shiner and Associates Inc. as trustee of Mastronardi's property.

B. ISSUE

16 The issue on this appeal is: did the bankruptcy judge err in holding that Mastronardi did not commit an act of bankruptcy by ceasing to meet his liabilities as they generally became due?

C. ANALYSIS

17 The appellant initiated his petition for a receiving order pursuant to sections 43(1) and 42(1)(j) of the *BIA*, which provide:

> 43(1) **Bankruptcy petition -**Subject to this section, one or more creditors may file in court a petition for a receiving order against a debtor if, and if it is alleged in the petition that,
>
> (a) the debt or debts owing to the petitioning creditor or creditors amount to one thousand dollars; and
>
> (b) the debtor has committed an act of bankruptcy within six months next preceding the filing of the petition.
>
> 42(1) **Acts of bankruptcy -** A debtor commits an act of bankruptcy in each of the following cases: . . .
>
> (j) if he ceases to meet his liabilities generally as they become due.

18 The bankruptcy judge seemed to rely heavily on two factors in dismissing the petition. First, he treated the Brabanders as a single creditor and held that there were no special circumstances justifying resort to the *BIA* by a single creditor. Second, he held that the creditor had not made a serious effort to collect on the debt beyond the issuance of the petition. Each of these, in the eyes of the bankruptcy judge, worked against a conclusion that Mastronardi had ceased to meet his liabilities generally as they became due. Presumably, the single creditor conclusion undercut the 'liabilities generally' component of s.42(1)(j) of the *BIA* and the lack of serious effort to collect the debt counted against a conclusion that the debtor had breached the 'ceases to meet his liabilities' component of the same provision. I will consider these two rationales in turn.

(1) Single Creditor/Special Circumstances

19 There is a line of cases, anchored in *Re Holmes* (1975), 20 C.B.R. (N.S.) 111 (Ont. Bktcy.), holding that a receiving order should not be made based on a default to only one creditor unless there are 'special circumstances'. The bankruptcy judge

applied *Holmes*. He held that the receiving order was being sought by the only creditor of Mastronardi and that none of the special circumstances enumerated by Henry J. in *Holmes* applied.

20 In my view, the bankruptcy judge erred in determining that Mastronardi had only one creditor, in effect the Brabander family lumped together. The civil action in Ohio proceeded from start to finish as an action brought by three separate plaintiffs - the estate of Scott Brabander, John Brabander personally and Susan Brabander personally. The final judgment of the Ohio Court of Common Pleas identified each of these three as a separate plaintiff and awarded specific damages to each plaintiff.

21 The respondent does not quarrel with the fact that only one creditor, John Brabander, acting as administrator of his son's estate, brought the petition for a receiving order. Such a contention would fail because s.43(1) of the *BIA* provides that a bankruptcy petition may be filed by "one or more creditors".

22 However, the respondent does contend that the separate identity of the three Brabander creditors is belied by the fact that the petition, brought on behalf of the single creditor "the estate of Scott Brabander", states that "Mastronardi is justly and truly indebted to Brabander in the sum of at least $2,842,738.40 (U.S.)". This amount, contends the respondent, "constitutes the entire foreign judgment against the Respondent." (factum, paragraph 35).

23 This is simply not the case. The total judgment in Ohio against Mastronardi was $3,574,405.06 (U.S.) The judgment in favour of the single creditor, the estate of Scott Brabander, was $2,410,993.40 (U.S.). The figure of $2,842,738.40 (U.S.) in the petition represents, as John Brabander testified at the bankruptcy hearing, "the amount awarded the Estate of my son, plus the recovered expenses which was $3,500 or something like that, plus interest since that date at ten percent". In short, the petition was brought by a single creditor and asserts only the debt owed to that creditor.

24 My conclusion is that the bankruptcy judge erred in determining that Mastronardi had only one creditor. In fact, there are at least three separate creditors. Accordingly, the bankruptcy judge did not need to consider whether there were 'special circumstances', within the meaning of *Holmes* and its progeny, justifying a receiving order. It was within his discretion to issue a receiving order on the basis that "the existence of two other unpaid debts is . . . sufficient to establish the act of bankruptcy": see *Re Joyce* (1984), 51 C.B.R. (N.S.) 152 (Ont. Bktcy.), and *Re Giusto* (1994), 25 C.B.R. (3d) 227 (Ont. Bktcy.).

(2) Lack of Serious Effort to Collect the Debt

25 The bankruptcy judge acknowledged that there was evidence that a demand had been made of the debtor. In my view, this observation was correct. During a four month period shortly after the Final Judgment of the Ohio trial court in the civil action the Ohio attorney for the Brabanders attempted to collect on the debt owing to them. He pursued this in precisely the way Mastronardi had instructed him through counsel - by contacting Arthur Barat, Mastronardi's personal and corporate counsel in Windsor. No results were achieved.

26 The bankruptcy judge recognized the legitimacy of the steps taken by the Brabanders to collect on the debt and he also knew that their efforts had been unsuccessful. Nevertheless, he decided not to grant the receiving order. He said:

> It is the case that there has been no action commenced in Ontario by the Brabander family for the recovery of the amount in the judgment nor any attempt by the family through the Court of Common Pleas of Cuyahoga County to register the judgment in Ontario. In other words, there has been no attempt to execute in Ontario.
>
> ...
>
> The evidence is that a demand was made of the debtor but there has really been no attempt to collect on this debt beyond the issuance of the petition. Without more, I am concerned that the Bankruptcy Court would become in this case a collection agency for a single creditor.

27 In my view, the bankruptcy judge erred in dismissing the petition for a receiving order on the basis that the appellant should have pursued other routes to collect on the debt owed by Mastronardi. I reach this conclusion for several reasons.

28 First, if a petitioner can satisfy the requirements of the *BIA*, I see no reason for denying him access to the process and remedies of the Act because there may be other civil routes open to him. The *BIA* is not a second-rate or fallback statute that can only be invoked if other avenues fail. I agree with Ground J. who said in *Re Cappe* (1993), 18 C.B.R. (3d) 229 (Ont. Gen. Div. [Commercial List]), at 235:

> I know of no statutory or common law which requires that a petitioning creditor have exhausted all other remedies available to that creditor to collect the debt owing to him or her before proceeding with a petition for a receiving order. In fact, the jurisprudence would seem to be to the contrary.

See also: *Re Chu* (1995), 30 C.B.R. (3d) 78 (Ont. Gen. Div.), at 82.

29 Second, Mastronardi appears from the record to have made suspect transfers of property at suspect times. Mastronardi was examined in April 1997 in the Ohio civil action. John Brabander and Thomas Schrader testified at the bankruptcy hearing. From these sources the following picture emerges. Mastronardi's principal corporate enterprise, MOS Enterprises, was a multi-million dollar corporation. In Leamington, Ontario, Mastronardi owned or operated a large greenhouse complex with outbuildings and houses, a trucking terminal and employees' quarters. He had a large private residence in Leamington and an oceanfront condominium in Florida. He owned the 38 foot cigarette boat that was involved in the accident. In addition, one of his numbered companies owned a 63 foot Searay valued at approximately $1,000,000.

30 I do not say that all of the above facts have been conclusively proven. However, they were all in evidence before the bankruptcy judge and Mastronardi introduced no evidence to contradict them. The *prima facie* conclusion I draw is that Mastronardi is a man with substantial personal and business assets.

31 Did the accident cause him to do anything with these assets? It appears - I put it no higher - that it did. Thomas Schrader testified that in September or October 1995, Mastronardi transferred his entire 51 per cent interest in MOS Enterprises, his central business, to his wife for no consideration. He also testified that at the same time Mastronardi transferred his half interest in the family residence to his wife, again for no consideration. Both of these transactions took place *after* the accident in June 1995 and *after* the Brabanders had commenced their civil action in Ohio, but *before* the Ohio court had made a decision. In his examination in the Ohio action, Mastronardi said that he made the transfers because he could not obtain insurance in Canada after the boat accident. That may or may not be the case (Mastronardi introduced no supporting evidence on this issue at the bankruptcy hearing). However, on the state of the record before the bankruptcy judge, these are highly suspicious transfers of property: see *Bombardier Credit Ltd. v. Find* (1998), 2 C.B.R. (4th) 1 (Ont. C.A.) at 10.

32 Moreover, when he was examined in the Ohio civil action in April 1997 (ten months before the judgment in the civil action), Mastronardi admitted that he intended, within weeks, to transfer his half interest in his oceanfront Florida condominium to his wife for $50,000.

33 All three of these transactions are precisely the kind of transactions that are particularly well-suited to investigation and review by a trustee in bankruptcy. They look vulnerable - again, I put it no higher - to an attack by a trustee as being settlements and, depending on when the Florida transfer was completed, reviewable transactions. To my mind, they constitute a compelling reason why a receiving order should have been granted. If a receiving order were made, time would start running backward from January 1998, when the petition was issued, and the three transactions might fall within the trustee's net under the *BIA*.

34 Third, Mastronardi owes three creditors more than $3.5 million pursuant to a valid Ohio court order. He appealed the trial court's order but did not pursue the appeal. The Ohio court order is truly a final order. Mastronardi is a man with substantial assets. For four months in 1998, his Ohio creditors made demands for payment of the money they were owed. Mastronardi made no response and, importantly, he did not pay a penny on the judgments. In these circumstances, namely a lawful multi-million dollar debt, a person with substantial assets, and no payment at all, the bankruptcy route strikes me as entirely appropriate. There is no need for the petitioning creditor to spend time and money continuing on the ordinary civil track when Mastronardi has not complied with his responsibilities on that track and when the petitioning creditor has established *prima facie* compliance with the statutory conditions of the *BIA*.

35 Fourth, the bankruptcy judge's concern "that the Bankruptcy Court would become in this case a collection agency for a single creditor" is, in my view, misplaced. As discussed previously, this is not a single creditor case; there are at least three substantial creditors. Moreover, there is nothing in the record to suggest that the appellant has invoked the *BIA* for any ulterior purpose, such as trying to force a creditor to deal with him to the exclusion of, or in priority to, other creditors.

36 The fact that the petitioning creditor desires, as he candidly admitted when he was cross-examined on his Affidavit of Verification in support of the petition, to collect on the debt owing to him, is not an impermissible or disqualifying feature. Virtually every creditor who initiates a bankruptcy petition would have this as an objective. On this point I agree with Catzman J. who said in *Re Four Twenty-Seven Investments Ltd.* (1985), 55 C.B.R. (N.S.) 183 (Ont. S.C.) at 188, aff'd (1985), 58 C.B.R. (N.S.) 266 (Ont. C.A.):

> I also reject the debtor's submission based upon the alleged improper or ulterior motive of the petitioning creditor. It is not an abuse of process or an improper purpose to commence a petition for the collection of a debt. It is not improper to petition to gain remedies not available outside of bankruptcy, including a thoroughgoing investigation of the bankrupt's affairs. Indeed, on the evidence, I consider this to be a prototypal case where the full arsenal of investigatory mechanisms and remedies available to a trustee in bankruptcy would be useful, appropriate and desirable.

37 I agree with that passage and regard it as equally applicable to the present appeal. Mastronardi owes substantial debts to several creditors, he has made several suspicious transfers of assets and he has not demonstrated any intention or inclination to pay even a penny of the debts he owes. In these circumstances, the petition for a receiving order brought by John Brabander, as administrator of his son's estate, complies with the requirements of the *BIA* and a receiving order would be "useful, appropriate and desirable".

DISPOSITION

38 I would allow the appeal, set aside the order of the bankruptcy judge dated February 15, 1999, and make an order adjudging Ollie Mastronardi to be a bankrupt and appointing Shiner and Associates to act as trustee of Mr. Mastronardi's property. I would also make an order of costs in favour of the appellant in respect of the appeal and the bankruptcy hearing below, both payable out of the estate of the bankrupt.

Appeal allowed.

TAB 3

1992 CarswellOnt 171
Ontario Court of Justice (General Division), In Bankruptcy

484030 Ontario Ltd., Re

1992 CarswellOnt 171, 12 C.B.R. (3d) 302, 32 A.C.W.S. (3d) 347, 8 O.R. (3d) 243, 90 D.L.R. (4th) 218

Re Bankruptcy of 484030 ONTARIO LIMITED

Ground J.

Heard: February 12-14 and 19, 1992
Judgment: March 17, 1992
Docket: Doc. 31-204358-T

Counsel: *K. Prehogan* and *D. Wingfield*, for Toronto-Dominion Bank.
M. Neirinck, for 484030 Ontario Ltd.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.b Act of bankruptcy
III.1.b.i Ceasing to meet liabilities generally
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.v Improper purpose of creditor
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.6 Practice and procedure on petition
III.6.e Evidentiary issues
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy — Ceasing to meet liabilities generally
Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Improper purpose of creditor
Bankruptcy --- Bankruptcy petitions for receiving orders — Practice and procedure on petition — Evidentiary issues
Receiving orders — Formalities — Two acts of bankruptcy alleged as basis for petition — Creditor proving debtor ceasing to meet liabilities generally as they became due — Removal and secretion of property not established — Unnecessary to prove both acts of bankruptcy — Receiving order granted.
A bank, which held security on the debtor's property, petitioned for a receiving order. It alleged that the debtor had committed acts of bankruptcy in (1) ceasing to meet its liabilities generally as they became due and failing to pay the bank and other creditors and (2) removing and secreting its property with the intent to defraud, defeat and delay its creditors, because it ceased

depositing its accounts receivable at the petitioner bank and was no longer applying its accounts receivable to the indebtedness secured thereby.

Held:

The receiving order was granted.

A debt alleged to be owing in a petition must be owing to a petitioner at the date of the petition, but it does not have to be due and payable at that time. The loans in question were demand obligations. On the basis of the evidence, there was no obligation on the bank to give the debtor six months in which to repay its indebtedness following demand.

It is not necessary for a petitioning creditor who has security to establish the process by which it valued its security unless its estimate is considered by the court to be a sham or absurdly low. It was reasonable for the bank to estimate the value of its security as it did.

Where a petitioner states as an act of bankruptcy, that the debtor ceased to meet its liabilities generally as they became due and proves that neither the debt owed to the petitioning creditor nor to another creditor named in the petition has been paid, the debtor, in order to refute the petitioner's claim that there was an act of bankruptcy, has to establish its financial position by clear and independent evidence. The debtor, in the present case, did not satisfy this onus.

The allegation that the debtor had removed or secreted its property with the intent to defraud, defeat and delay its creditors was not established. Challenges to certain cheques that appeared to relate to payment of personal expenses of individuals failed. In addition, because the bank froze the debtor's accounts, the debtor was forced to open accounts at another bank to continue operations. This was not evidence of removal or secretion of property with intent to defraud, defeat or delay the debtor's creditors.

Despite the fact that all the bank's allegations were not established, the whole petition did not have to be dismissed. All of the elements of a petition for a receiving order were established; the bank was entitled to have a receiving order issued.

Table of Authorities

Cases considered:

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Baker, Re (1937), 19 C.B.R. 73 (Ont. S.C.) — *applied*

Black & White Sales Consultants Ltd., Re (1979), 33 C.B.R. (N.S.) 87 (Ont. S.C.) — *applied*

Button, Re; Ex parte Voss, [1905] 1 K.B. 602, [1904-7] All E.R. Rep. 418 (C.A.) — *applied*

Churchill Forest Industries (Manitoba) Ltd., Re, 16 C.B.R. (N.S.) 158, [1972] 2 W.W.R. 178, 23 D.L.R. (3d) 301 (Man. Q.B.), affirmed 16 C.B.R. (N.S.) 172n, [1972] 4 W.W.R. 122, 25 D.L.R. (3d) 380n (Man. C.A.) — *reffered to*

Columbia Properties Ltd. v. Commonwealth Mortgage Corp. (1963), 5 C.B.R. (N.S.) 258, 44 W.W.R. 448, 41 D.L.R. (2d) 235 (B.C. S.C.), affirmed (1964), 6 C.B.R. (N.S.) 321, 48 W.W.R. 31, 45 D.L.R. (2d) 310 (B.C. C.A.) — *referred to*

Hayes, Re (1979), 34 C.B.R. (N.S.) 280 (B.C. S.C.) — *referred to*

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Hugh M. Grant Ltd., Re (1982), 41 C.B.R. (N.S.) 28 (Ont. S.C.) — *applied*

It's Hear Co., Re (1991), 8 C.B.R. (3d) 78 (Ont. Bktcy.) — *applied*

Lakin Builders Co., Re, 2 C.B.R. (N.S.) 15, [1961] O.R. 368, 27 D.L.R. (2d) 393 (S.C.) — *referred to*

MTM Electric Co., Re (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.) — *referred to*

Malidav Holdings Ltd., Re (1979), 33 C.B.R. (N.S.) 161 (Ont. S.C.) — *referred to*

Omni-Stone Corp., Re (sub nom. *First City Trust Co. v. Omni-Stone Corp.*) (1991), 4 O.R. (3d) 636 (Bktcy.) — *referred to*

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Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3 [R.S.C. 1985, c. B-3] —

s. 25(2) [R.S.C. 1985, c. B-3, s. 43(2)]

Bankruptcy Act, R.S.C. 1985, c. B-3 —

s. 43(2)

s. 43(6)

s. 43(7)

Petition for receiving order.

***Ground J.*:**

1 This is a petition for a receiving order brought by the Toronto-Dominion Bank (the "bank") against 484030 Ontario Ltd. (the "company"). The bank alleges that the company is indebted to the bank in the sum of $655,063.95, that the bank holds security on the company's property for the payment of said sum and estimates the value of such security at $500,000 and that the company has within six months preceding the date of the petition committed the following acts of bankruptcy namely:

(a) It has ceased to meet its liabilities generally as they become due and has failed to pay its obligations to the petitioner and other creditors, to wit:

(i) On August 7, 1991, failed to pay the Toronto-Dominion Bank the sum of $640,285.93;

(ii) In July and August of 1991, failed to pay Vector Ltd. its monthly mortgage payments. The mortgage principal now due and owing is $1.65 million dollars;

(iii) On August 20, 1991, failed to pay Prudential Insurance the sum of $44,317.95;

(iv) In July and August 1991, failed to pay the city of Toronto property taxes in the amount of $18,800.00.

(b) The debtor has removed and secreted his property with the intent to defraud, defeat, and delay its creditors or any of them, to wit:

(i) It has ceased depositing its accounts receivable at the Toronto-Dominion Bank, and is no longer applying its accounts receivable to the indebtedness secured thereby.

