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Insolvency Case Law Digest

2004

Several times a year, the Office of the Superintendent of Bankruptcy (OSB) publishes its *OSB Newsletter*. One of the most popular features is the insolvency case law summaries prepared by the law students from the OSB Student Recruitment Program. Unfortunately, due to space restrictions, we cannot print as many summaries as our readers would like us to. This Digest is a collection of summaries from 2004 that could not make it to print in our newsletters but we felt are still worth reading.

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Decisions followed by the word "Appealed" have either been appealed or followed by related proceedings.

Proposals

In the matter of Advanced Wing Technologies Corp.

British Columbia Supreme Court
Burnyeat J.

Citation: 2004 BCSC 236

Facts: In December 2002, Advanced Wing Technologies Corp. (the "debtor") filed a notice of intention to file a proposal. On July 4, 2003, Drs. Cleator and Kane (the "creditors") reached a "Standstill Agreement" that allowed them to appoint a Receiver if US $34,000 were not paid by September 31, 2003. The proposal was approved and required a payment of $250,000 by September 8, 2003. As a result of a failure of payment, the creditors gave notice of their intention to realize on their security in a letter dated October 8, 2003. The creditors assigned all their rights in their security to 674921 B.C. Ltd. (the "Applicant"). C. Topley & Company and its parent company (the "Receiver") was appointed the Receiver of the debtor on November 17, 2003. The sole inspector appointed under the proposal waived the default to November 30, 2003. The applicant applied to annul the proposal.

Issues:

(1) Should the proposal be annulled?

(2) In deciding this question, should it be shown that the creditors will gain from the bankruptcy of the debtor?

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Decision: The proposal was annulled. In addition, the trustee had to expose the assets of the debtor to the market and any inspectors appointed had to approve any sale.

Discussion: In deciding the issue, it had to be shown that the creditors would gain from the bankruptcy of the debtor.

A default under the proposal had taken place since the payment due by the end of September, 2003, was never made. Under section 62.1 of the *Bankruptcy and Insolvency Act* (BIA), a trustee must inform all creditors and the Official Receiver if default is made in the performance of any provision of a proposal and the default has not been waived by the inspectors. The bases for which it is appropriate to annul a proposal are provided in the case law. A proposal can be annulled if there is gain for the creditors in the event of a bankruptcy, but this is not a precondition but only one factor to be considered. Furthermore, in reference to section 63 of the BIA, the debtor had failed to show that the creditors would receive less under a bankruptcy than the $250,000 that would be received under a proposal. Since there was no suggestion that any such payment was expected in the future, the creditors could not vote on a new proposal if the proposal was refused. In addition, refusing to annul the proposal would be costly with respect to the validity of security now held by the Applicant and would not be in the interest of the creditors when considering the fact that the Applicant could file another proposal for the consideration of creditors.

Appealed

In the matter of the proposal of Charles Gregory and Rachael Rahnee

Ontario Superior Court of Justice
Registrar Sproat

Citation: [2004] O.J. No. 4257

Facts: The debtors were spouses who owned and operated a catering business. The venture led to a state of indebtedness that resulted in the insolvency of the debtors. They wished to file a joint Division I proposal. They moved for an order directing the Official Receiver to accept the filing of a joint proposal and the accompanying documentation prescribed by the *Bankruptcy and Insolvency Act* (BIA). The Office of the Superintendent of Bankruptcy (the "OSB") attended on the motion, not to oppose the filing but rather to make submissions as to the OSB`s policy on the acceptance of filing joint Division I proposals.

Issues:

(1) Should the OSB be obliged to automatically accept a joint Division I proposal where it does not on its face meet the eligibility criteria set out in the BIA?

(2) Must an order from the court permitting debtors to file a joint Division I proposal be obtained prior to doing so, as per the OSB's policy?

Decision: Under s. 62(1) of the BIA, the Official Receiver has no right to reject the filing of proposals. Therefore, it is possible to file a joint Division I proposal without prior authorization from the court to do so.

Discussion: The OSB argued that it has a certain discretion to reject the filing of a joint proposal when it does not on its face meet the eligibility criteria set out in the BIA. The Registrar failed to see any evidence that supports this claim. However, she stated that the filing of a proposal must be accompanied by the necessary documents as prescribed by the BIA.