The Facts

2 The company carries on business in the municipality of Metropolitan Toronto as the owner and manager of six commercial/light industrial properties referred to herein as Yonge, Sorauren, Danforth, Adelaide, Tycos and Castlefield. All of the properties, with the exception of Tycos, are subject to first and second mortgages and assignments of rent collateral to such mortgages. In the case of Tycos there is a first mortgage only with a collateral assignment of rents. The security held by the bank consists of a second mortgage on Adelaide in the principal amount of $500,000 with an assignment of rents subordinated to the assignment of rents in favour of the Royal Trust Co. as first mortgagee and a general assignment of book debts. The indebtedness of the company to the bank as at August 28, 1991, consisted of two "term loans" aggregating approximately $365,000 and an operating loan which was in the amount of approximately $275,000 as at the date of the petition. The sole shareholder and director of the company is Mr. Randy Airst ("Airst"). His wife Susan Stann ("Stann") is the vice-president of the company. Airst and Stann reside at 119 Beechwood Ave., Willowdale, Ontario.

3 On July 23, 1991, the bank demanded payment of all three loans by August 7, 1991. On August 28, 1991, the petition for a receiving order was filed and by order of the registrar dated September 11, 1991, Richter and Partners Inc. was appointed interim receiver.

Notice Disputing Petition

4 The issues in this application arise primarily under the notice disputing petition filed by the company. The relevant allegations in the notice are as follows. The company alleges that the two term loans comprising the bulk of the company's indebtedness to the bank were for a set term of seven years and that the bank could not demand payment of those loans so long as they were in good standing which they were as of the date of the petition. The company further alleges that the demand for payment of the operating loan was in breach of an agreement between the bank and the company that the bank was required to give the company a period of six months from the date of any demand within which to repay its indebtedness to the bank and accordingly as of the date of the petition there was no amount due and payable from the company to the bank. The company alleges that the bank was fully secured in respect of the indebtedness of the company to it and that as a fully secured creditor the bank has no status to file a petition for a receiving order against the company. The company further alleges that the petition for the receiving order was not issued in good faith and in accordance with the aims and objectives of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 in that the company was truly solvent at the date of the petition and the petition was issued without good reason and with the sole ulterior motive of forcing the company to repay its indebtedness to the bank as soon as possible. The company further states in the notice that it has not removed or secreted any of its property with the intent to defraud, defeat or delay any of its creditors. In the course of the hearing the company also took the position that the bank had not established that the company was not meeting its liabilities generally as they became due as at the date of the petition.

The Issues

5 The issues arising in this matter would therefore appear to be as follows:

6 1. Is it necessary that the petitioning creditor establish that there was a sum of money due and payable to it at the date of the petition or is it sufficient that the petitioning creditor establish that there was money owing to it at the date of the petition?

7 2. Were the two loans described in the materials as "term loans" truly loans for a set term of seven years or were they demand loans with the monthly payments on such loans based on a seven-year amortization?

8 3. Was there any agreement between the company and the bank that the company would be given six months to repay its indebtedness to the bank in the event of any demand?

9 4. Was the bank in fact fully secured with respect to the indebtedness of the company to it and if so, does this prevent the bank from filing a petition for a receiving order?

10 5. Was the petition for a receiving order not filed in good faith and for the ulterior motive of forcing the company to repay its indebtedness to the bank as soon as possible and therefore should the court dismiss the petition "for other sufficient cause" pursuant to s. 43(7) of the *Bankruptcy Act*?

11 6. Has the bank established that the company at the date of the petition had ceased to meet its liabilities generally as the became due or has the evidence led by the company established that at that date the company was meeting its liabilities generally as they became due?

12 7. Has the bank established that at the date of the petition the company had removed or secreted its property with intent to defraud, defeat and delay its creditors or any of them?

Reasons

13 1. With respect to the question of whether the petitioning creditor must establish that amounts are due and payable to it at the date of the petition or simply establish that there are moneys owing to it at the date of the petition, there is no material dispute as to the fact the sum of $640,285.93 was owing by the company to the bank at the date of the petition. The bank statements filed as exhibits would appear to verify this amount and it was not seriously disputed by the company.

14 In *Re Lakin Builders Co.*, 2 C.B.R. (N.S.) 15, [1961] O.R. 368, 27 D.L.R. (2d) 393 (S.C.) it was held at p. 376 [O.R.] that "a debt or debts may be owing to the petitioning creditor within the meaning of [the section] although not payable until a

future date and if such a debt or debts are owing and the debtor has committed available acts of bankruptcy a receiving order may issue." This reasoning was adopted in *Columbia Properties Ltd. v. Commonwealth Mortgage Corp.* (1963), 5 C.B.R. (N.S.) 258, 44 W.W.R. 448, 41 D.L.R. (2d) 235 (B.C. S.C.), at p. 261 [C.B.R.], affirmed (1964), 6 C.B.R. (N.S.) 321, 48 W.W.R. 31, 45 D.L.R. (2d) 310 (B.C. C.A.), at p. 323 [C.B.R.] where it was held that a debt otherwise sufficient which is owing but not yet due and payable is a sufficient debt upon which to found a bankruptcy petition.

15 However, in *Re Ron-Co Holdings Ltd.* (1967), 10 C.B.R. (N.S.) 132 (Ont. S.C.), McDermott J. held that debts, that were owing but were not yet payable at the date the petition was filed, were not sufficient to found a petition. The case comment following this decision at 10 C.B.R. (N.S.) 140 is as follows:

> In the case of *Re Lakin Builders Ltd.*, [1961] O.R. 368, 2 C.B.R. (N.S.) 15, 27 D.L.R. (2d) 393, 3 Can. Abr. (2d) 336, Smily J. held that a debt owing to a petitioning creditor but not payable until a future date, was a sufficient debt on which to found a petition in bankruptcy. The instant decision on its face, appears to be contrary to the *Lakin* case.
>
> In the instant judgment, the petitioning creditor was not able to prove the acts of bankruptcy alleged, and this in itself, was sufficient reason for dismissing the petition. In the circumstances, it would seem that the pronouncement of the court on the point that a future debt is not a sufficient basis for a petition, should be treated as *obiter*.

16 In a more recent Ontario case, however, *Re It's Hear Co.* (August 7, 1991), Austin J. (Ont. Bktcy.) [now reported aat (1991), 8 C.B.R. (3d) 78], Austin J. reviewed the case law on this issue and held at p. 4 that [at p. 80 C.B.R.]:

> Although it seems to me that the issue is still arguable, the weight of authority appears to be that a debt that is owing, whether or not presently payable, is to be considered when determining whether or not the petitioner qualifies under s. 43(1)(a) of the [*Bankruptcy Act*,] R.S.C. 1985, c. B-3.

I would adopt the statement of Austin J. in *Re It's Hear Co.* and the decisions referred to therein that the preponderance of the authorities would seem to establish that it is sufficient for the petitioning creditor to establish that there was money owing to it at the date of the petition and need not establish that there was anything due and payable.

17 2. With respect to the nature of the "term" loans outstanding at the date of the petition, these loans are referred to in various exhibits, including some of the internal bank documentation, as "term loans" or "seven year term loans." There was not entered in evidence any agreement between the parties with respect to the terms and conditions of these loans and the only relevant documentation appears to be a series of promissory notes covering both the term loans and the operating loan. All of the promissory notes are expressed to be payable on demand. The evidence of Mr. Aguanno, the account manager of the bank, was that the term loans were regarded by the bank as demand loans with the payments amortized over a seven-year term and that the loans would not be called so long as the company complied with all of the bank's conditions with respect to such loans. The evidence of Mr. Airst was that the company had never understood that these loans were loans that could be called on demand.

18 In view of the vague and conflicting testimony on the terms and conditions of these two loans and that the only documentary evidence is the series of demand promissory notes and in view of the evidence of both parties that the total credit to the company was subject to annual review which seems to be inconsistent with a fixed term loan, I find that the two "term loans" were demand obligations which could be called by the bank on demand and that the seven-year reference was simply with respect to the amortization period on which the monthly payments on such loans were based.

19 3. With respect to the company's assertion that the bank was required pursuant to an agreement between the bank and the company to give the company six months to repay its indebtedness to the bank in the event of a demand being made on the company's loans, Mr. Airst stated in evidence that Mr. Steve Johnson who was then the account manager with the bank, had advised him that "in a worst case scenario," if the bank were to demand payment of its loans, it would give the company six months in which to repay the amounts owing. The memorandum prepared by Mr. Johnson and submitted in evidence (Exhibit 37, Tab 5), states that the discussion with Mr. Airst was to the effect that if the company decided to move its account to an alternate financial institution and assuming that the company was leaving the bank on good terms, there was no set time limit for switching the financial arrangements and that a period of six months would be available if the company required that much

time. In view of the conflicting evidence on this point and the lack of any documentation or even correspondence establishing the agreement of the company to permit six months for payment in the event of a demand, which would seem to be a most unusual thing for a bank to agree to, I find that there was no obligation on the bank to give the company six months in which to repay its indebtedness to the bank following demand.

20 4. With respect to the question of the bank being fully secured, the bank has stated in its petition that it estimates the value of such security at $500,000. In evidence, Mr. Aguanno stated that the bank had not ascribed any value to the assignment of rentals on Adelaide or the general assignment of book debts and had valued its collateral mortgage at $500,000 maximum, this being the face amount of the collateral mortgage. It is the bank's position that the petitioning creditor may value all of its security as a package and that, so long as the petitioning creditor has valued its security in a way that is not absurdly low or a sham, the court should not intervene.

21 The company's position is that the petitioning creditor must act reasonably in estimating the value of its security and should give due consideration to the value of each asset of the debtor to which each part of the security could attach and that, if the bank had proceeded in this manner, it would have determined that it was fully secured. The company further takes the position that, if in fact the bank was fully secured, it does not have the status to file a petition for a receiving order and in the case before the court the bank was fully secured and accordingly the petition should be dismissed.

22 On the basis of all the evidence, I find that it was reasonable for the bank to estimate the value of its security at $500,000. In any event, it would appear to be settled law that the bank need only establish that this value was not absurdly low or was not a sham for the bank to position itself to file a petition for a receiving order.

23 Section 43(2) of the *Bankruptcy Act* provides as follows:

> Where the petitioning creditor referred to in subsection (1) is a secured creditor, he shall in his petition either state that he is willing to give up his security for the benefit of the creditors in the event of a receiving order being made against the debtor, or give an estimate of the value of his security, and in the latter case he may be admitted as a petitioning creditor to the extent of the balance of the debt due to him after deducting the value so estimated, in the same manner as if he were an unsecured creditor.

[Emphasis added.]

24 The Supreme Court of Ontario held in *Re Black & White Sales Consultants Ltd.* (1979), 33 C.B.R. (N.S.) 87 (Ont. S.C.) that the court will not generally review the estimate of the value of the security so long as $1,000 is shown outstanding. The court held that the purpose of s. 25(2) of the Act [R.S.C. 1970, c. B-3] (now s. 43(2) [R.S.C. 1985, c. B-3]) is to qualify the petitioning creditor as an unsecured creditor of the debtor. As there was no evidence that the security had been undervalued, the indebtedness of at least $1,000 to the petitioning creditor was not in doubt. The estimate of the value of security was therefore not reviewed.

25 It was held in *Columbia Properties Ltd. v. Commonwealth Mortgage Corp.* at p. 324 [6 C.B.R. (N.S.)] that the court will not review the estimate of the value of the security unless the estimate is a sham or absurdly low:

> [T]he Court will hold no inquiry into the creditor's estimate of the value of the security unless that valuation be a mere sham or is absurdly small.

26 The Supreme Court of Ontario held in *Re Axler* (1985), 56 C.B.R. (N.S.) 255 (Ont. S.C.) at p. 257 that it is not the function of the bankruptcy court, at the hearing of the petition, to value security. It is sufficient to find that there is at least $1,000 owing to the petitioning creditor.

27 In valuing its security, the secured creditor need only show that his valuation is reasonable: *Re Baker* (1937), 19 C.B.R. 73 (Ont. S.C.). It was held in that case at p. 75 [19 C.B.R.] that the decision of Vaughan Williams L.J. in *Re Button; Ex parte Voss*, [1905] 1 K.B. 602, [1904-7] All E.R. Rep. 418 (C.A.), at p. 604 [K.B.] should be adopted:

> In my opinion the creditor has complied with the provision as to the valuation of his security. He has given an estimate, and it is admitted that his estimate is such that it is not possible to say that it is a mere sham and not a substantial estimate. It has been urged upon us that the registrar should, when the petitioning creditor estimates his security, inquire whether the estimate is right. I think that the intention of the sub-section, which throws upon the creditor the duty of making the estimate, is to avoid the necessity of any such inquiry.

The above two authorities for the proposition that "the court should not enter into a determination of the true value after the declaration of the estimated value" were cited by Gray J. in *Re Hugh M. Grant Ltd.* (1982), 41 C.B.R. (N.S.) 28 (Ont. S.C.) at p. 33.

28 It is therefore not necessary for the creditor to establish the process by which it valued its security unless its estimate is considered by the court to be a sham or absurdly low.

29 There appears to be some authority for the proposition put forward by counsel for the company that, if the court should find that the bank was in fact fully secured, the petition should be dismissed on the basis that the bank did not have status to file the petition initially.

30 If the amount of the indebtedness owing to a petitioning creditor who holds security is uncertain and there is a possibility that there may not be any unsecured indebtedness, the court may either stay or dismiss the petition: *Re Malidav Holdings Ltd.* (1979), 33 C.B.R. (N.S.) 161 (Ont. S.C.) . It was stated at p. 167 that:

> [T]here is at least a possibility that there may be no unsecured indebtedness. If the debtor an establish that there is no unsecured debt, then the petition should be dismissed, *but that has not been done*.

[Emphasis added.] The point may be moot however as, on the evidence before the court, I do not find that the company has established that the bank was in fact fully secured. The properties referred to by counsel for the company as having "hidden equity" and positive cash flow were, in addition to Adelaide, the Yonge, Sorauren and Tycos properties. The only security held by the bank which could attach to those properties was the general assignment of book debts. Such assignment was subordinate to specific assignments of rents on all the properties in favour of the mortgagees and, even if the general assignment of book debts could be registered against the lands and therefore attach to the proceeds of sale of any of such properties in excess of the amount of the mortgages on such property, there were no impending sales at the date of the petition. It is difficult to see, at the date of the petition, that there was any positive cash flow or any potential proceeds from sales of assets to which the general assignment of book debts could attach. In view of this, I do not find that there were assets of the company to which the bank's security could attach at the date of the petition which had a value sufficient to provide full security for the amounts then owing to the bank.

31 5. Counsel for the company has maintained that the company was solvent and was meeting its liabilities generally as they became due at the date of the petition, that it was working out its cash flow problems through an agreement with the second mortgagee to take over the Castlefield property and through a refinancing of the Danforth property and that the company was a viable business entity at the date of the petition. Counsel for the company further maintained that the bank was well aware of all these facts and that accordingly the filing of the petition was not done in good faith and was done only to accelerate payment of the indebtedness of the company to the bank and accordingly for these reasons the court should exercise its discretion under s. 43(7) of the *Bankruptcy Act* and dismiss the petition. On the basis of the evidence before the court, in particular the evidence of discussions which Ms. Stann had with the bank in the spring and summer of 1991 and the evidence of Mr. Laurie indicating problems with trusts in various properties and cash flow problems, I cannot find that the bank accepted the position of the company as described by counsel for the company. It would seem to be clear from the evidence of Mr. Aguanno and from the correspondence and memoranda submitted in evidence that the bank was demanding further security by way of a general security agreement which it would have registered against title to all of the properties and an independent consultant's report on the company and that it was very concerned as to the financial viability of the company and its future prospects. It would also appear that the bank felt that the value of the company was deteriorating daily and that such deterioration would not be remedied

by a disposition and release with respect to the Castlefield property and a refinancing of the Danforth property and accordingly concluded that the best route to follow would be to place the company in bankruptcy with a resulting orderly liquidation of all of its properties and assets and distribution of the proceeds of such liquidation among all its creditors. Whether or not the bank was right in its concern for the future prospects of the company, the evidence does not indicate any improper motive on the part of the bank in initiating bankruptcy proceedings so as to constitute "other sufficient cause" to dismiss the petition in accordance with s. 43(7) of the *Bankruptcy Act*.

32 6. It was not disputed that the mortgages on the properties other than Castlefield were in good standing with all payments made to date as at the date of the petition. The company filed with the court copies of a substantial number of cheques issued during July and August evidencing payments made by the company to a number of creditors. Counsel for the company maintains that the company has therefore rebutted the presumption arising out of the allegation contained in para. 4(a) of the petition that the company had ceased meeting its liabilities generally as they became due. Counsel for the bank counters that, for the debtor to rebut the presumption arising from the proof of failure to pay the indebtedness to the petitioning creditors and at least two other creditors, the debtor must establish by independent evidence such as recent financial statements showing a profit or positive cash flow or an accounts payable ledger showing that the bulk of the accounts payable have been paid in the ordinary course of business.

33 Section 43(7) of the *Bankruptcy Act* provides as follows:

> Where the court is not satisfied with the proof of the facts alleged in the petition or of the service of the petition, *or is satisfied by the debtor that he is able to pay his debts*, or that for other sufficient cause no order ought to be made, it shall dismiss the petition.

[Emphasis added.]

34 In *Re Hayes* (1979), 34 C.B.R. (N.S.) 280 (B.C. S.C.) at pp. 280-281 it was held that the onus is on the respondent debtor to prove it is able to pay its debts:

> If I am to refuse the petition, the respondents must satisfy me affirmatively that they are able to pay their debts (Bankruptcy Act, R.S.C. 1970, c. B-3, s. 25(7)) [now s. 43(7)]. The evidence, however, led by the respondents is not that they are able to pay the judgments aforementioned, but rather that the creditors are not pressing for payment. As the onus on the respondents in these circumstances has not been met, the receiving order must go.

35 In *Re Omni-Stone Corp.* (sub nom. *First City Trust Co. v. Omni-Stone Corp.*) (1991), 4 O.R. (3d) 636 (Bktcy.), the evidence of the petitioning creditor established that the debtor was unable to meet its liabilities generally. A letter written by the debtor's counsel to counsel for another creditor stating that the debtor was in "severe financial difficulty", although written on a "without prejudice" basis, was admitted into evidence on the basis of the prejudice to the recipient. Farley J. held at pp. 641-642 [4 O.R. (3d)]:

> Given the nature of the admissions in the letters, especially the one to Holland, and H's view of procrastinating the inevitable, I do not accept his *unsupported testimony that O was financially viable*. In my view *at a minimum* H would have to have presented *audited financial statements* plus a *current analysis of its situation* to support any possibility of a determination of 'able to pay but unwilling to do so.'

[Emphasis added.]

36 In support of this decision Farley J. cited with approval the following comments of O'Connor J. in *Re Redbrooke Estates Ltd., (*sub nom. *Re Meco Electric (1960) Inc.)* 13 C.B.R. (N.S.) 117, [1968] Que. S.C. 692, at p. 118 [C.B.R.]:

> While considerable proof was made at the hearing establishing that the debtor has been dilatory in failing to attempt to reach a consensus with some of the creditors it engaged for the construction of the building, there was on the other hand telling proof made by the debtor that it was meeting generally its liabilities, at least those which it acknowledged to be

> due and payable. Other evidence made by the debtor through its bankers and accountants, internal and external, when coupled with the proof of intercompany guaranties and reserves, was so strong that the Court 'is satisfied by the debtor that he is able to pay his debts'.

37 These decisions would appear to support the position that if the debtor can establish by clear and independent evidence that it was meeting its liabilities generally as they became due, this will rebut the presumption that, because the petitioning creditor and the other creditors named in the petition had not been paid, the debtor was not meeting its liabilities generally as they became due. I do not find that the debtor has satisfied this onus in the case before the court.

38 If the debtor asserts that its liabilities have generally been met as they became due, sufficient evidence to satisfy the court must be presented. To be sufficient, such evidence would have to indicate the financial position of the debtor and this would require that financial accounts or statements be submitted.

39 Counsel for the bank further states that, although the copies of cheques filed with the court indicate that a number of creditors were paid, there is no evidence as to whether these creditors accounted for 20 per cent, 50 per cent or 80 per cent of the total obligations of the company, that it is easy to pay a number of small debts if you are not paying large debts, that there was Ontario capital tax unpaid and that there is evidence from other witnesses including Ms. Hume and Mr. Laurie that other debts of the company were not being paid as at the date of the petition.

40 In *Re Hugh M. Grant Ltd.*, supra, at p. 34 the Ontario Supreme Court adopted the proposition established in *Re Shirley* (1927), 8 C.B.R. 235, [1927] 2 D.L.R. 969 (N.B. K.B.), affirmed (1927), 8 C.B.R. 612, [1928] 1 D.L.R. 350 (N.B. C.A.): where a debtor pays some of his creditors, and makes partial payments to others, and pays nothing to others, he has committed an act of bankruptcy as defined by the section. The court in *Hugh M. Grant* further elaborated this point at p. 34 by indicating that the issue in each case is the ceasing to meet liabilities generally as they become due and not the reasons therefor. The decision of the Manitoba Court of Appeal in *Re Churchill Forest Industries (Manitoba) Ltd.*, 16 C.B.R. (N.S.) 158, [1972] 2 W.W.R. 178, 23 D.L.R. (3d) 301 (Man. Q.B.), at p. 166 [C.B.R.], affirmed 16 C.B.R. (N.S.) 172n, [1972] 4 W.W.R. 122, 25 D.L.R. (3d) 380n (Man. C.A.), was cited with approval:

> It is not for the Court to speculate why the manager made no payments on account of liabilities falling due prior to his appointment and, while it is a reasonable inference that it was because of insufficient available current or liquid assets, *it really is of no consequence, insofar as the bankruptcy petitions are concerned, why the payments were not made*. The issue is the ceasing to meet liabilities generally as they become due, not the reasons therefor.

[Emphasis added.]

41 7. The petition alleges that the company had removed or secreted its property with the intent to defraud, defeat and delay its creditors and relies upon the fact that the company had ceased depositing its accounts receivable with the bank and was no longer applying its accounts receivable to the indebtedness secured thereby. Counsel for the bank also led evidence to the effect that the company had issued cheques payable to cash and in payment of certain expenses that appeared to be personal expenses of Mr. Airst and Ms. Stann rather than company expenses and relied on this as a further instance of removing or secreting property with the intent to defraud, defeat and delay creditors.

42 I do not so find. While it is arguable that certain of the expenses of 119 Beechwood Ave. were charged to the company in proportions in excess of the use of those premises for business purposes, the evidence of Mr. Airst provided logical explanations for all of the other cheques challenged by counsel for the bank. I do not accept the proposition that charging certain expenses of the Beechwood property to the company beyond what might be regarded as a reasonable amount in any way evidences a removal or secretion of property with an intent to defraud, defeat or delay creditors. With respect to the company ceasing to deposit its accounts receivable with the bank, the bank froze the company's accounts as of July 23, 1991, and would no longer permit the company to write cheques on such accounts. In order to continue operations, the company was forced to open accounts with another bank and it in fact did open accounts with the Royal Bank of Canada. Again, I do not find that this action in any way

evidences a removal or secretion of property with the intent to defraud, defeat or delay the company's creditors. Accordingly, I find the act of bankruptcy alleged in para. 4(b) of the petition not established.

43 Counsel for the company maintained that if I should find that any of the allegations in the petition not established, the whole petition should be dismissed and relied upon the decisions in *Re Holmes* (1975), 20 C.B.R. (N.S.) 111, 9 O.R. (2d) 240, 60 D.L.R. (3d) 82 (S.C.) and *Re Whatznu Fashions (1988) Ltd.* (1989), 73 C.B.R. (N.S.) 241 (Ont. S.C.).

44 It was held in *Re Holmes* that the act of bankruptcy and every allegation in the petition must be strictly proved. This requires that evidence be placed before the court to prove all the allegations of fact made in the petition, whether or not they are put in issue by the debtor in his notice of dispute, including what might be regarded as merely formal facts. All elements necessary to found a receiving order must be pleaded in the petition and all allegations made therein must be strictly proved by the petitioning creditor. In that case, however, the only act of bankruptcy alleged was that the debtor ceased to meet its liabilities generally as they became due and the court determined that the petitioning creditor had not established that liabilities to creditors other than itself had not been paid.

45 In *Re Whatznu Fashions*, supra, Granger J. was of the opinion that a petitioning creditor must be able to prove every fact in the petition, and if he fails to prove any fact, the petition must be dismissed. In following *Re Holmes*, supra, Granger J. stated at p. 244 [73 C.B.R. (N.S.)]:

> In my opinion, a petition is different than a statement of claim based on negligence where the plaintiff pleads what might be referred to as standard allegations of negligence and then attempts to fit his claim within any or all of those standard claims. In a bankruptcy matter, as pointed out by Henry J., the court is dealing with a quasi-criminal matter and if the petitioning creditor alleges a fact in the petition he must be able to present prima facie proof of such fact on the date the petition is issued or the entire petition will be dismissed and not merely the unproved allegation in the petition.

46 In this case the court found that the petitioning creditor had not provided satisfactory proof of any money owing to it by the debtor.

47 In my view, these decisions do not stand for the proposition that if any allegation in the petition is found not to be established, the whole petition must be dismissed. I believe that the ratio of these decisions is that each of the elements of a petition for a receiving order must be established, i.e., that there is money owing by the debtor to the petitioning creditor, that the amount owing is at least $1,000, that there has been an act of bankruptcy within the six months prior to the date of petition and that there is a person qualified to act as trustee and prepared to act. I do not accept the proposition that if a petitioning creditor alleges two acts of bankruptcy and is successful in establishing one such act but not the other, that the whole petition should fail.

48 As a result of the findings set out in items 1 to 7 above, I have found all of the elements of a petition for a receiving order to be established and accordingly, the bank is entitled to have a receiving order issued.

49 Counsel for the company submitted that, even if I should find all of the elements of a petition for a receiving order established and that the petitioning creditor is therefore entitled to have a receiving order issued, I should dismiss the petition if the issuance of a receiving order is not in the best interests of all the creditors in the circumstances of this particular case and if the petitioning creditor has other options available to it. Counsel for the company refers to the discretion of the court under subss. 43(6) and 43(7) of the *Bankruptcy Act* as to whether it will or will not make a receiving order, even if satisfied with the proof of the facts alleged in the petition and of the service of the petition, if the court is satisfied that the debtor is able to pay his debts, or that for other sufficient cause no order ought to be made.

50 In support of this submission, counsel relied on the decisions in *Re TDM Software Systems Inc.* (1986), 60 C.B.R. (N.S.) 92 (Ont. S.C.); *Re Malidav Holdings Ltd.*, supra, and *Re MTM Electric Co.* (1982), 42 C.B.R. (N.S.) 29 (Ont. S.C.). With respect, I do not think that any of those decisions is based upon a fact situation analogous to that before this court.

51 In *Re TDM Software Systems Inc.*, supra, the court was not satisfied that the debtor could not meet its debts as they became due. Hollingworth J. stated at p. 96 [60 C.B.R. (N.S.)]:

> I therefore have to consider whether the debtor at the present time is able to pay his debts and in that connection I am not assisted by Mr. McCormack, who, of course, would not know because he is no longer with them. I have the evidence of Mr. Colombo that financing did come to the company through the form of the arbitrageur in October and that at the present time, although he only has $200 of the $150,000 which has been expended, he has sworn under oath that Miller is putting up more money and apparently Miller is the financial brains at least behind this organization at the present time.

52 In *Re Malidav Holdings Ltd.* Saunders J. found that the question of whether there was any unsecured indebtedness owing to the petitioner was dependent upon the outcome of an action in New Brunswick and accordingly stayed the petition pending the outcome of the New Brunswick action. Saunders J. stated at pp. 168-169 [33 C.B.R. (N.S.)]:

> This brings me to the consideration as to whether I should dismiss or stay the petition pursuant to either subs. (7) or subs. (11) of s. 25 of the Bankruptcy Act, R.S.C. 1970, c. B-3. The realty taxes have been paid. There is the possibility that the New Brunswick court may declare the Nightingale mortgage null and void, in which event the indebtedness to Federal would become fully secured. While it is recognized that because of the default in the payment of taxes Federal may now insist that the entire principal and interest on its mortgage be accelerated, it is noted that so far as the Nightingale mortgage is concerned default under the Federal mortgage is dependent on default on an existing prior encumbrance. If the Nightingale mortgage is null and void, there can be no such defaults, and all defaults would then be cured. In all the circumstances I am of the opinion that the petition should be stayed pending the outcome of the New Brunswick action ...

53 In *Re MTM Electric Co.*, supra, Anderson J. was not satisfied with the proof of the alleged act of bankruptcy, i.e., that the debtor was failing to meet its liabilities generally as they fell due. In addition, however, the decision of Anderson J. was based upon disapproval of the conduct of the petitioning creditor.

54 Anderson J. stated at p. 30 [42 C.B.R. (N.S.)]:

> I am not satisfied with the proof. In saying that, I have not overlooked that the debtor has obvious financial difficulties. Financial difficulties do not necessarily indicate an act of bankruptcy. If they did, the case load in this court would be even heavier than it is. Nor have I overlooked that in coping with those financial difficulties there has been, on the part of the debtor, what I might term some selective payment of debts. That is a situation in no way surprising where financial difficulties exist and is not something at which any material criticism can be levelled, unless the debtor is insolvent or on the eve of insolvency. There is no such evidence in this case. On the contrary, as I have already indicated, the evidence is that the debtor is continuing to carry on its business, that it has work in progress and work in prospect. The president of the debtor company described in evidence the nature of the contracting business which is carried on. In particular, he described how the proceeds of each job, as completed, were largely applied in satisfaction of the obligations incurred in further jobs that were in the course of completion.

55 And at p. 31 [42 C.B.R. (N.S.)]:

> A further consideration which I have had in mind in disposing of this petition is that the conduct of the petitioning creditor was not such as to lead to the exercise of the court's discretion in its favour. It was the evidence of Mr. Sugar, which I accept, that in the meeting which he had with Mr. Marcovitz, of the petitioning creditor, in November 1981, Mr. Marcovitz told him that he had to have payment and that if he did not have it he would not sue in the ordinary civil court but would proceed by way of petition in bankruptcy.

56 In the case before this court, all of the elements of a petition for a receiving order have been proven to the satisfaction of the court. I am not satisfied that there is any other circumstances, such as improper conduct on the part of the petitioning creditor, that should lead me to dismiss the petition "for other sufficient cause" under subs. 43(7) of the *Bankruptcy Act*.

57 Counsel are asked to submit a draft receiving order to me. Costs of this petition, on a solicitor and client basis, shall be payable to the petitioning creditor out of the estate.

Receiving order granted.

End of Document

TAB 4

Most Negative Treatment: Distinguished
Most Recent Distinguished: Indalex Ltd., Re | 2011 ONCA 265, 2011 CarswellOnt 2458, [2011] O.J. No. 1621, 75 C.B.R. (5th) 19, 17 P.P.S.A.C. (3d) 194, [2011] W.D.F.L. 2503, [2011] W.D.F.L. 2504, 276 O.A.C. 347, 331 D.L.R. (4th) 352, 89 C.C.P.B. 39, 201 A.C.W.S. (3d) 553, 104 O.R. (3d) 641, 2011 C.E.B. & P.G.R. 8433 (headnote only) | (Ont. C.A., Apr 7, 2011)

2005 CarswellOnt 3445
Ontario Superior Court of Justice [Commercial List]

Ivaco Inc., Re

2005 CarswellOnt 3445, [2005] W.D.F.L. 3789, [2005] O.J. No. 3337, 12 C.B.R. (5th) 213, 141 A.C.W.S. (3d) 366, 47 C.C.P.B. 62

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OR PLANS OF COMPROMISE OR ARRANGEMENT OF IVACO INC. AND THE APPLICANTS LISTED IN SCHEDULE "A"

Farley J.

Heard: June 13-15, 2005
Judgment: July 18, 2005
Docket: 03-CL-5145

Counsel: Andrew J. Hatnay (Ontario Agent) for Quebec Pension Committee of Ivaco Inc.
Fred Mayers, Susan Rowland for Superintendent of Financial Services
Geoff R. Hall for QIT-Fer et Titane Inc.
Jeffrey S. Leon, Sheryl E. Seigel, Richard B. Swan for National Bank of Canada
Daniel V. MacDonald for Bank of Nova Scotia
Robert W. Staley, Kevin J. Zych, Evangelia Kriaris for Informal Committee of Noteholders
Stephanie Fraser for Pension Benefit Guaranty Company
Peter F.C. Howard, Ashley John Taylor for Ernst & Young Inc., the Court-Appointed Monitor

Subject: Insolvency; Estates and Trusts; Family; Property; Corporate and Commercial
Related Abridgment Classifications
Bankruptcy and insolvency
VIII Property of bankrupt
VIII.5 Trust property
VIII.5.a General principles
Pensions
I Private pension plans
I.2 Payment of pension
I.2.l Bankruptcy or insolvency of employer
I.2.l.ii Registered plans
Headnote
Bankruptcy and insolvency --- Property of bankrupt — Trust property — General principles
Pension funds — I Inc. had established various registered pension plans for their employees — I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. — Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which

subjected assets to deemed trust in favour of pension beneficiaries — Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease — Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans — Motion dismissed — After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

Pensions --- Payment of pension — Bankruptcy or insolvency of employer — Registered plans

I Inc. had established various registered pension plans for their employees — I Inc. later suspended its past-service payments into plans so that it would have sufficient cash to continue operating until conclusion of sale of its business as going concern to H Inc. — Sale became liquidating proceeding under Companies' Creditors Arrangement Act, which subjected assets to deemed trust in favour of pension beneficiaries — Several of I Inc.'s creditors petitioned to have proceedings transformed into proceedings under Bankruptcy and Insolvency Act, where deemed trust would cease — Superintendent brought motion for order directing that portions of I Inc.'s sale of its business be distributed to fund pension plans — Motion dismissed — After taking interests of all stakeholders into account, superintendent had not made compelling case for altering bankruptcy proceedings from their normal course.

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ABN Amro Bank N.V. v. BCE Inc. (2003), 44 C.B.R. (4th) 1, 2003 CarswellOnt 2890 (Ont. S.C.J. [Commercial List]) — considered

AEVO Co. v. D & A Macleod Co. (1991), 7 C.B.R. (3d) 33, 4 O.R. (3d) 368, 1991 CarswellOnt 206 (Ont. Bktcy.) — referred to

Bank of Montreal v. Scott Road Enterprises Ltd. (1989), 36 B.C.L.R. (2d) 118, 73 C.B.R. (N.S.) 273, [1989] 4 W.W.R. 566, 57 D.L.R. (4th) 623, 1989 CarswellBC 337 (B.C. C.A.) — referred to

Bassano Growers Ltd. v. Price Waterhouse Ltd. (1998), 1998 CarswellAlta 555, (sub nom. *Bassano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 216 A.R. 328, (sub nom. *Bossano Growers Ltd. v. Diamond S Produce Ltd. (Bankrupt))* 175 W.A.C. 328, 66 Alta. L.R. (3d) 296, 6 C.B.R. (4th) 199 (Alta. C.A.) — referred to

Beverley Bedding Corp., Re (1982), 40 C.B.R. (N.S.) 95, 1982 CarswellOnt 147 (Ont. Bktcy.) — referred to

Black Brothers (1978) Ltd., Re (1982), 41 C.B.R. (N.S.) 163, 1982 CarswellBC 480 (B.C. S.C.) — referred to

British Columbia v. Henfrey Samson Belair Ltd. (1989), 75 C.B.R. (N.S.) 1, [1989] 2 S.C.R. 24, 34 E.T.R. 1, [1989] 5 W.W.R. 577, 59 D.L.R. (4th) 726, 97 N.R. 61, 38 B.C.L.R. (2d) 145, 2 T.C.T. 4263, [1989] 1 T.S.T. 2164, 1989 CarswellBC 351, 1989 CarswellBC 711 (S.C.C.) — referred to

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Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board) (1985), [1985] 1 S.C.R. 785, 19 D.L.R. (4th) 577, [1985] 4 W.W.R. 481, 60 N.R. 81, 38 Alta. L.R. (2d) 169, 63 A.R. 321, 55 C.B.R. (N.S.) 241, 1985 CarswellAlta 319, 1985 CarswellAlta 613 (S.C.C.) — referred to

Harrop of Milton Inc., Re (1979), 22 O.R. (2d) 239, 92 D.L.R. (3d) 535, 29 C.B.R. (N.S.) 289, 1979 CarswellOnt 185 (Ont. Bktcy.) — referred to

Hunt v. T & N plc (1993), [1994] 1 W.W.R. 129, 21 C.P.C. (3d) 269, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 37 B.C.A.C. 161, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 60 W.A.C. 161, (sub nom. *Hunt v. T&N plc)* 109 D.L.R. (4th) 16, 85 B.C.L.R. (2d) 1, (sub nom. *Hunt v. Lac d'Amiante du Québec Ltée)* 161 N.R. 81, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.) — considered

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — referred to

I.B.L. Industries Ltd., Re (1991), 76 D.L.R. (4th) 439, 2 O.R. (3d) 140, 4 C.B.R. (3d) 301, 1991 CarswellOnt 180 (Ont. Bktcy.) — referred to

Kenwood Hills Development Inc., Re (1995), 30 C.B.R. (3d) 44, 1995 CarswellOnt 38 (Ont. Bktcy.) — referred to

New Brunswick v. Peat Marwick Thorne Inc. (1995), 37 C.B.R. (3d) 268, 170 N.B.R. (2d) 373, 435 A.P.R. 373, 1995 CarswellNB 114 (N.B. C.A.) — referred to

Toronto Dominion Bank v. Usarco Ltd. (1991), 42 E.T.R. 235, 1991 CarswellOnt 540 (Ont. Gen. Div.) — distinguished

Unisource Canada Inc. v. Hongkong Bank of Canada (1998), 1998 CarswellOnt 5122, 43 B.L.R. (2d) 226, 14 P.P.S.A.C. (2d) 112 (Ont. Gen. Div.) — referred to

Unisource Canada Inc. v. Hongkong Bank of Canada (2000), 2000 CarswellOnt 893, 15 P.P.S.A.C. (2d) 95, 131 O.A.C. 24 (Ont. C.A.) — referred to

Woodward's Ltd., Re (1993), 17 C.B.R. (3d) 236, 79 B.C.L.R. (2d) 257, 1993 CarswellBC 530 (B.C. S.C.) — considered

Statutes considered:

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

Generally — considered

s. 2(1) — considered

s. 42 — referred to

s. 43(7) — considered

s. 136(1) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — considered

Pension Benefits Act, R.S.O. 1990, c. P.8

Generally — referred to

s. 57(3) — considered

s. 57(4) — referred to

s. 57(5) — considered

Régimes complémentaires de retraite, Loi sur les, L.R.Q. 1989, c. 38

Generally — referred to

s. 11 — referred to

MOTION by superintendent of financial services for order directing that portion of sale of insolvent business be distributed to its pension plans.