According to the OSB, the BIA does not deal with joint Division I proposals. Due to this legislative silence, the OSB argued that the legislature has not laid out specific criteria for the approval of such a proposal. The Registrar rejected this argument citing *Re Roosenboom* and sections of the BIA that support the opposite position. She held that a proposal must be filed by an "insolvent person" and that the definition of "person" in the BIA includes "a partnership …" She concluded that even though the BIA does not deal with joint Division I proposals expressly, it does so implicitly. Since, the Official Receiver has no right to reject a regular Division I proposal, he or she does not have the right to reject a joint proposal.

In regards to the requirement of prior authorization by the court to file a joint proposal, the OSB submitted its policy dated May 17, 2002. It stated that the OSB would accept such a filing in cases where the trustee administering the estate will have obtained prior authorization from the court to do so. The Registrar pointed out the many flaws of this policy, namely the absence of legislative authority giving jurisdiction to the courts to grant such an order. Other deficiencies included the accumulation of delays and costs for the debtor as well as the possibility of estoppels.

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Considering these flaws, the Registrar ruled that the best procedure would be to allow joint filings and allow interested parties to oppose them when the situation calls for it.

In the matter of a proposal of Sandra Marie Slaney

British Columbia Supreme Court
Master Bolton

Citation: 2004 BCSC 388

Facts: Ms. Slaney filed a proposal, which was accepted by the creditors on March 27, 2000. One of her debts was a "Royal Bank Student Loan" in the amount of $27,700. The Royal Bank consented to the proposal in a voting letter, binding the administrators of the student loan program. On June 19, 2001, the trustee issued a certificate to the effect that Ms. Slaney had complied with all of her obligations. Subsequently, the Attorney General of Canada sought to recover payment of the loan on the basis that, under s. 178 of the *Bankruptcy and Insolvency Act* (BIA), this debt survived the discharge from the proposal. In response, Ms. Slaney applied for a declaration that the debt in question did not survive the discharge by referring to s. 62(2) of the BIA and argued that, since the creditor assented to the proposal, s. 178 did not preserve the debt.

Issue: Under 62(2) of the BIA, should the approval of the proposal bind the Crown in respect of a debt under s. 178 and release the debtor from it?

Decision: The application was dismissed. The special treatment of a creditor under s.178 should not be different whether its application arises in the context of a bankruptcy or that of a proposal. If a proposal should have the effect of releasing the debtor from a s. 178 debt, the statute should say so explicitly.

Discussion: The Crown argued that the word "assents" towards the end of s. 62(2) means "assents to the release of a s. 178 debt" rather than "assents to the proposal". The Registrar's approach was to consider the matter as perfectly ambiguous, and he considered the practical justice of the issue. In doing so, he concluded that no one reading the voting letter sent out to the creditors was put on notice that assent to the proposal would cancel a debt that would otherwise have survived bankruptcy. In his opinion, if a proposal were to have the effect of releasing the debtor from a s. 178 debt, it should say so explicitly, rather than pursuant to an implication read into a statute that one could find ambiguous. The purpose of s. 62 is not to allow an insolvent person to make a proposal when faced with a s.178 debt. Rather, it is to permit such proposals generally, and the provisions made for s.178 debts are necessary qualifications to the general procedure.

In the matter of the proposal of Plancher Héritage Ltée / Heritage Flooring Ltd.

New Brunswick Court of Queen's Bench
Glennie J.

Citation: 2004 NBQB 168

Facts: Heritage Flooring ("Heritage") entered into a complex loan agreement similar to a revolving line of credit with the Royal Bank of Canada (the "Bank"). Through this agreement, Heritage had a credit limit that fluctuated depending on various factors, such as the deposit of receipts into a blocked account and a weekly report of inventory and accounts. Three years into the agreement, Heritage was notified that it was in default of the provisions of the margin working Capital Loan Agreement (the agreement) and that it had 15 days to pay its debt in full. In response to the Bank's demand, Heritage filed a Notice of Intention (the "notice") to make a proposal and the Bank was so notified by the trustee. Under section 69 of the *Bankruptcy and Insolvency Act* (BIA), a stay of proceedings was in effect and no creditor could seek remedies against Heritage. Following the notice, the Bank notified the trustee that it would no longer provide overdraft privileges to Heritage and that furthermore, the amount of available credit in the account was capped to the amount available the day prior to the filing of the notice. The Bank also required that the procedures under the agreement be continued throughout the stay of proceedings. On February 20, 2004, while the stay was still in effect, the Bank seized $200,000 from Heritage's account, which it applied against Heritage's operating facilities in accordance with the procedures of the loan agreement. The trustee contested this action under s. 69 of the BIA. The Bank replied by stating that, under s. 65.1(4)(b) of the BIA, it was not required to provide further advance of credit, since

doing so would prejudice the Bank's position by decreasing its security. In addition to contesting the Bank's action, Heritage applied for an extension on the stay of proceedings, which was contested by the Bank.