***Farley J.*:**

1 As argued, the Superintendent of Financial Services (Ontario) moved as follows. Paragraphs 1 and 87 of the Superintendent's factum stated:

> 1. The Superintendent of Financial Services ("Superintendent") brings this motion for an Order directing the Monitor to distribute part of the proceeds of sale of the businesses of Ivaco Inc. ("Ivaco") and certain of its subsidiaries to four non-union pension plans in order to protect the interests of a vulnerable group of persons — the pension beneficiaries.

> Alternatively, the Superintendent seeks an Order that an amount sufficient to satisfy the claims in respect of the non-union pension plans be held in segregated trust accounts for the benefit of the pension beneficiaries pending the payment of the claims.
>
> 87. For the foregoing reasons, the Superintendent respectfully requests that this Honourable Court make an order
>
> > (a) directing the Monitor to pay into the Non-Union Plans the amounts owing in respect of the unpaid contributions and the Companies' wind-up liabilities;
> >
> > (b) alternatively, to the extent that any amount claimed by the Superintendent is not paid under paragraph (a), an order directing the Monitor to segregate into a separate trust sufficient funds to pay such claim;
> >
> > (c) in the further alternative, to the extent that any amounts in (a) or (b) are not paid or segregated, to delay the granting of a bankruptcy order until all pension liabilities of the Companies are finally determined and paid.

2 The Superintendent's factum also stated at para. 2:

> 2. Ivaco, Ivaco Rolling Mills Ltd. ("IRM"), Ifastgroupe Inc. ("Ifastgroupe") and Docap (1985) Corporation ("Docap") (being four of the Applicants, and collectively, the "Companies") had established various registered pension plans for their employees in Ontario. Under the provisions of the *Pension Benefits Act*, the Companies were required to make contributions to pension plans on a monthly basis, and under the terms of the Initial Order granted in these proceedings, the Applicants were entitled to make such contributions. However, the Companies claimed that unless they suspended payment of certain pension contributions, they would not have sufficient cash to continue operations until a sale of the Applicants' business could be concluded. On this basis, they obtained an order of this Honourable Court to permit them to suspend payments of certain pension contributions that became due after the Initial Order. Thus, apart from the DIP lender, which has been repaid in full out of the sale proceeds, the pensioners were the only creditors who provided a source of financing to the applicants so that a going concern sale could be concluded.

With respect, it would appear to me that the last sentence of para. 2 somewhat overstates the situation. What was suspended by the November 28, 2003 order (which was not opposed by any interested party, including salaried employees, salaried pensioners or pension regulators or overseers including the Superintendent — and as to which no one has utilized the come-back provisions, certainly on any timely basis or on any direct basis) was that the Ivaco Companies would not have to pay any past service contributions for any of the 16 affected pension plans including the four Salaried (i.e. Non-Union) Plans which were not assumed by the purchaser in the Heico sale transaction which closed as of December 1, 2004.

3 The November 28, 2003 order provided:

> **Pension Payments**
>
> 3. THIS COURT ORDERS that notwithstanding any other provision of the Amended and Restated Order, the Applicants and Partnerships (as defined in the Amended and Restated Order) shall not make any past service contributions or special payments to funded pension plans maintained by an Applicant or Partnership (the "Pension Plans") during the Stay Period, pending further Order of this Court.
>
> 4. THIS COURT ORDERS that none of the Applicants or Partnerships, or their respective officers or directors shall incur any obligation, whether by way of debt, damages for breach of any duty, whether statutory, fiduciary, common law or otherwise, or for breach of trust, nor shall any trust be recognized, whether express, implied, constructive, resulting, deemed or otherwise, as a result of the failure of any person to make any contribution or payments other than current cost contribution obligations ("Current Contributions") during the Stay Period that they might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership.

5. THIS COURT ORDERS that if any claim, lien, charge or trust arises as a result of the failure of any Person to make any contribution or payment (other than Current Contributions) during the Stay Period that such Person might otherwise have become required to make to any pension plans maintained by an Applicant or Partnership but for the stay provided for herein, no such claim lien, charge or trust shall be recognized in this proceeding or in any subsequent receivership, interim receivership or bankruptcy of any of the Applicants or Partnerships as having priority over the claims of the Charges as set out in the Amended and Restated Order.

6. Nothing in this Order shall be taken to extinguish or compromise the obligations of the Applicants and Partnerships, if any, regarding payments under the Pension Plans.

Even if the "priorities are reversed" with a bankruptcy, this does not affect paragraph 6 of the Order; the claims would be unsecured, not extinguished or compromised.

4 The overstatement would appear to me to be that other stakeholders (such as the financial and trade creditors) as a result of the stay also contributed to the financial stability of the Ivaco Companies, fragile as their financial situation was, by not being paid interest as such became due nor for pre-filing indebtedness which was due. On the other hand, notwithstanding that past service contributions could be characterized as functionally a pre-filing obligation, legally the obligation pursuant to the applicable pension legislation is a "fresh" obligation.

5 Current pension obligation payments continued to be paid throughout the period subsequent to the November 28, 2003 order.

6 While originally initiated as a restructuring CCAA proceeding with a filing under the CCAA on September 16, 2003, the emphasis rather soon thereafter functionally became a two track exercise, namely either a restructuring or a sale (and in the latter case it was hoped that it would be a sale as a going concern rather than a piecemeal liquidation).

7 The Heico deal was a sale as a going concern with the purchaser assuming the unionized worker pension plans (but not the Salaried Plans) and with all workers (unionized and non-unionized) being taken on except for 5 non-unionized workers (one active and 4 inactive). In the periods (i) September 16, 2003 to November 28, 2003 and (ii) then to December 1, 2004, all unionized and non-unionized workers continued to be paid their wages and pensioners continued to be paid their pensions at full entitlement rates.

8 It does not appear to be disputed that the Heico deal on a going concern basis maximized the value of the enterprise both for the creditors and, with the assumption of the unionized workers and virtually all non-unionized workers plus the assumption of the unionized worker pension plans, for the workers. It is unfortunate, but a realistic fact of life in these circumstances that the Salaried Plans were not assumed; the deficit in the Salaried Plans now being estimated at approximately $23 million which, according to present actuarial assumptions, may impact those pensions by 20% to 50%, according to the Pension Committee of Ivaco Inc.; however, the Superintendent's submissions were that the past contributions recovery would result in a pension reduction of 17% (and without recovery of the past contributions, the reduction would be 26%), notwithstanding the approximately $11 million increase in the Salaried Plans during the 14 $^{1}/_{2}$ month period to December 1, 2004. Part of this deficiency will be picked up by the Ontario Pension Benefits Guarantee Fund ("PBGF") (recognizing that not all of the Salaried Plan beneficiaries are covered by the Ontario legislation). The PBGF payment would entitle the Superintendent to a subrogated charge against any then existing assets of the Ivaco Companies.

9 The Ivaco Companies are still involved in the CCAA proceedings. It cannot be reasonably disputed that it is not reasonably possible for the Ivaco Companies to be restructured. In pith and substance what has happened is that there has been a liquidating CCAA proceeding.

10 The National Bank, the Bank of Nova Scotia, the Informal Committee of Noteholders, and a very major trade creditor, QIT — Fer et Titane Inc., wish to have the proceedings transformed into BIA proceedings. It would not appear to me that there has been any conduct alleged to have been taken by any of these BIA desirous parties which would be considered "inequitable" in the sense of *Bulut v. Brampton (City)* (2000), 48 O.R. (3d) 108 (Ont. C.A.); *Christian Brothers of Ireland in Canada, Re*

(2004), 69 O.R. (3d) 507 (Ont. S.C.J. [Commercial List]). See also *Unisource Canada Inc. v. Hongkong Bank of Canada* (1998), 43 B.L.R. (2d) 226 (Ont. Gen. Div.), affirmed (2000), 15 P.P.S.A.C. (2d) 95 (Ont. C.A.); *AEVO Co. v. D & A Macleod Co.* (1991), 4 O.R. (3d) 368 (Ont. Bktcy.).

11 While in a non-bankruptcy situation, the Ivaco Companies' assets are subject to a deemed trust on account of unpaid contributions and wind up liabilities in favour of the pension beneficiaries by s. 57(3) of the *Pension Benefits Act* (Ontario), in a bankruptcy situation, the priority of such a statutory deemed trust ceases unless there is in fact a "true trust" in which the three certainties of trust law are found to exist, namely (i) certainty of intent; (ii) certainty of subject matter; and (iii) certainty of object. For these three certainties to be met, the trust funds must be segregated from the debtor's general funds. See *British Columbia v. Henfrey Samson Belair Ltd.* (1989), 59 D.L.R. (4th) 726 (S.C.C.); *British Columbia v. National Bank of Canada* (1994), 119 D.L.R. (4th) 669 (B.C. C.A.); *Bassano Growers Ltd. v. Price Waterhouse Ltd.* (1998), 6 C.B.R. (4th) 199 (Alta. C.A.); *I.B.L. Industries Ltd., Re* (1991), 2 O.R. (3d) 140 (Ont. Bktcy.); *Continental Casualty Co. v. MacLeod-Stedman Inc.* (1996), 141 D.L.R. (4th) 36 (Man. C.A.). There is no evidence that any of the "required" funds have been segregated or earmarked for the pension beneficiaries; nor did the Superintendent make such a request as a condition of the Heico deal being closed. Since there has been no such segregation, the deemed statutory trusts would not be effective as trusts upon the happening of a bankruptcy: see *Henfrey* at p. 141.

12 An administrator's lien pursuant to s. 57(5) of the *Pension Benefits Act* (Ontario) would also be ineffective in a bankruptcy. Section 2(1) of the BIA provides that a "secured creditor" includes a person who holds a lien (i.e. a "true lien") on a debt which is actually owing. Even though provincial legislation may deem something to be a lien, that deeming does not make it a s. 2(1) BIA "lien": see *New Brunswick v. Peat Marwick Thorne Inc.* (1995), 37 C.B.R. (3d) 268 (N.B. C.A.). While provincial legislation may validly affect priorities in a non-bankruptcy situation, once bankruptcy has occurred s. 136(1) of the BIA determines the status and priority of claims: see *Deloitte, Haskins & Sells Ltd. v. Alberta (Workers' Compensation Board)* (1985), 19 D.L.R. (4th) 577 (S.C.C.); *Husky Oil Operations Ltd. v. Minister of National Revenue* (1995), 128 D.L.R. (4th) 1 (S.C.C.).

13 The Superintendent relies on my earlier decision of *Toronto Dominion Bank v. Usarco Ltd.* (1991), 42 E.T.R. 235 (Ont. Gen. Div.). However this case is distinguishable in that while there was a bankruptcy petition outstanding at the time of the motion, no one was pressing it forward. The petitioner had died and the bank as the major creditor of Usarco only wished to proceed with a bankruptcy once the property was sold (which property had environmental problems of a significant nature). I indicated at pp. 2 and 4:

> While it is possible for the bank to be substituted or added as a petitioner in the Gold bankruptcy petition ... it has not moved to do so. It is now approximately a year and a half since the Gold Petition. The bank will not move in respect of a petition until the Hamilton property is sold. It is unclear when this might happen; no likely timetable was established. In my view, it would be inappropriate for the bank to put all proceedings involving Usarco (including this motion by the administrator) into suspended animation while the bank determined if, as, and when it wished to take action.

Rather in the present case with the Ivaco Companies there are major creditors who wish to proceed forthwith — and for the reason that such a bankruptcy will enhance their position (i.e. the pension deficit claims will become unsecured and rank *pari passu* with the other unsecured claims). See also *Usarco* at p. 5 where I observed:

> One of the primary purposes of a bankruptcy proceeding is to secure an equitable distribution of the debtor's property amongst the creditors; although another purpose may be for creditors to avail themselves of provisions of the BA which may enhance their position by giving them certain priorities which they would not otherwise enjoy.

See also *Black Brothers (1978) Ltd., Re* (1982), 41 C.B.R. (N.S.) 163 (B.C. S.C.); *Bank of Montreal v. Scott Road Enterprises Ltd.* (1989), 73 C.B.R. (N.S.) 273 (B.C. C.A.); *Beverley Bedding Corp., Re* (1982), 40 C.B.R. (N.S.) 95 (Ont. Bktcy.); *Harrop of Milton Inc., Re* (1979), 22 O.R. (2d) 239 (Ont. Bktcy.). Once a creditor has established the technical requirements of s. 42 of the BIA for granting a bankruptcy order and the debtor is unable to show why a bankruptcy order ought not to be granted, a bankruptcy order should be made: see *Kenwood Hills Development Inc., Re* (1995), 30 C.B.R. (3d) 44 (Ont. Bktcy.). A court has the discretion to refuse such an order pursuant to s. 43(7) with the onus being on the debtor to show sufficient cause why

the order ought not to be granted. While in the present case, the Ivaco Companies as debtors have not objected to the proposed bankruptcy proceedings, they are not functionally in a position to do so as they are rudderless in this respect (the officers and directors have abandoned ship by resigning some months ago and the Monitor's increased powers not extending to this — see the order of December 17, 2004, which in respect of anything which may be considered touching the pension plan issues, *only* relates to, in effect a safekeeping of the Heico sale proceeds and other assets of the Ivaco Companies). However for the purposes of this motion, I think it fair to treat the Superintendent as the "champion" of the Ivaco Companies' interests in this issue in a surrogate capacity.

14 Allow me to observe that the usual situation of invoking a s. 43(7) discretion is where (i) the petitioner has an ulterior motive in pursuing the petition (such as eliminating a competitor or inflicting harm on the debtor (together with its officers, directors, shareholders and/or other creditors) as a revenge tool) or (ii) there is no meaningful purpose to be served by the bankruptcy as there are no assets and no alleged bad conduct to be investigated. What the Superintendent has submitted in opposition to the request to proceed in bankruptcy mode is not of this nature. Nor is this type of situation of the nature envisaged at para. 12 of *Woodward's Ltd., Re* (1993), 17 C.B.R. (3d) 236 (B.C. S.C.) at p. 241 where Tysoe J. stated:

> 12. Section 11 of the CCAA has received a very broad interpretation. The main purpose of s. 11 is to preserve the status quo among the creditors of the company so that no creditor will have an advantage over other creditors while the company attempts to reorganize its affairs. The CCAA is intended to facilitate reorganizations involving compromises between an insolvent company and its creditors and s. 11 is an integral aspect of the reorganization process.

There is no such reorganization possible under the existing circumstances. Rather the compromise of claims may be adequately effected under the BIA regime (as opposed to the submission of the Superintendent to appoint an interim receiver to operate under the CCAA proceedings). It would seem to me that those claims which have already been resolved under the CCAA proceeding could be "transferred" as resolved claims into a BIA proceeding.

15 The Superintendent has not paid out any amount under the PBGF and thus has not effected nor perfected its status as a subrogee.

16 Given the limited role of the Monitor as indicated above I do not see that the Monitor in fact, law and fairness can be considered a fiduciary to the pension beneficiaries in the nature of an administrator of the Salaried Plans.

17 Pursuant to s. 57(3) and (4) of the *Pension Benefits Act*, what is the responsibility? It is that the employer (the Ivaco Companies) be deemed to hold the pension funding monies in trust for the pension beneficiaries. However there is no provision in that legislation that the monies be paid out to the pension plan at any particular time. As discussed above, those deemed trusts may be defeated, in the sense of being inoperative to give a priority, in the event of a bankruptcy. The BIA does not contain any provision that the priority position is maintained in a bankruptcy; rather the case law is to the contrary: see *Henfrey* at p. 741; *Bassano* at pp. 201-202; *I.B.L. Industries Ltd., Re* at pp. 143-4.

18 In the end result I do not see that the Superintendent has made a compelling case to the effect that the petitions in bankruptcy should not be allowed to proceed in the ordinary course. I have reached that conclusion by weighing the factors pro and con as discussed above, including the relative benefits to all stakeholders (including workers and pensioners) to maintaining the CCAA proceedings (with the benefit of the suspension of past contributions as per the unopposed (and un-reconsidered) order of November 28, 2003, the fact that no reorganization is now possible as all Ivaco Companies (except Docap) have ceased operations and are without operational assets and that the Ivaco Companies are now essentially in a distribution of proceeds mode.

19 However, to allow sufficient time for consideration of appeal, no action or step is to be taken with respect to dealing with the bankruptcy for at least 60 days from the release of these reasons. Of course it will be within the context of those bankruptcy proceedings that priorities will be determined if there is a bankruptcy, keeping in mind that s. 43(7) of the BIA may be raised at the hearing of the petition.

20 While the Superintendent in effect griped about the machinations concerning certain "corporate" actions or steps to be taken concerning the Ivaco Companies to "prepare" them for a bankruptcy proceeding, I do not find that these mechanical steps as outlined in paragraphs 2-5 of the National Bank motion as being improper — but rather that these mechanical steps merely recognize the exposure and experience of the Superior Court of Justice (Ontario) to this situation. I have the similar view as to paragraphs 7-8. However, in the circumstances, I do not find it appropriate to allow (indeed direct) that there be an assignment in bankruptcy on a "voluntary basis" as there is the s. 43(7) issue to be determined. Similarly with respect to the balance of declarations requested by the National Bank, while I have made some general observations as to reversing priorities, it would not be appropriate to determine with finality the priorities of various claims on the record before me at this time.

21 With respect to the Pension Committee of Ivaco Inc.'s motion to transfer the issue of whether the Ivaco Companies are obliged on a solidary basis for the obligations of each other for amounts owing to the Salaried Plan pursuant to s. 11 of the *Supplemental Pension Plans Act* (Quebec), I have the following observations. I do not rule out the possibility of requesting the Quebec Superior Court to determine this issue. However I do not find it necessary or desirable to make that decision at the present time. It would make sense to do so once it has been determined whether the Ivaco Companies are bankrupt or not (in the latter case one would conclude that likely the CCAA proceedings would be supplemented by an interim receivership) as different factors may come into functional play depending on that outcome.

22 In the interim, I would note the following. Canadian courts have a good deal of experience in dealing with foreign law on a proven basis. There is an issue of extraterritorial application of the SPPA. When provincial legislation purports to have an extraterritorial effect, the courts of the enacting province do not have exclusive jurisdiction to determine the constitutional validity or scope of the legislation: see J. Walker, ed., *Castel & Walker: Canadian Conflict of Laws*, 6th ed., Vol. 1 (Toronto: Butterworths, 2005) at 2:7.

23 This constitutional question would appear to arise incidentally to the ordinary course of these proceedings here in Ontario over which this Court has properly assumed jurisdiction — and such jurisdiction has not been challenged since the start of these proceedings on September 16, 2003. See *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.) where La Forest J. observed at pp. 308-10:

> In determining what constitutes foreign law, there seems little reason why a court cannot hear submissions and receive evidence as to the constitutional status of foreign legislation. There is nothing in the authorities cited by the respondents that goes against this proposition. Quite the contrary, *Buck v. Attorney-General*, [1965] 1 All E.R. 882 (C.A.), holds only that a court has no jurisdiction to make a declaration as to the validity of the constitution of a foreign state. That would violate the principles of public international law. But here nobody is trying to challenge the constitution itself. The issue of constitutionality arises incidentally in the course of litigation. The distinction is clearly made by Lord Diplock in *Buck*, at pp. 886-87:
>
> > The only subject-matter of this appeal is an issue as to the validity of a law of a foreign independent sovereign state, in fact, the basic law prescribing its constitution. The validity of this law does not come in question incidentally in proceedings in which the High Court has undoubted jurisdiction as, for instance, the validity of a foreign law might come in question incidentally in an action on a contract to be performed abroad. The validity of the foreign law is what this appeal is about; it is nothing else. This is a subject-matter over which the English courts, in my view, have no jurisdiction.
>
> Similarly in *Manuel v. Attorney General*, [1982] 3 All E.R. 786 (Ch. D.), while it was asserted that the courts of one country should not pronounce on the validity of a statute of another, the case where the question arises merely incidentally is expressly excepted.
>
> The policy reasons for allowing consideration of constitutional arguments in determining foreign law that incidentally arises in the course of litigation are well founded. The constitution of another jurisdiction is clearly part of its law, presumably the most fundamental part. A foreign court in making a finding of fact should not be bound to assume that

> the mere enactment of a statute necessarily means that it is constitutional. Formal determination of constitutionality is often purely fortuitous. It is often dependent on there happening to be parties interested in challenging the statute. This is unlikely to happen where, as in this case, most of the parties affected are outside the enacting jurisdiction. In this case, the Quebec statute has never been challenged by Quebec litigants because it does not arise in normal litigation in the province, and in extraprovincial litigation. Quebec defendants benefit while Quebec plaintiffs are normally unaffected. Why should a litigant not be able to argue constitutionality in the course of litigation that directly raises the issue? As a practical matter, it is not much more difficult to determine constitutionality than any other aspect of foreign law.

He went on to state at pp. 314-15:

> It may, no doubt, be advanced that courts in the province that enacts legislation have more familiarity with statutes of that province. It must not be forgotten, however, that courts are routinely called to apply foreign law in appropriate cases. It is thus only the fact that a constitutional issue is raised that differentiates this case. But all judges within the Canadian judicial structure must be taken to be competent to interpret their own Constitution. In a judicial system consisting of neutral arbiters trained in principles of a federal state and required to exercise comity, the general notion that the process is unfair simply is not legally sustainable, all the more so when the process is subject to the supervisory jurisdiction of this Court.
>
> This approach is even more persuasive where, as here, the issue relates to the constitutionality of the legislation of a province that has extraprovincial effects in another province. That is especially true where the constitutionality of the other province's legislation has never been challenged in the other province's courts, and where moreover, as here, such a challenge is unlikely. Where the violation is as much a violation against the Constitution of Canada, then the superior courts which must legitimately face the issue should be able to deal with the question. Against this position, it was observed that most of the parties interested in the question as interveners would be in the province whose statute is impugned. That may be, but where the alleged violation relates to extraterritorial effect, many of the interested parties are also outside Quebec. Above all, it is simply not just to place the onus on the party affected to undertake costly constitutional litigation in another jurisdiction.

24 The Ivaco Companies initiated the CCAA proceedings in Ontario; no party has questioned the appropriateness of their so doing. Under these circumstances one would have to consider that there should be an onus on the Pension Committee to demonstrate that Quebec is clearly the more appropriate forum on all aspects of the issue as framed. See *ABN Amro Bank N.V. v. BCE Inc.* [2003 CarswellOnt 2890 (Ont. S.C.J. [Commercial List])] (April 30, 2003) a decision of mine at para. 26. This motion is dismissed.

25 Orders accordingly.

Motion dismissed.

End of Document

TAB 5

Most Negative Treatment: Distinguished
Most Recent Distinguished: Economopoulos, Re | 2000 CarswellOnt 3778, 20 C.B.R. (4th) 71 | (Ont. Bktcy., Aug 4, 2000)

1999 CarswellOnt 4720
Ontario Court of Justice, General Division

Dallas/North Group Inc., Re

1999 CarswellOnt 4720, [1999] O.J. No. 5744, 17 C.B.R. (4th) 56, 46 O.R. (3d) 602

In the Matter of a Petition in Bankruptcy against Dallas/North Group Inc.

In the Matter of a Petition in Bankruptcy against Ted Pangia

Ground J.

Heard: January 18-22, 1999
Judgment: February 10, 1999
Docket: 31-205982-T, 31-205983-T

Counsel: *Mark L. Goodman* and *Jeffrey Radnoff*, for Petitioning Creditor.
Douglas D. Langley, for Dallas/North Group Inc. and Ted Pangia.

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.b Act of bankruptcy
III.1.b.i Ceasing to meet liabilities generally
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.c Act of bankruptcy within 6 months prior to petition
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.v Improper purpose of creditor
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.8 Costs
XVII.8.h Miscellaneous
Civil practice and procedure
XXIV Costs
XXIV.5 Persons entitled to or liable for costs
XXIV.5.f Non-party
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy — Ceasing to meet liabilities generally

Debtor P signed promissory note to C, pursuant to purchase agreement — Provisions of purchase agreement raised questions as to when promissory note was payable — C assigned promissory note and rights under purchase agreement over to creditor M — Company E initiated action against debtors P and D — Action was settled and company agreed to negotiate to obtain full and final releases of claims against debtors — Claims of creditor M and of C were settled and releases were obtained from them — Creditor M brought petitions to assign debtors P and D into bankruptcy as assignee of promissory note — Petitions dismissed — Creditor M took assignment of promissory note subject to terms of purchase agreement — Debtor P satisfied all obligations under settlement and releases should be delivered to debtor P — No indebtedness was owing to creditor M at date of trial.

Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Act of bankruptcy within 6 months prior to petition

Individual P and company D signed promissory note to C, pursuant to purchase agreement, but question remained as to when promissory note was payable — C assigned promissory note and rights under purchase agreement over to creditor M — Company E initiated action against debtors P and D — Action was settled and company E obtained full and final releases of claims against debtors from creditor M — Creditor M brought petitions to assign P and D into bankruptcy — Creditor M relied on evidence of indebtedness owing to travel agency and to individual creditors — Petitions dismissed — Travel invoices were for business trips, which were debt of company, not personal obligation of P — Claims of individual creditors were settled and releases obtained — Creditor provided no evidence that either debtor had, in six months prior to petitions, failed to meet liabilities.

Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Improper purpose of creditor

Individuals, C and P, were founders of predecessor to company E — C assigned promissory note from by debtors, P and company D, over to creditor M — P resigned as chairman and CEO of company E after being presented with ultimatum by board of directors — P was served with petition in bankruptcy, on basis of outstanding legal bills — Creditor M was added as creditor to bankruptcy petitions on basis of promissory note — Company E initiated action against P and company D seeking damages, for fraud and other serious offences, and cancellation of P's shares — Action was settled and company E obtained full and final releases of claims against debtors, including from creditor M — As part of settlement, P agreed to issuance of Mareva injunction and signed over his founders shares — Creditors undertook motions to find P in contempt of Mareva injunction and initiated further actions against P for indebtedness — Bankruptcy petitions were dismissed — Barrage of proceedings taken against P was concerted effort to harass and intimidate P and attempt to remove P as officer of company E when company E was on verge of becoming viable corporation — Petitions in bankruptcy were brought for improper collateral purpose and not to obtain distribution of debtors' property among creditors — Costs awarded to P and D on solicitor and client basis.

Table of Authorities

Cases considered by *Ground J.*:

Consoli, Re (1982), 41 C.B.R. (N.S.) 203 (Ont. Bktcy.) — applied

De La Hooke, Re (1934), 15 C.B.R. 485 (Ont. S.C.) — applied

Dimples Diapers Inc. v. Paperboard Industries Corp. (1992), 15 C.B.R. (3d) 204 (Ont. Gen. Div.) — applied

Shepard, Re (1996), 40 C.B.R. (3d) 145, *(*sub nom. *Shepard (Receivership), Re)* 109 Man. R. (2d) 306 (Man. Master) — applied

Statutes considered:

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

s. 43(7) — considered

PETITIONS by creditors to assign debtors into bankruptcy.

***Ground J.*:**

1 Both petitions are brought by MMCM Group Limited ("MMCM") as assignee of a joint promissory note dated October 26, 1995, made by Ted Pangia ("Pangia") and Dallas/North Group Inc. ("DNG") in the principal amount of $U.S. 224,999.00 of which a balance of $U.S. 160,000.00 is alleged to be outstanding. The date of the original petitions brought by a company called West Promenade Investments Limited ("West Promenade") was June 12, 1997. The indebtedness to West Promenade has since been paid in full. MMCM was added as a petitioning creditor by order of this court and the affidavit of verification on

behalf of MMCM was sworn October 10, 1997. The act of bankruptcy allege in both petitions is that Pangia and DNG have ceased to meet their liabilities generally as they became due.

2 It is trite law that bankruptcy proceedings are quasi criminal in nature and that because of the nature of such proceedings the act of bankruptcy and every allegation made in the petition and in the affidavit of verification must be strictly proved by sound and convincing evidence and, if such proof is not made, a receiving order should not issue. In my view, on the petitions now before this court, the petitioning creditor has failed to establish by sound and convincing evidence either the debt alleged to be owing to it or the alleged acts of bankruptcy.

3 The promissory note assigned to MMCM was originally issued to Agostino Capista ("Capista") pursuant to an agreement dated October 26, 1995 (the "DNG Agreement") entered into among Capista, Pangia and others relating to Pangia's purchase of Capista's interest in DNG. Although the promissory note states on its face that, with the possible exception of the sum of $25,000, the note is to be paid in full by November 30, 1996, the provisions of the DNG Agreement pursuant to which the note was issued raise serious questions as to when the note is due and payable. It is also interesting to note that Capista assigned to MMCM not only the promissory note but also his rights under the DNG agreement and under an agreement entered into contemporaneously therewith dealing with Pangia's purchase of Capista's interest in EPA Enterprises (the "EPA Agreement"). Accordingly, in my view, MMCM clearly took the assignment of the promissory note subject to the terms of the DNG Agreement relating to the payment of the promissory note.

4 In addition, on December 18, 1997, as a result of litigation which I will refer to later, commenced against Pangia and DNG by Ecology Pure Air International Inc. ("EPAI") and others, a settlement agreement was entered into (the "December Settlement Agreement") dealing with various claims against Pangia and DNG. Pursuant to the December Settlement Agreement, EPAI covenanted "to negotiate with and to the extent necessary, pay all monies and provide such other consideration to the following third parties as may necessary to obtain full and final releases of all claims against Ted Pangia and/or Dallas North Group. Such parties shall include Pellegrini, MMCM, Capista, Trolio, Molinaro/Vedemo Construction, the schedule "A" shareholders/creditors (best efforts only for Schedule A creditors)". With respect to the claim of Capista, it is clear from the evidence that he received the $ U.S. 160,000 and the 450,000 shares of EPAI to which he was entitled under the DNG Agreement and the EPA Agreement respectively. In addition, correspondence from Mark Goodman ("Goodman") of Solmon, Rothbart, Goodman, solicitors for EPAI, dated March 17, 1998 and March 30, 1998 make it clear that settlements had been reached with a number of claimants with claims against Pangia or DNG, including MMCM and Capista, and that releases were obtained from them. The letter of March 30, 1998 from Mr. Goodman reads in part as follows:

> THIRD PARTY RELEASES: Under the term of the Settlement, EPAI was required to obtain full and final releases of all claims against Ted Pangia and/or Dallas North Group from Pellegrini, MMCM (C), Capista (best efforts) Trolio, Molinaro/Vedemo Construction, and a best efforts for Schedule A shareholder/creditors. To date, we have delivered to you releases from Pellegrini, MMCM (C), Capista, Trolio, and Molinaro/Vedemo Construction. This represents a total satisfaction of Mr. Pangia's debt of an amount in excess of $500,000.00.

5 Clearly, the claims of Capista and MMCM against Pangia and DNG have been settled and the debts extinguished. Counsel for MMCM submitted that this is not the case because the releases were delivered to counsel for Pangia in escrow. I cannot accept such submission. If a claim is settled and a release given, the fact that the recipient of such release does not forward the release on to the party released pending completion of other closing arrangements and delivery of other documents, does not negate the fact that the claim was settled and a release given and the debt is extinguished.

6 In any event, the escrow is expressed to be "pending final settlement". Counsel for MMCM submitted that final settlement under the December Settlement Agreement has not been completed because Mr. Pangia has not dealt with U.S. investors who were bringing claims against Pangia and EPAI and that the Mareva injunction issued on consent against Mr. Pangia has not been lifted. I do not accept such submissions. The December Settlement Agreement makes no reference whatsoever to Mr. Pangia dealing with U.S. investors and the only reference to the Mareva injunction is that following delivery of documents "EPAI solicitors shall immediately thereafter move to have the action commenced against Pangia and Dallas/North Group dismissed without costs and any injunction dissolved". The evidence is clear that EPAI's solicitors did bring a motion to lift the Mareva

injunction on March 6, 1998. EPAI takes the position that it has satisfied all of its obligations under the December Settlement Agreement and that is not contested by the respondents. It is clear from the evidence that Pangia has satisfied all his obligations under the December Settlement Agreement. He has transferred 10,000,000 founders shares of EPAI, obtained the written release required from the Malaysian investors and his obligation to attend an interview with one Nigel Stephen Axton ("Axton") was waived by EPAI. Accordingly, in my view, the December Settlement Agreement has been fully completed and the escrow is terminated. The releases enclosed with Goodman's letter of March 17, 1998 should be delivered to Pangia, together with 800,000 consultant's shares of EPAI belonging to Pangia held by Goodman.

7 In the result, I find that there is no indebtedness owing as of the date of the trial by Pangia or DNG to MMCM and accordingly the petitions should be dismissed.

8 Although I am satisfied that the petitions should be dismissed in any event, I will deal with the alleged acts of bankruptcy that Pangia and DNG failed to meet their liabilities generally as they fell due. As evidence of such act of bankruptcy, insofar as Pangia is concerned, counsel for MMCM appear to rely upon the evidence as to indebtedness owing to Regal Travel, Simon Tam, Paul Pellegrini and Elio Trolio. With respect to Regal Travel, it is clear from the evidence that the invoices were for business trips of Pangia on behalf of EPAI. The representative of Regal Travel acknowledged that she was aware that they were all business trips and that all prior invoices had been paid by EPAI. There was no evidence that any of the travel was personal or private travel of Pangia and accordingly I find that any indebtedness to Regal Travel is a debt of EPAI and not of Pangia. With respect to Simon Tam, the same analysis applies. Clearly, all of the expenses incurred by Mr. Tam and charges paid by him with respect to the travel to Hong Kong and with respect to the sponsorship of the Lions Club event, were for the benefit of EPAI and were incurred for business purposes of EPAI and not for the personal benefit of Pangia and I again find that any indebtedness owing to Simon Tam is a debt of EPAI and not of Pangia. In the case of both Regal Travel and Simon Tam, the witnesses gave evidence that Pangia had said that he would see them paid. Pangia flatly denies that he considered either of these debts as a personal obligation and, although he is sympathetic to the representative of Regal Travel and feels a moral commitment to pay the bill when he is able, there is no written guarantee by Pangia that he will pay these accounts and no fresh consideration passing to Pangia and accordingly any commitment made by him would in my view be unenforceable even if it could be proven to the satisfaction of the court.

9 With respect to the alleged indebtedness to Pellegrini and Trolio, the March 30, 1998 letter from Goodman clearly indicates that settlements were reached and releases obtained from Mr. Pellegrini and Mr. Trolio and such releases were forwarded to Pangia's solicitor subject to the same escrow as referred to above. Accordingly, in my view, any indebtedness to Pellegrini or Trolio has been extinguished and the escrow has been terminated and the releases executed by Mr. Pellegrini and Mr. Trolio should be delivered to Pangia.

10 There was during the course of the trial reference to indebtedness of Pangia to Revenue Canada Taxation as a result of an assessment in March or April of 1998. Although such assessment appears to relate to the 1996 taxation year, it was clearly not a debt of which Pangia was aware or able to deal with during the six month period prior to the date of the original petition and accordingly is irrelevant from the point of view of establishing a failure to meet liabilities generally as they become due in the six month period prior to the date of the original petitions.

11 With respect to DNG, the only debts which counsel for MMCM appear to rely upon to establish a failure to meet liabilities generally as they fall due would appear to be the claims of Messrs. Pellegrini and Trolio that they advanced monies to DNG and incurred expenses for DNG as well as for Pangia. The same analysis as to the evidence of settlement of such claims and delivery of releases, as dealt with above with respect to Pangia, would apply.

12 Accordingly, I find that MMCM has provided no evidence that either Pangia or DNG had, during the six months prior to the date of the original petitions, failed to meet their liabilities generally as they fell due let alone having strictly proven such acts of bankruptcy by sound and convincing evidence.