Issues:

a) Could an extension of the stay of proceedings be granted to Heritage?

b) Did the Bank act contrary to the stay provisions of s. 69 of the BIA by seizing Heritage's operating account and capping its operating facility subsequent to the date Heritage filed its Notice of Intention?

Decision:

a) Heritage was granted an extension of the stay of proceedings.

b) The Bank was not entitled to seize Heritage's operating account and cap the amount available as of the date of its filing of the Notice. By unilaterally capping Heritage's revolving line of credit, the Bank exercised a remedy contrary to the stay provisions of the BIA.

Discussion: The Court concluded that a) Heritage was acting in good faith and with diligence, b) Heritage would likely make a viable proposal if an extension were granted, and c) no creditor would be prejudiced if an extension were granted, hence fulfilling the conditions required to grant an extension of the stay. Paragraph 69.(1)(a) of the BIA states that no creditor has any remedy against the insolvent person or his property. Case law has established that "remedy" must be given a broad interpretation. In that regard, the Court interpreted the provisions of paragraph 65.1(4)(b) of the BIA to mean that the status quo intended by the BIA be protected and preserved. Neither party to a loan agreement can unilaterally amend its terms. Failure to maintain the status quo would be contrary to the fundamental objective of the stay of proceedings of the BIA as it relates to an insolvent person being authorized to file a proposal. By capping the revolving line of credit, the Bank exercised a remedy against Heritage that was contrary to the BIA's stay provisions. The Court added that the purpose of the stay was to allow an insolvent person to continue business in accordance with its existing arrangements with its creditors.

The Court then differentiated among the types of loans, namely demand, term, and revolving, in order to determine whether a secured creditor was required to continue to operate existing credit agreements in accordance with loan agreements with the debtor. In this regard, the Bank had no authority to cap Heritage's line of credit as of the day immediately preceding the filing of its notice of intention since a secured creditor could not enforce its security during the stay period. Furthermore, in response to the Bank's argument under paragraph 65.1(4)(b) of the BIA, the Court indicated that the Bank would not have been advancing credit to Heritage by maintaining the revolving line of credit. Rather, it would simply have been operating a revolving process in accordance with the margins and conditions agreed to by both parties. Paragraph 65.1(4)(b) of the BIA must be read in the context of the Bank's agreement with Heritage.

Stay of Proceedings

In the matter of Laing v. French

British Columbia Supreme Court
Dorgan J.

Citation: 2004 BCSC 851

Facts: Mr. Laing ("Laing") advanced the amount of $2,267,976 to Mr. French ("French") for investment purposes. French guaranteed a 10 percent annual rate of return on the money advanced and predicted that the investments would generate from 19.2 to 23.4 percent annually. Those gains were not generated and no payments were ever made to Laing. French used part of the funds to build a house on a property that was subsequently transferred to his wife's name and then sold. In 2003, French made an assignment into bankruptcy. Laing filed a proof of claim as an unsecured creditor and motioned before the Court to have the stay of proceedings against the bankrupt lifted with respect to his claims under s. 69.4 of the *Bankruptcy and Insolvency Act* (BIA). In fact, he intended to bring an action to compel French to repay the amount invested and to request that his obligations resulting from the judgment survive a bankruptcy discharge, pursuant to paragraphs 178(1) e) and h) of the BIA. Laing also sought a declaration that the proceeds arising from the sale of the property be subject to a constructive trust in his favour. Laing agreed to forward any moneys

received as a result of this action to the trustee. However, before Laing could bring this action, the Court first had to grant his application to lift the stay of proceedings against the bankrupt.

Issues:

(1) Was Laing's proof of claim as an unsecured creditor inconsistent with his claim that Ms. French's property was held in trust for him?