13 The petitions are accordingly dismissed.

14 Although I have found that MMCM has failed to established either a debt owing to it by the respondents or acts of bankruptcy by the respondents, I would have dismissed the petitions even if indebtedness and acts of bankruptcy had been established. Subsection 43(7) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B.3 as amended (the "BIA") provides that where the court is satisfied that: "for other sufficient cause no order ought to be made" it shall dismiss the petition. The case law is clear that the bankruptcy courts and bankruptcy proceedings should not be used for the purpose of obtaining some collateral advantage or to settle a dispute between shareholders and that to purchase a debt for the purpose of bringing a petition in bankruptcy against the debtor is an improper collateral purpose. (See *Re De La Hooke* (1934), 15 C.B.R. 485 (Ont. S.C.); *Re Consoli* (1982), 41 C.B.R. (N.S.) 203 (Ont. Bktcy.); *Re Shepard* (1996), 40 C.B.R. (3d) 145 (Man. Master) and *Dimples Diapers Inc. v. Paperboard Industries Corp.* (1992), 15 C.B.R. (3d) 204 (Ont. Gen. Div.)).

15 In my view, the evidence in this trial is overwhelming that the petitions were brought for a collateral purpose and not for the purpose of obtaining a distribution of the property of the respondents among their creditors.

16 This matter has a long and tortuous history. Pangia, along with Capista, was one of the founders of a predecessor corporation to EPAI. Paul Mazza ("Mazza"), a Hamilton lawyer and a shareholder and officer of EPAI introduced Pangia in the fall of 1995 to Nigel Stephen Axton ("Axton") as a person who could help EPAI with offshore financing. Pangia made inquiries about Axton and found out that he was a disbarred lawyer who had been convicted for fraud and had spent time in the penitentiary and accordingly advised Mazza that he did not wish to be involved with Axton. Axton next surfaced in December 1996 at the EPAI shareholders meeting where his principal purpose appears to have been to heckle.

17 In November 1995, a corporate reorganization took place involving a reverse takeover of a Delaware corporation listed on the Nasdaq exchange and which became EPAI. The company continued with the development of a fuel catalyst which appeared to have considerable market potential in the automobile industry and in March of 1996 EPAI did a private placement of $5,500,000 U.S. with Malaysian investors. EPAI also proceeded to enter into an agreement with M.H. Myerson, a U.S. brokerage firm with respect to the continuation of its listing on the Nasdaq exchange.

18 On April 4, 1997, Pangia received and passed on to EPAI a letter from M.H. Myerson referring to the Nasdaq application and the requirement of a further private placement of securities of EPAI or an agreement with a substantial customer for products of EPAI.

19 In May of 1997, a rather peculiar document called Direction was circulated to directors of EPAI and addressed to Mazza and John Howard, another director of EPAI, to the effect that:

> This letter will serve as your good and irrevocable direction for John Howard and Paul Mazza to negotiate a financial interest or private placement between Ecology Pure Air International, Inc. and Allen Fracassi or his Assigns on the basis that our current Chairman, Ted Pangia, will be forced to resign in all of his capacities with our Company.

20 Mr. Fracassi was at the time apparently the President of Phillips Services Inc., a company of which a partner of Mazza is alleged to have been a director. At a meeting of the Board of Directors of EPAI on June 16, 1997, Pangia was presented with an ultimatum that he had to resign as Chairman and CEO of EPAI on the basis that a majority of the directors had lost faith in his ability to manage the company and Pangia felt that he had no choice but to tender his resignation.

21 The following day, June 17, 1997, Pangia and DNG were served with the original petitions in bankruptcy, the petitioning creditor being West Promenade which appears to be a company controlled by Axton. A lawyer by the name of Marc Huber ("Huber") represented West Promenade. The debt on which the petition was based was an outstanding legal bill in the amount of $8,710.15 from the Turkstra Mazza law firm which had been assigned to West Promenade. On July 29, 1997, such claim was paid in full and Pangia completed an affidavit of solvency. In mid-August 1997, Pangia received a notice of examination from Huber requiring him to attend on an examination on his affidavit of solvency. The notice of examination read as follows:

> YOU ARE REQUIRED TO BRING WITH YOU and produce at the examination the following documents and things: any and all bank accounts and statements for the last five (5) years, books of account for the last five (5) years, income

tax returns for the last five (5) years, GST returns for the last five (5) years, bills of exchange, documents indicating any indebtedness to and by you to others whatsoever and including documents relating to your financial position and your ownership of property for the last five (5) years, and your disposal of property for the last five (5) years, documents relating to the ownership, pedigree, care and location of any Arabian horses, and all books, records, papers, documents, correspondence, computer records, programs, disks and tapes, contracts, leases, plans, mortgages, monies, of every kind relating to your assets and liabilities for the last five (5) years.

22 In view of the fact that the indebtedness to West Promenade had been paid in full, Pangia did not attend the examination.

23 On August 8, 1997 at the request of Capista who was aware of the pending bankruptcy proceedings, Pangia executed an acknowledgement that the amount outstanding to Capista under the DNG agreement and the EPA agreement was $160,000 U.S. and 450,000 shares of EPAI. At the same time, Capista asked Pangia for his collection of antique watches to be pledged as security for a loan which Capista was obtaining from a third party.

24 On August 28, 1997, a motion was brought by MMCM, by Goodman as its solicitor, to be added as a petitioning creditor to the petitions against Pangia and DNG. MMCM brought such motion as assignee of the promissory note from Pangia and DNG to Capista. By order of this court, MMCM was added as a petitioning creditor.

25 Pangia was next served with a request to admit dated October 6, 1997 by Huber as solicitor for West Promenade "In the Matter of the Bankruptcy of Ted Pangia" requesting admission of 40 facts and 8 documents. Pangia refused to respond and the matter was dealt with by the Registrar in Bankruptcy on December 10, 1997 and Pangia was not ordered to answer any of the questions.

26 On December 17, 1997, Pangia was served with a Statement of Claim in an action commenced against him by EPAI alleging fraud and other serious offences and claiming damages of $10,000,000 for fraud and breach of trust, $20,000,000 for breach of fiduciary duty and $10,000,000 punitive and exemplary damages as well as an order cancelling all shares of EPAI issued to Pangia. A meeting was arranged for the next day with Pangia and his counsel, Michael W. Smith ("Smith") with Axton, who appears to have been retained by Mazza or EPAI to "manage EPAI's litigation", to discuss the settlement of the EPAI action and of other claims made against Pangia and DNG. After extensive negotiations, the December Settlement Agreement referred to above was entered into and executed on December 18, 1997. As part of such settlement, Pangia agreed to a Mareva injunction being issued which he thought would last only until December 22, 1997, the date by which various documents pursuant to the December Settlement Agreement were to be delivered, and would apply only to prevent him from disposing of any shares of EPAI. On December 17, 1997, a Mareva injunction order was issued on consent by Justice Hoilett.

27 Following the execution of the December Settlement Agreement, Pangia attended at Goodman's office and signed share certificates for 10,000,000 of his founders shares over to corporations which appeared to be clients of Goodman.

28 In February, 1998, at a meeting with Axton and Capista, Pangia was advised that the $50,000 loan to Capista, for which his antique watch collection was pledged as security, was to be taken over by State Mortgage Corporation, another Axton company, but would now be for $63,000 and that further collateral of 400,000 shares of EPAI was required.

29 On March 6, 1998, EPAI brought a motion returnable March 24, 1998 to dissolve the Mareva injunction. That motion was adjourned from March 24, 1998 to April 7, 1998 on consent. Shortly thereafter, Pangia was served with Statements of Claim in five actions commenced by Tam, Fred Tcharmtchi (two actions), both represented by Huber, and by George P. Barnes, Jr., a U.S. investor and the Michael P. Horowitz group, a group of U.S. investors, represented by other counsel, all of whom resisted the motion being brought by EPAI to lift the Mareva injunction. The Tam and Tcharmtchi actions were subsequently assigned to MMCM.

30 Pangia was then served with a motion for contempt of the order of Justice Hoilett. Such motion was brought by EPAI on April 2, 1998 and returnable April 7, 1998, the same day on which the motion for the lifting of the Mareva injunction was returnable. The contempt alleged in the motion for contempt was the refinancing of the first mortgage on a horse farm owned by a numbered company controlled by Pangia and the sale of a horse in Atlanta, Georgia, which was sold by the boarding stable

to pay back charges for board and care. It is clear that neither of these transactions constituted a breach of the Mareva injunction order. On the return of these motions, on April 7, 1998, Smith was not available to represent Pangia and an agent appeared although Pangia had no opportunity to instruct the agent. Justice Beaulieu issued an order which did not find Pangia in contempt but imposed certain restrictions on him and directed that the issue of Pangia's contempt be set down for a *viva voce* hearing.

31 Following the issuance of the order of Justice Beaulieu, Pangia received a threatening phone call from Axton during which he was told that his ongoing litigation problems were what happens to someone who crosses Mazza. A copy of the Mareva order against Pangia was subsequently circulated to a long list of people. Smith received the list from Huber and there were apparently follow-up phone calls by Huber to a number of these people.

32 On April 15, 1998, Pangia was summoned to a meeting at Goodman's office attended by Goodman, Axton and Pangia. Pangia was told by Axton not to bring his lawyer with him. Following that meeting, a letter dated April 17, 1998 ("the April settlement letter") was sent to Smith after a number of changes were made as a result of telephone calls from Axton. Such letter set out the terms of settlement of the actions which had been commenced by Tam and Tcharmtchi against Pangia and subsequently assigned to MMCM. In both of such actions the plaintiffs were represented by Huber.

33 On May 14, 1998, Pangia received a letter from Goodman, now acting for State Mortgage, referring to the loan made by State Mortgage to Capista and stating:

> You have been previously been provided with notice of a default with respect to your outstanding obligations to State Mortgage Corporation.
>
> We are advised that no payments have been made and the loan is still in default.
>
> Please take notice that State Mortgage Corporation is moving the liquidate the security it possesses and will take such steps as are necessary without any further notice to you.

34 During the May and June, 1998 period, Axton appears to have been involved in settlement discussions between Pangia and the U.S. investors who had also started actions against Pangia and others.

35 On June 11, 1998, another motion was brought by EPAI, represented by Goodman, for contempt of the Mareva injunction order, the basis of such contempt again being the refinancing of the first mortgage on the horse farm owned by Pangia's company and the sale of a horse in Atlanta by the boarding stable. Such motion was adjourned *sine die*.

36 On September 2, 1998, Pangia was served with another Statement of Claim by the Toronto-Dominion Bank, represented by Huber, for an indebtedness on a VISA card of $11,209.00. Huber also brought a motion to add the Toronto-Dominion Bank as a petitioning creditor. The motion record for such motion was 244 pages in length. Huber also claimed a conflict of interest on the part of the Wilson, Vukelich firm, which had been retained by Pangia to defend the Toronto-Dominion Bank action, on the basis that such firm had in the past acted for the Toronto-Dominion Bank. Mr. Langley, the partner of Wilson, Vukelich representing Pangia, arranged to get a waiver of conflict from the Toronto-Dominion Bank and the indebtedness to the Toronto-Dominion Bank was paid in full.

37 The MMCM motion to lift the Mareva injunction finally came on on September 18, 1998 but was referred to be set down as a long motion and as of this date has not been heard.

38 It is apparent to this court, from the above barrage of proceedings taken against Pangia, that this was a concerted effort orchestrated by Axton and/or Mazza of bullying, harassment and intimidation of Pangia in an attempt to remove him as an officer and director of EPAI and to reduce his shareholdings of EPAI to nil at a time when EPAI was on the verge of becoming a very viable corporation. It is difficult to think of a clearer example of petitions in bankruptcy having been brought for an improper collateral purpose.

39 More disturbing is the fact that this campaign was carried out using the court system as a vehicle and that lawyers participated in this scheme. Members of the Bar are not mere hand maidens to, or mouthpieces for, their clients. They are officers

of the court and should not countenance or participate in an abuse of the process of the courts such as that manifestly evidenced by the history of the legal proceedings commenced against Pangia. The court must demonstrate its disapproval of such abuse of process, and the participation of members of the Bar in such abuse, in the strongest possible terms.

40 An order will issue dismissing both petitions and directing that the releases referred to in Goodman's letter of March 17, 1998 and the 800,000 shares of EPAI owned by Pangia and held by Goodman be released forthwith to Pangia.

41 There will be costs to the respondents on a solicitor and client basis. I will ask Mr. Langley to submit his bill of costs. In view of the fact that MMCM is probably a corporation without assets, I will ask for brief written submissions from counsel as to the other persons against whom the costs order should be made.

Petitions dismissed.

TAB 6

Most Negative Treatment: Check subsequent history and related treatments.

1939 CarswellQue 18
Quebec Superior Court, In Bankruptcy

Vipond v. Ewing

1939 CarswellQue 18, 21 C.B.R. 129

In re Heirs of H. S. Vipond, and E. E. Vipond (Respondents), and G. B. Ewing et al. (Petitioners)

Boyer J.

Judgment: September 28, 1939

Counsel: *Houle & Houle* , for the petitioners.
Vipond & Vipond , for the respondents.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.1 Grounds for petition
III.1.c Act of bankruptcy within 6 months prior to petition
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.v Improper purpose of creditor
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Grounds for petition — Within 6 months prior to petition
Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Improper purpose of creditor
Petition — Acts of Bankruptcy — Ceasing to Meet Liabilities Generally as They Become Due — Transfer of Assets — Facts — No Proof of Assets — Discretion of Court in Granting or Refusing Receiving Order — Dismissal of Petition — The Bankruptcy Act, Secs. 3(j), 4(7), 9 C.B.R. 29 , 32.
On a petition for a receiving order alleging that the respondents to the petition had ceased to meet their liabilities generally as they became due and had transferred assets to the prejudice of their creditors the Court, after reviewing the facts, exercised its discretion against the petitioners and refused to grant a receiving order.

***Boyer J.*:**

1 The Court, having heard the parties and their evidence, examined the documents of record and deliberated;

2 Seeing petitioners, who claim to be unsecured creditors in the sum of $4,924, pray for a receiving order against respondents on the ground that they, since six months and before, have ceased to meet their liabilities generally as they became due, have transferred assets to the prejudice of their creditors, and to avoid paying the judgment of petitioners against them, made a voluntary partition with members of their family, of real rights and properties in Vaudreuil;

3 The respondents, for contestation, deny the facts alleged by petitioners and aver that there is an action pending to set aside petitioners' judgments, that no receiving order can be made against the heirs of Herbert S. Vipond, that the petition is made in bad faith in view of harassing the respondents and injuring their reputation, the petitioner having bought the judgment, basis of his claim, for revenge, on account of the fact that respondent Ernest Vipond and his late brother, who as lawyers in partnership,

defeated petitioner's action against his own brother; that petitioner Ewing is insolvent and the transfer made to the other petitioner was so made to defraud his creditors, that a seizure was taken against petitioners in the hands of respondents for taxes;

4 Whereas, on August 16, 1934, The Transportation Building Company obtained judgment against Ernest Vipond and the late Herbert Vipond, lawyers, carrying on their profession in partnership, for $6,350;

5 These lawyers represented Sidney Ewing, brother of the petitioner Gordon Ewing in an action taken by the latter against his said brother which action he lost both in the Superior Court and in appeal;

6 These proceedings occasioned hatred and a spirit of revenge in the heart of petitioner Ewing, not only against his said brother, but against their lawyers, and he, on several occasions, declared that he would get even and put the lawyers in bankruptcy;

7 On January 31, 1938, he bought the judgments in the first place mentioned for the sum of $700, while he was himself in financial difficulties;

8 This transfer was, however, made on the express condition that it should not be executed in the name of the transferor, but that the transferee should obtain a further judgment in his own name and this he obtained after contestation on October 4, 1938;

9 This judgment was appealed and the appeal dismissed for want of security after an extension of the time to file same on the ground that the judgment was rendered on a later date had been refused;

10 An action in improbation of this judgment was subsequently taken after the service of the present petition, and is still pending;

11 There was talk of settlement between the parties and the condition imposed by petitioner Ewing was that the claim of the Viponds for fees as between attorney and client against said petitioner's brother Sidney be transferred to him, which was refused;

12 Petitioner Ewing transferred the greater part of his claim to the other petitioner ostensibly on October 3, 1938, the day before he obtained judgment personally, but the date of this transfer has not been proved nor has the service of this transfer. At the time said petitioner was in serious financial difficulties as is evidenced specially by a seizure for taxes against him in the hands of respondents and other judgments against him;

13 Petitioner de Winter, the transferee, was not heard and was not present at the hearing.

14 Considering now the reasons given in support of the petition whereas: as to the partition of property, namely, a farm composed of six lots in Vaudreuil, between the respondents and their co-heirs which took place on November 5, 1938, there is no proof of fraud, and, apparently, respondents got a fair share and, moreover, petitioners' judgment was registered against it;

15 There is no proof of any transfer of assets;

16 As to the third ground, there are several judgments for a large total rendered against respondents as a result of the depreciation of real estate, but they all date back four to seven years and have been lying dormant for several years;

17 Outside of part of the Vaudreuil farm on which petitioners' judgment has been registered, as well as at least one other judgment, there is no proof of any assets or future rights.

18 Considering that the present proceedings are inspired by spite and a spirit of revenge and are abusive;

19 Nothing would be gained by a receiving order and additional costs would be incurred in vain;

20 There is no failure "to meet liabilities (in the plural) generally as they become due" within the last six months (*The Bankruptcy Act* , sec. 4(3)(*b*) [9 C.B.R. 31]);

21 The Court has a certain discretion to exercise (sec. 4(7) [9 C.B.R. 32]) and the facts and circumstances taken together justify the Court in refusing to grant the petition;

22 Wherefore doth dismiss said petition with costs.

End of Document

TAB 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Down, Re | 2000 BCSC 1148, 2000 CarswellBC 1640, [2000] B.C.W.L.D. 1104, [2000] B.C.J. No. 1565, 80 B.C.L.R. (3d) 28, 98 A.C.W.S. (3d) 349, 19 C.B.R. (4th) 46, 189 D.L.R. (4th) 709 | (B.C. S.C., Jul 28, 2000)

1934 CarswellOnt 95
Ontario Supreme Court, In Bankruptcy

De La Hooke, Re

1934 CarswellOnt 95, 15 C.B.R. 485

In re E. De La Hooke

F. G. Cook, Esq., Registrar

Judgment: May 16, 1934

Counsel: *J. Singer, K.C.*, for the petitioning creditors.
T. C. Newman, for the debtor.

Subject: Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.v Improper purpose of creditor
Headnote
Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Improper purpose of creditor
Petition — Unsatisfied Judgment against Debtor — Judgment Assigned to Business Competitor of Debtor using Similar Trade Name — Petition Filed for Purpose of Removing Business Competitor — Dismissal of Petition.
The debtor carried on a cleaning and pressing business under the name of "Clean-it-erias". On March 13, 1933, a judgment was obtained against the debtor for $521.85 and costs by Willowvale Cleaners and Dyers. Execution was issued on the judgment and filed with the sheriff of the city of Toronto on April 12, 1933. Certain payments were made to the sheriff upon the execution but later, on January 22, 1934, one Ivy Scott obtained an assignment of the judgment, and notice of the assignment and a demand for payment of the amount due under the judgment was served upon the debtor.
A petition for a receiving order in which it was stated the debtor had permitted an execution issued against him to be returned endorsed to the effect that the sheriff could find no goods whereon to levy, was filed by Ivy Scott against the debtor who opposed it on the ground the application was for a collateral and improper purpose and was an abuse of the process of the Court. On the hearing of the petition an order was made by Armour, J., granting leave to the petitioner to amend the petition by adding Ever-ready Cleaners Limited as a petitioner and directing the hearing of the amended petition by the Registrar.
The petitioners had acquired a business from one Charles Rae, a former employee of the debtor, which business was carried on under the trade name of "Cleaniteria" a name similar to that used by the debtor. The only debts owing by the debtor was the amount owing to the petitioning creditors and Willowvale Cleaners and Dyers, and an amount owing to one Pulfer which account was stated by Pulfer to be in a satisfactory condition. The debtor had had no business dealings with either of the petitioning creditors.
Held, that the petitioner Ivy Scott acting on behalf of Ever-ready Cleaners Limited, obtained an assignment of the judgment against the debtor for the sole purpose of filing a petition in bankruptcy against the debtor and of eventually removing a business

competitor who was using a similar trade name. The petition was not filed with a view to an equal distribution of the debtor's assets among his creditors.
The petition was dismissed.

***Cook, Esq.* (Registrar):**

1 This is a petition by Ivy Scott and Ever-ready Cleaners Limited (the latter added as a petitioner pursuant to the order of Armour, J., dated Thursday, March 1, 1934) that E. De La Hooke, carrying on business and residing at the city of Toronto, be adjudged bankrupt and that a receiving order be made in respect of his estate. The said petition was filed February 16, 1934, and the debtor gave notice of his intention to oppose the petition on the ground "that the application of Ivy Scott is for a collateral and improper purpose and is an abuse of the process of this honourable Court."

2 The said petition came on for hearing before Armour, J., on March 1, 1934, and an order was made granting leave to the petitioner to amend the petition by adding Ever-ready Cleaners Limited as a party petitioner and to file the consent of Ever-ready Cleaners Limited and the affidavit of Norman Walsh its president. The said order also directed that the petition as amended be referred to the Registrar in Bankruptcy for hearing.

3 At the hearing before me *viva voce* evidence was taken in addition to the affidavits filed in support of the petition and by the debtor. The petitioners state in their petition *inter alia* as follows:

> 2. That the said E. De La Hooke is justly and truly indebted to me in the sum of five hundred and twenty-one and 85/100 ($521.85) dollars, for judgment debt, and thirty-one and 45/100 ($31.45) dollars, for costs, together with interest on the said amount from the 13th day of March, 1933, being the sum of five hundred and thirty-six and 85/100 ($536.85) dollars, (less fifteen ($15.00) dollars paid on account thereof) for debt, and the sum of thirty-one and 45/100 ($31.45) dollars for costs, due under a judgment obtained in the County Court of the county of York in a certain action commenced by Willowvale Cleaners and Dyers (plaintiffs) against the said E. De La Hooke (defendant), which judgment bears date the 13th day of March, 1933. The amount due under the said judgment for debt, costs and interest was assigned to me by Joseph Davis and Harry Stevenson, the only partners in Willowvale Cleaners and Dyers, by indenture of assignment bearing date the 22nd day of January 1934, and notice of the said assignment and demand for payment of the amount due under the said judgment for debt, costs and interest was duly served upon the said E. De La Hooke on the 22nd day of January, 1934, and the said indebtedness has not been paid and still remains unpaid.
>
> That the said E. De La Hooke, within six months before the date of the presentation of this petition, has committed the following acts of bankruptcy, namely:
>
> That he permitted the execution or other process issued against him in the County Court action of Willowvale Cleaners and Dyers versus E. De La Hooke, to be returned endorsed to the effect that the sheriff can find no goods whereon to levy or to seize or take.

4 In an affidavit, sworn on March 1, 1934, Norman Walsh, the president of Ever-ready Cleaners Limited, states that Ivy Scott, one of the petitioners, is the trustee for the said Ever-ready Cleaners Limited.

5 At the hearing before me, counsel for the debtor admitted that the judgment was unpaid and that the debtor had received notice of the assignment of same to the petitioner, Ivy Scott. The deputy sheriff of the city of Toronto was called to show that a return of *nulla bona* had been made by the sheriff. The debtor said that he had arranged with a Mr. Campbell of the sheriff's office to pay the sum of $5 a week on account of the judgment and that he had paid $20 in all. The debtor states in his affidavit, sworn on February 21, 1934, as follows:

> 8. That I have never had any business dealings or transactions with the petitioner, Ivy Scott, of any kind whatsoever, and that I am informed and do verily believe that the said Ivy Scott has gone out and purchased the judgment held by Willowvale Cleaners and Dyers against me for the sole purpose of bringing this petition, and having me declared bankrupt, in order that she can acquire exclusive use of the name "Clean-it-erias", in the city of Toronto.

6 The debtor stated in evidence that he started in the business of cleaning and pressing in February, 1932, at Dupont Street, Toronto, under the name of La France Cleaners. About April 1, 1932, he changed the name to La France Clean-it-erias, and on April 10, 1932, he dropped the words "La France" and used the name "Clean-it-erias"; that at this time he spoke to N. L. Martin, the trustee in bankruptcy of Clean-it-erias Limited, and asked him if he could use the name of "Clean-it-erias" and that Mr. Martin said he had no objection. At a later date, namely, November 27, 1933, the debtor received a letter from N. L. Martin (Ex. 8) as follows:

> I understand from you that you desire to use the name "Clean-it-erias" in connection with your cleaning and pressing business. Should you wish to do so, this is to advise you that I do not propose to take any steps to prevent you using it.

7 The debtor also states that he paid the Bell Telephone Company the arrears owing by Clean-it-erias Limited and that the telephone company gave him the privilege of using the telephone numbers of the said bankrupt company. The debtor also said that he had an employee by the name of Charles Rae, who was discharged by him about April 8, 1932; that Charles Rae started in business under the name of "Danforth Clean-it-erias", and subsequently transferred his business to 2455 Queen Street East, Toronto, where he carried on under the firm name and style of "Clean-it-erias".

8 J. A. Pulfer gave evidence that he had been employed by the Ever-ready Cleaners Limited, one of the petitioners herein; he said that Ever-ready Cleaners Limited took over the business of Rae on August 26, 1933, to liquidate a debt; he acted as manager until the middle of December; that the work was done at the plant of the Ever-ready Cleaners Limited; that the prices of Clean-it-erias were cheaper than those of Ever-ready Cleaners Limited; that the business was assigned to Ivy Scott, who is a relation of Walsh, the president of Ever-ready Cleaners Limited.

9 Harry Stevenson, a former partner of Willowvale Cleaners gave evidence that the debt was assigned by Willowvale Cleaners to Ivy Scott; that the debtor owed $795.45 including judgment for $536.85 to the Willowvale Cleaners and that the balance of $259 still remained unpaid. In cross-examination he said that Willowvale Cleaners and Dyers was closed up and that he was working for Ever-ready Cleaners when the said judgment was assigned to Ivy Scott.

10 J. A. Pulfer also gave evidence that he does work for the debtor and that the latter owes him a substantial amount; when cross-examined by counsel for the debtor he said that his account was in a satisfactory condition.

11 Counsel for the petitioning creditors stated that these were the only debts owing by the debtor within his knowledge. The debtor further stated that some time in February 1934 he had a discussion with Walsh, the president of Ever-ready Cleaners & Dyers; that at that time Walsh asked why the debtor had sent a letter to Ivy Scott and that he had as much right to use the name of "Clean-it-erias" as the debtor had. Later the debtor was served with the notice of seizure and then the petition. The debtor states that the name of "Clean-it-erias" is the only asset of the business and that if he lost the name he would not have any business.

12 Counsel for the debtor tendered in evidence a declaration of business (Ex. 4) signed by the debtor to which counsel for the petitioning creditor objected. As this declaration was not registered, in my opinion it is not admissible in evidence.

13 A copy of declaration of business (Ex. 7) signed by Charles Rae was filed in the Registry Office for Toronto on July 12, 1932. It is in part as follows:

> I Charles Rae, of the city of Toronto, in the county of York, Cleaner, hereby certify:
>
> 1. That I have carried on and intend to carry on trade and business as Cleaner and Dyer, at 1802 Danforth Avenue, under the name of Cleaniteria.
>
> 2. That the said business has subsisted since the 11th day of April, 1932, and that no other person is associated with me in partnership in the said business.

14 One of the leading cases dealing with a similar situation is *King v. Henderson*, [1898] A.C. 720, at p. 731, 67 L.J.P.C. 134, where Lord Watson says:

Their Lordships do not dispute the soundness of the proposition that a plaintiff or petitioner who institutes and insists in a process before the Bankruptcy or any other Court, in circumstances which make it an abuse of the remedy sought or a fraud upon the Court, cannot be said to have acted in that proceeding either with reasonable or probable cause. But, in using that language, it becomes necessary to consider what will, in the proper legal sense of the words, be sufficient to constitute what is generally known as an abuse of process or as fraud upon the Court. In the opinion of their Lordships, mere motive, however reprehensible, will not be sufficient for that purpose; it must be shewn that, in the circumstances in which the interposition of the Court is sought, the remedy would be unsuitable, and would enable the person obtaining it fraudulently to defeat the rights of others, whether legal or equitable.

15 And again at p. 732:

The very intelligible principle which was recognised in *Ex parte Wilbran* (1820), 5 Madd. 1, does not appear to their Lordships to have been departed from in any of the subsequent decisions which were brought under their notice by the industry of the appellant's counsel. Motive cannot in itself constitute fraud, although it may incite the person who entertains it to adopt proceedings which, if successful, would necessarily lead to a fraudulent result; and it is not the motive, but the course of procedure which leads to that result, which the law regards as constituting fraud. In *In re Davies* (1876), 3 Ch. D. 461, the Court of Appeal refused to make an adjudication in bankruptcy, where it was clearly shewn that the proceeding had been used and was meant to be used for the illegitimate and fraudulent purpose of extorting money from the debtor. And, again, in *Ex parte Griffin* (1879), 12 Ch. D. 480, the same Court, although there was a good petitioning creditor's debt, and an act of bankruptcy had been committed, refused to make an adjudication. The ratio of the decision was thus explained by James, L.J., "I think I never knew a case so transparent as to the fraud with which the whole thing was conceived, and the oppression which it was intended to exercise. It would, I think, be a shocking thing for any court of justice in a civilised country to be made the instrument of proceedings like these."

16 See also *Ex parte Griffin; In re Adams* (1879), 12 Ch. Div. 480, per Brett, L.J., at p. 483, 48 L.J. Bk. 107.

A more transparent fraud upon the bankruptcy law I do not think it is possible to imagine. A debt, which was apparently not worth a shilling, was bought up, not for the purpose of its being recovered, not for the purpose of making the debtor a bankrupt, but for the purpose of threatening to make him a bankrupt, in order to force him by that oppression to give up a just debt which was due to him, so that the estate on which it was charged might go cleared from the charge into the hands of *Griffin*, and also for the purpose of saving *Moojen*, who was *Griffin's* father-in-law, from a most proper and just application to strike him off the roll of solicitors. I am sorry to say I am not shocked at these proceedings, for I am too old to be shocked at anything, but certainly a viler fraud I have never heard of.

Cotton, L.J.: I agree that the appeal must be dismissed. The proceedings in bankruptcy were not taken to obtain payment of the debt, but the debt was purchased in order to take the proceedings in bankruptcy.

James, L.J.: After what Lord Justice *Cotton* has said, in which I entirely agree, people will probably think twice before they buy debts for the purpose of taking bankruptcy proceedings. The appeal will be dismissed with costs.

17 See also *Ex parte Harper; In re Pooley* (1882), 20 Ch. D. 685, per Jessel, M.R., at p. 692, 51 L.J. Ch. 810:

I must take it, therefore, that Mr. *Harper* knew that the object of buying up this debt was, not the recovery of the debt, but to make Mr. *Holt* a bankrupt, and (as I consider to be the fair inference) with the view of removing him from being trustee. But, even if it goes no further than the first proposition, it is a gross abuse of the bankruptcy laws. And we must recollect that all this occurred after the well-known judgment, a judgment which made a great noise in the profession, in *Ex parte Griffin*, 12 Ch. D. 480, which was delivered in July, 1879, and in which Lord Justice *Cotton* said, 12 Ch. Div. 483: "The proceedings in bankruptcy were not taken to obtain payment of the debt, but the debt was purchased in order to take the proceedings in bankruptcy," and Lord Justice *James* added that he entirely agreed with that, and that after what Lord Justice *Cotton* had said "people will probably think twice before they buy debts for the purpose of taking

bankruptcy proceedings." Now a solicitor, who after that chooses to be concerned in buying up a debt with the view of taking bankruptcy proceedings, cannot complain if his conduct is viewed with disapprobation by a Court of Justice.

18 In *In re A Debtor*, [1928] 1 Ch. 199, at p. 211, 97 L.J. Ch. 120, Lawrence, L.J., says:

None of these answers, in my judgment, is sufficient. It cannot, in my opinion, be too clearly understood that bankruptcy proceedings, which are in their nature quasi criminal, must not be used for the purpose of obtaining a collateral advantage. An attempt to do so, even though unsuccessful, will be sufficient to disentitle a petitioning creditor to an order, and, therefore, the fact that in the present case the debtor refused to pay the costs of the Sherbourne Trust, Ld., and that that demand was not insisted upon, does not absolve the petitioning creditors from the consequences of having made that demand. The principle upon which the Court acts in these cases is that it treats a demand of this nature as evidence that bankruptcy proceedings were taken not with the bona fide intention of obtaining adjudication but for some collateral purpose.

19 And again at p. 213:

Applying the underlying principle of all those cases to the present case, it seems to me to be clear that the creditors here have utilized bankruptcy proceedings for the purpose of extorting, or attempting to extort, money from the debtor for which the debtor was in no sense liable. In other words, the petitioning creditors have utilized bankruptcy proceedings for a collateral purpose, and that is a thing which the Court does not allow.

20 The evidence is that the debtor had no business dealings with either of the petitioning creditors. The debt on which the petitioning creditors rely was incurred by the debtor to Willowvale Cleaners and Dyers and that the latter had issued a writ of execution and given it to the sheriff on April 12, 1933, for execution. The debtor says that he agreed to pay $5 a week and paid $15 to the sheriff by June 15, 1933. The petitioning creditor, Ivy Scott, obtained an assignment of this judgment on January 22, 1934, at which time it was quite apparent that the account was in a very unsatisfactory condition.

21 No evidence was called by the petitioners to show what consideration, if any, was given to obtain the assignment of the judgment. The petitioners themselves were not called to give *viva voce* evidence in explanation of the circumstances. They had acquired a business from Charles Rae, a former employee of the debtor, which business was carried on under the trade name of "Cleaniteria", a name similar to that used by the debtor. The evidence is that the only debts owing by the debtor are the amount owing to the petitioning creditors, and Willowvale Cleaners and Dyers, and an amount owing to Pulfer which account the latter says is in a satisfactory condition. The debtor swore in evidence that the name of "Clean-it-erias" is the only asset of the business.

22 I am of opinion that the petitioner, Ivy Scott, acting on behalf of Ever-ready Cleaners Ltd., obtained an assignment of this judgment for the sole purpose of filing a petition in bankruptcy against the debtor and of eventually removing a business competitor who was using a similar trade name. I am also of the opinion that the petition was not filed with a view to an equal distribution of the assets of the debtor among his creditors. After a careful perusal of many of the leading cases, and following the principles of law laid down in the cases I have cited, I find that the petition should be dismissed.

23 There will, therefore, be an order dismissing the petition, with costs.

TAB 8

2010 ONCA 456
Ontario Court of Appeal

Chartrand, Re

2010 CarswellOnt 4044, 2010 ONCA 456, 189 A.C.W.S. (3d) 599, 267 O.A.C. 91, 69 C.B.R. (5th) 143

IN THE MATTER OF THE BANKRUPTCY OF MARCEL CHARTRAND, AN INDIVIDUAL RESIDING IN THE TOWN OF HAWKESBURY, COUNTY OF PRESCOTT, IN THE PROVINCE OF ONTARIO, BUSINESSMAN

CIBC Mortgages Inc., Trading as Firstline Mortgages (Applicant / Appellant) and Marcel Chartrand (Respondent / Respondent)

Karen M. Weiler, R.A. Blair, Paul Rouleau JJ.A.

Heard: June 2, 2010
Judgment: June 21, 2010
Docket: C50804

Proceedings: reversing *Chartrand, Re* (2009), 2009 CarswellOnt 8356 (Ont. S.C.J.)**Proceedings: additional reasons at *Chartrand, Re* (2009), 2009 CarswellOnt 8349 (Ont. S.C.J.)**

Counsel: Benjamin Frydenberg for Appellant
Marcel Chartrand for himself

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
III Bankruptcy petitions for receiving orders
III.3 Hearing of petition
III.3.b Defences
III.3.b.vi Dispute of debt
Headnote
Bankruptcy and insolvency --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Dispute of debt Debtor owed mortgage debt to creditor in amount of $237,474.75 — Debtor was involved in litigation with Canada Revenue Agency (CRA) concerning arrears of GST in amount of $175,000 and his assets were frozen — Appraisal reports appraised value of property at between $209,000 and $230,000 — Debtor did not make payments to creditors — Creditor bank estimated value of security at $200,000 — Creditor brought application for bankruptcy against debtor and application was dismissed as creditor did not prove that it met requirements of s. 43(2) of Bankruptcy and Insolvency Act — Creditor appealed decision — Appeal allowed — Date for valuing creditor's security was date of application — Creditor's claim ranked behind CRA claim for GST, and on date of application, there was in excess of $100,000 of unsecured debt owed to creditor — Creditor's application appeared to overvalue secured debt by $100,000 to it's detriment and it therefore appeared that argument was not made before application judge — Debt owed was certain and it was apparent there was problem of unsecured indebtedness.
Table of Authorities
Cases considered:
A.E.S. Empire Inc., Re (1989), 77 C.B.R. (N.S.) 33, 1989 CarswellOnt 193 (Ont. S.C.) — considered
C. Tokmakjian Ltd., Re (2003), 2003 CarswellOnt 4616, [2003] O.T.C. 1027, 46 C.B.R. (4th) 227 (Ont. S.C.J.) — considered
Fred Walls & Son Holdings Ltd., Re (1999), 1999 CarswellBC 1873, 13 C.B.R. (4th) 60 (B.C. S.C.) — considered

Fred Walls & Son Holdings Ltd., Re (2003), 40 C.B.R. (4th) 171, 11 B.C.L.R. (4th) 315, 2003 CarswellBC 451, 2003 BCCA 132, 179 B.C.A.C. 140, 295 W.A.C. 140 (B.C. C.A. [In Chambers]) — referred to

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — referred to

Statutes considered:

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

Generally — referred to

s. 43(1) — considered

s. 43(2) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

s. 222(1) — referred to

APPEAL by creditor of judgment reported at *Chartrand, Re* (2009), 2009 CarswellOnt 8356 (Ont. S.C.J.), concerning whether creditor satisfied requirements of *Bankruptcy and Insolvency Act*.

***Per curiam*:**

Background

1 The respondent, Mr. Chartrand, owed a mortgage debt of approximately $237,474.75 to the appellant, Canadian Imperial Bank of Commerce (CIBC), including $37,000 for back taxes which CIBC paid.

2 The Canada Revenue Agency (CRA) had a claim for unpaid GST in the amount of $175,000 for which it claimed a super priority by virtue of s. 222(1) of the *Excise Tax Act*, R.S.C. 1985, c. E-15, over the CIBC mortgage.

3 CIBC brought an application for a bankruptcy order against Mr. Chartrand. The issue on this appeal is whether CIBC satisfied the requirements of ss. 43(1) and (2) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3, s. 1; 1992, c. 27, s. 2., (the *BIA*) which state:

> s. 43(1) Subject to this section, one or more creditors may file in court an application for a bankruptcy order against a debtor if it is alleged in the application that
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> (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
>
> (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application,
>
> if applicant creditor is a secured creditor.
>
> (2) If the applicant creditor referred to in subsection (1) is a secured creditor, they shall in their application either state that they are willing to give up their security for the benefit of the creditors, in the event of a bankruptcy order being made against the debtor, or give an estimate of the value of the applicant creditor's security, and in the latter case they may be admitted as an applicant creditor to the extent of the balance of the debt due to them after deducting the value so estimated, in the same manner as if they were an unsecured creditor.

4 Inasmuch as CIBC did not wish to give up its security entirely, it had to give an estimate of the value of the security. For CIBC's application to succeed, the unsecured portion of its claim had to exceed $1,000. In addition, it had to prove that Mr. Chartrand had committed an act of bankruptcy within the six months preceding the application.

5 In its application dated March 5, 2008, CIBC estimated the value of its mortgage security to be $200,000, thus asserting that there was an unsecured balance owing of approximately $37,000. Mr. Chartrand disputed CIBC's application.

6 At the hearing, CIBC submitted two appraisal reports. The first dated March 6, 2007 valued the property at between $209,000 to $225,000; the second dated January 23, 2008 at $230,000. Mr. Chartrand, who represented himself, testified that the value of the property was $275,000.

The Application Judge's Decision

7 The application judge held that the evidence that Mr. Chartrand had committed an act of bankruptcy and was unable to pay his debts generally as they came due within the six months that preceded the application was overwhelming.

8 He was also satisfied that there was no merit in Mr. Chartrand's allegation that the application was brought for an improper purpose. If CIBC's application was granted, then, by virtue of the provisions of the *BIA* respecting distribution, the priorities between itself and the CRA would be reversed. The application judge held, in accordance with *Ivaco Inc., Re* (2006), 83 O.R. (3d) 108 (Ont. C.A.), that this was a legitimate reason to bring the application.

9 The application judge dismissed CIBC's application on the basis that he was not satisfied it had shown it had at least $1,000 of unsecured indebtedness. In so doing, the application judge was alive to the fact that the *BIA* did not require the applicant to provide an independent appraisal and that it need only provide an estimate which must establish that its valuation was not a sham or absurdly low. Although the appraisal reports were hearsay, they could be considered for the purpose of determining that the estimate of value was made in good faith and was not a sham or absurdly low. See *C. Tokmakjian Ltd., Re*, [2003] O.J. No. 4667 (Ont. S.C.J.) at para. 41. The application judge, however, distinguished *Tokmakjian* from the situation before him. In *Tokmakjian*, the applicant's account manager testified about efforts made to sell the security and gave evidence that these efforts had resulted in few offers and those that were received were low because the market was poor. In the instant case, CIBC had chosen not to offer any evidence in this regard. It had filed its application after just receiving the last appraisal valuing the property at $230,000, yet it had chosen to estimate the value at $200,000 without explanation. Thus, the application judge held that the estimate was absurdly low, that he could not find on the evidence that the estimate was made in good faith, and that CIBC had not established that the value of the property was at least $1,000 less than the debt owed by Mr. Chartrand.

Argument on Appeal and Analysis

10 Having regard to the very narrow margin between the debt claimed and the appraisals, combined with CIBC's omission to adduce any evidence of valuation, the application judge's decision in favour of the unrepresented Mr. Chartrand is certainly understandable.

11 On this appeal, CIBC submits that the application judge made a palpable and overriding error in concluding that it failed to establish at least $1,000 of unsecured debt.

12 CIBC makes two submissions in support of its argument. The first is that a valuation of $200,000 was not absurdly low. The appraisal of $230,000 did not take into consideration that property taxes in the approximate amount of $32,500 were owed. Thus, this amount should have been subtracted from the appraised value. The second is that, as CIBC's mortgage ranked behind CRA's claim for GST in the amount of $175,000 on the date of the application, there was in excess of $100,000 of unsecured debt owing to CIBC at that time.

13 CIBC's affidavit in support of its application valued its security at $100,000. Based on the argument CIBC now makes before us, the affidavit overvalued the amount of CIBC's secured debt by at least $100,000 to its detriment. It therefore appears that CIBC's submissions may not have been made to the application judge. In addition, had this been the case, it is likely the application judge would have addressed them in otherwise comprehensive reasons.

14 We agree that the date for valuing CIBC's security is the date of the application and that, taking into consideration the amount of the debt owing to the CRA and its priority, CIBC was an unsecured creditor. The relevant time for determining whether an act of bankruptcy has occurred is the date of the application. See *The 2010 Annotated Bankruptcy and Insolvency*

Act, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra at p. 148 and cases cited therein. It only makes sense that that date is also the relevant date for determining the value of the security.

15 Other jurisprudence also supports our conclusion that the application should succeed. The decision of *Fred Walls & Son Holdings Ltd., Re* (1999), 13 C.B.R. (4th) 60 (B.C. S.C.) appeal dismissed on procedural grounds at (2003), 40 C.B.R. (4th) 171 (B.C. C.A. [In Chambers]) holds that the relevant date for valuing a security is both the date of the application and the date that the application is heard. Payments made to reduce indebtedness to the applicant creditor after the date of the application and before the date of the hearing would thus be taken into consideration in determining the amount of unsecured debt. Here, there were none. I also note that in *A.E.S. Empire Inc., Re* (1989), 77 C.B.R. (N.S.) 33 (Ont. S.C.), Saunders J. dealt with a situation in which the applicant creditor was owed approximately $300,000. It alleged its security was worth only $250,000 although the property in issue had been sold to the debtor in an arm's length transaction a few months earlier in the same year for $351,000. The applicant creditor had not had the property appraised and there was no evidence of valuation from any person qualified to give such evidence. Saunders J. held, however, that the valuation was not a sham. The debt owing was certain, and, having regard to the evidence of second mortgagees, it was apparent there was a problem of unsecured indebtedness. In these circumstances, he held that a court ought to grant the petition rather than exercise its discretion to grant a stay.

16 For these reasons, the decision of the application judge is set aside, the appeal is allowed and the application is granted.

17 Having regard to the fact that the submissions now advanced on appeal were submissions that ought to have been made at first instance, we would order that there be no costs at first instance. Costs of this appeal are to the appellant and are fixed in the amount of $9,000, all inclusive.

Appeal allowed.

End of Document

TAB 9

2009 CarswellOnt 374
Ontario Superior Court of Justice [Commercial List]

Bank of Nova Scotia v. Huronia Precision Plastics Inc.

2009 CarswellOnt 374, [2009] G.S.T.C. 12, [2009] O.J. No. 312, 176 A.C.W.S. (3d) 31, 50 C.B.R. (5th) 58

The Bank of Nova Scotia (Applicant) v. Huronia Precision Plastics Inc. (Respondent)

Morawetz J.

Heard: November 4, 2008
Judgment: January 26, 2009
Docket: CV-08-7722-00CL

Counsel: Sam Rappos, for Applicant, Bank of Nova Scotia
A'Amer Ather, for Canada Revenue Agency
Chris Burr, for Maxium Financial Services Inc.

Subject: Estates and Trusts; Goods and Services Tax (GST); Tax — Miscellaneous; Insolvency

Related Abridgment Classifications

Tax
I General principles
I.5 Priority of tax claims in bankruptcy proceedings

Headnote

Tax --- Goods and Services Tax — Collection and remittance — GST held in trust

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for bankruptcy order against company — Canada Revenue Agency ("CRA") also brought motion in which it sought order directing receiver to pay CRA GST debt of $63,164.17, and in event that court permitted lifting of stay, order permitting CRA to take necessary steps to protect its priority position over GST held in trust — Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank — Bank's motion granted; CRA's dismissed — Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act — Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order — Desire for bank to alter priorities was legitimate reason to seek bankruptcy — Excise Tax Act, R.S.C. 1985, c. E-15, ss. 222(1), (1.1).

Tax --- General principles — Priority of tax claims in bankruptcy proceedings

Bank brought motion for order permanently lifting order for stay of proceedings against company to allow bank to bring application for bankruptcy order against company — Canada Revenue Agency ("CRA") also brought motion in which it sought order directing receiver to pay CRA GST debt of $63,164.17, and in event that court permitted lifting of stay, order permitting CRA to take necessary steps to protect its priority position over GST held in trust — Vesting order provided that receiver would distribute holdback of $130,000 after payment to CRA of amount of GST claim to extent that it was found to attach to net proceeds in priority to interest of bank — Bank's motion granted; CRA's dismissed — Issue was whether CRA had priority with respect to amounts over bank according to s. 222 of Excise Tax Act — Bank would have ability to nullify GST deemed trust by bringing application for bankruptcy order — Desire for bank to alter priorities was legitimate reason to seek bankruptcy.

Table of Authorities

Cases considered by *Morawetz J.*:

Ivaco Inc., Re (2006), 2006 C.E.B. & P.G.R. 8218, 25 C.B.R. (5th) 176, 83 O.R. (3d) 108, 275 D.L.R. (4th) 132, 2006 CarswellOnt 6292, 56 C.C.P.B. 1, 26 B.L.R. (4th) 43 (Ont. C.A.) — followed

Statutes considered:

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

Generally — referred to

s. 2 "bankrupt" — considered

s. 43 — pursuant to

s. 67(2) — considered

s. 67(3) — considered

Excise Tax Act, R.S.C. 1985, c. E-15

Pt. IX [en. 1990, c. 45, s. 12(1)] — referred to

Pt. IX, Div. II [en. 1990, c. 45, s. 12(1)] — referred to

s. 222 [en. 1990, c. 45, s. 12(1)] — referred to

s. 222(1) [en. 1990, c. 45, s. 12(1)] — considered

s. 222(1.1) [en. 1993, c. 27, s. 87(1)] — considered

MOTION for order permanently lifting order for stay of proceedings against company; MOTION for order directing receiver to pay Canada Revenue Agency amount of $63,164.17.

***Morawetz J.*:**

1 The Bank of Nova Scotia ("BNS") seeks an order permanently lifting the stay of proceedings provided for in paragraph 9 of the order of September 17, 2008 (the "Appointment Order") as against Huronia Precision Plastics Inc. ("Huronia") for the purposes of permitting BNS to bring an application for a bankruptcy order against Huronia pursuant to s. 43 of the *Bankruptcy and Insolvency Act* ("*BIA*"); and authorizing and directing Zeifman Partners Inc. ("Zeifman" or the "Receiver"), the court appointed Receiver of Huronia to consent, on behalf of Huronia, to BNS's application for a bankruptcy order.

2 The Canada Revenue Agency ("CRA") has also brought a motion in which it seeks an order directing the Receiver to pay to CRA immediately, the amount of $63,164.17; and in the event that this court permits a lifting of the stay to permit BNS to apply for the bankruptcy order, a lifting of the stay to permit CRA to take the necessary steps to protect its priority position.

3 The Appointment Order was made September 17, 2008. The Receiver subsequently brought a motion returnable September 30, 2008 seeking an order vesting certain equipment in Magna Closures Inc. ("Magna") and directing that the net proceeds of the sale would stand in the place of the equipment.

4 The order was granted on September 30, 2008 (the "Vesting Order") and paragraph 9 of the Vesting Order provides:

> 9. THIS COURT ORDERS that notwithstanding paragraph 30 of the Appointment Order, the Receiver shall withhold from the net proceeds of the Purchased Assets the total sum of $130,000 (the "Holdback") pending resolution of the claim asserted by Canada Revenue Agency ("CRA") respecting possible pre-receivership GST arrears said to be owing by the Debtor (the "GST Claim"). The Receiver shall distribute the Holdback, or any balance thereof after payment to CRA of the amount of the GST Claim to the extent that it is found to attach to the net proceeds in priority to the interest of Maxium and BNS, to Maxium and BNS in accordance with their respective proportionate entitlements to the net proceeds under the terms of the Bill of Sale or as otherwise agreed upon by them, upon the consent of CRA, Maxium and BNS or a further order of this Court.
>
> [emphasis added]

5 Subsequent to the granting of the Vesting Order, CRA informed BNS and Maxium that CRA's claim for GST for the period prior to the Appointment Order was $63,164.17.

6 Pursuant to ss. 222(1) of the *Excise Tax Act* ("*ETA*"), persons who have collected GST amounts but have not remitted them to CRA, as and when required to do so by the *ETA*, are deemed to hold those amounts in trust for the Crown.

7 The one notable exception to the priority granted to the deemed trust is that it is subject to s. 222(1.1) of the *ETA*, which provides that s. 222(1) does not apply, at or after the time a person becomes bankrupt (within the meaning of the *BIA*), to any amounts that, before that time, were collected or became collectable by the person as or on account of tax under Division II of the *ETA*.

8 Section 67(2) of the *BIA* provides that all deemed trusts created by federal or provincial legislation for Her Majesty are rendered invalid except those that would be valid in the absence of such legislation and except those set out in s. 67(3) of the *BIA*. The deemed trust under the *ETA* is not listed in s. 67(3), nor, in my view, is it analogous to the deemed trusts that are set out in that section.

9 Counsel for BNS submits that it is clear that the *ETA* specifically contemplates that the priority afforded to the Crown under s. 222 of the *ETA* can be extinguished and reversed on the occurrence of a bankruptcy. Further, both the *ETA* and the *BIA* recognize that any priority that CRA could potentially have with respect to the Holdback in the amount of the GST Claim would be reversed upon the bankruptcy of Huronia.

10 CRA submits that it has priority over BNS with respect to the Holdback pursuant to the provisions of the *ETA* and since BNS has acceded to CRA's priority as a result of paragraph 9 of the Vesting Order, BNS should not be permitted to bring an application for a bankruptcy order to disrupt CRA's priority to which it acceded.

11 Counsel for BNS submits that at no time prior to or after the issuance of the Vesting Order did it accede to the CRA having an interest in the Holdback in the amount of GST Claim in absolute priority to BNS.

12 In my view, absent the wording of paragraph 9 of the Vesting Order, BNS would have the ability to reverse the priority of the GST Claim by bringing an application for a bankruptcy order.

13 The Court of Appeal decision in *Ivaco Inc., Re*, [2006] O.J. No. 4152 (Ont. C.A.) stands for the proposition that it is not improper to seek a bankruptcy order for the purpose of reversing a statutory priority. In this case, it would be to reverse the priority position of CRA. Further, the timing of BNS's action has no bearing on the validity of the action being sought as there are no such time limitations imposed under s. 222(1.1).

14 It seems to me that the issue to consider is whether paragraph 9 of the Vesting Order operates so as to support the position put forth by CRA. In my view, the paragraph is clear where it provides that the Receiver "shall distribute the Holdback, or any balance thereof, after payment to the CRA of the amount of the GST Claim *to the extent that it is found to attach to the net proceeds in priority to the interest of* ... [Maxium and BNS]". [emphasis added]

15 I agree with the submission of counsel to BNS that paragraph 9 reflects that any distribution of the Holdback to CRA is dependent on a determination as to whether the GST Claim attaches to the Holdback in priority to the interest of BNS.

16 In its factum, counsel to CRA, at paragraph 24 states that the Receiver's obligation to pay the deemed trust portion of the GST was made explicit and that the obligation to pay CRA was not otherwise qualified by any conditions. I disagree. The emphasized portion of paragraph 9 has to be given a common sense interpretation which, in this case, takes into account that, at the time of the issuance of the Vesting Order, there was an outstanding issue with respect to the priority of the interest of Maxium and BNS.

17 CRA also made the submission that the Receiver had certain obligations and responsibilities as set out in paragraph 9 of the Vesting Order which specifically qualifies the Receiver's rights as set out in the Appointment Order. Counsel for CRA submitted that the relevant portion of the Vesting Order specifically speaks to payment to CRA and, as of the date of the hearing of this motion, with Huronia not being bankrupt, the Receiver is under an obligation to pay CRA the amount of its deemed trust claim. I do not read paragraph 9 in such a way that it supports this submission. At the time of the granting of the Vesting

Order, the issue of priority with respect to the interest of Maxium and BNS had not been determined with finality. It follows that the payment obligation to CRA had not been triggered.

18 Paragraph 9 does not, in my view, direct the Receiver to distribute the Holdback to CRA forthwith upon the CRA providing evidence to the Receiver with respect to the amounts owing by Huronia for the period prior to the issuance of the Appointment Order. If it did, the emphasized words in paragraph 9 would serve no purpose.

19 Finally, with respect to the request of BNS to lift the stay for the purpose of bringing an application for a bankruptcy order against Huronia and authorizing the Receiver to consent to such application, I am satisfied that the desire for BNS to use the *BIA* to alter priorities is a legitimate reason to seek a bankruptcy (see *Re Ivaco Inc.*) and the timing of the BNS's action has no bearing on the validity of this request.

20 Consequently, it follows that the motion of BNS is granted and an order shall issue lifting the stay of proceedings against Huronia for the purpose of permitting BNS to bring the application for bankruptcy order and authorizing the Receiver to consent to such application on behalf of Huronia.

21 In these circumstances, it also follows that no order is to be made directing the Receiver to make payment to CRA, nor is the stay to be lifted to enable CRA to take steps to protect its position. The motion of CRA is dismissed.

22 If the parties are unable to agree on costs, brief written submissions, to a maximum of three pages, may be filed within 20 days.

Order accordingly.

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