(2) If Laing was permitted to bring an action, should the Court have granted his motion to lift the stay?

Decision: The Court ruled in favour of Laing. All three requirements to lift the stay of proceedings were met.

Discussion: A secured creditor may be deemed to have surrendered his security if he files a proof of claim as an unsecured creditor. In this case, Laing clearly stated that he had the intention of turning over to the trustee all funds recovered from this action so that other creditors would not suffer any prejudice if a judgment were to be rendered in his favour. The Court therefore found that Laing was not a secured creditor under s.2 of the BIA with respect to his constructive trust claim. As a result, the Court turned to Laing's submissions as to why the stay should be lifted. In *Re Advocate Mines Ltd*[1], Registrar Ferron listed three compelling reasons for lifting a stay. First, the debt must be one to which a discharge is not a defence. Laing's arguments convinced the Court that his claim of fraudulent misrepresentation could eventually be upheld in Court and survive a bankruptcy discharge under paragraphs 178 (1) (e) and (h) of the BIA. Secondly, the bankrupt must be a necessary party to solve the issues at hand. Because it was impossible to adjudicate on the constructive trust claim against Mrs. French, a non-bankrupt, without first determining whether the bankrupt was guilty of fraudulent misrepresentation, the Court concluded that the bankrupt was a necessary party. Finally, the valuation of the debt must be complex, thus making it inappropriate to follow a summary procedure. Accordingly, the Court could not deal with the allegations of fraud in the case at bar through a summary procedure and needed to conduct a full trial on the issue.

[1] Re Advocate Mines Ltd. (1984), 52 C.B.R. (N.S.) 277 (Ont. S.C. in Bankruptcy)

Trustees: Duties and Taxation

In the matter of De Stefanis

British Columbia Supreme Court
Goepel J.

Citation: 2004 BCSC 10

Facts: The matter involves an application by the Law Society of British Columbia ("Law Society") to secure its custodian's fee. On November 13, 2002, the Law Society appointed a custodian to take over the assets and liabilities of the firm Hean Wylie Peach De Stefanis ("firm"), which was insolvent. On June 16, 2003, the custodian billed the Law Society for fees and disbursements related to its administration of the firm. In the petition in bankruptcy that commenced these proceedings, the Law Society sought an order that the custodian be granted an administrative charge over the firm's assets in priority to all security agreements, charges, liens and encumbrances. The Royal Bank of Canada and the Canada Customs and Revenue Agency opposed this matter.

Issue: Should the custodian's charges be considered as administrative charges that can be paid from the firm's assets?

Decision: The judge decided that the Law Society cannot claim the administrative charges of the custodian from the assets of the firm.

Discussion: In accordance with the Law Society's argument, the judge compared the duties as a custodian, a receiver and a monitor appointed pursuant to the *Companies' Creditors Arrangement Act*. The custodian is appointed to protect the interests of the law firm's clients, not the creditors. Both a receiver and a monitor act on behalf of all interested parties. Also, the Law Society, being a self-regulating body, has the mandate to serve and protect the public interest. That is why the judge believed that the costs were properly borne by the Law Society. According to the *Legal Profession Act* of British Columbia, the Law Society is allowed to recover the costs of a custodianship from the lawyers. Since the application for an administrative charge was dismissed, the Law Society must claim the costs where it is impossible for the lawyers to reimburse those fees.

Appealed

In the matter of Cyrenus Joseph Dugas, appellant, and PricewaterhouseCoopers Inc., respondent

New Brunswick Court of Appeal
Drapeau C.J.N.B., Rice and Deschênes JJ.A.

Citation: 2004 NBCA 15

Facts: In 2001, Peter Gaudet, Adam Gaudet, 508571 N.B. Ltd. and 100167 P.E.I. Inc. (the "Creditors") obtained a consent judgment of the Court of Queen's Bench of New Brunswick against Mr. Dugas (the "Appellant"). Still outstanding from this award is the sum of $2,050,000. The summer following the judgment, the Appellant fished for crab, earning gross revenues in excess of $800,000. Immediately following the end of the crab season, he made an assignment in bankruptcy in which the Creditors were the only ones to file a proof of claim. The Appellant "failed, without justification, to complete Form 65 in any useful manner." The trustee, lacking the information required to fix the amount that the bankrupt was required to pay out of his earnings in accordance with subsection 68(3) of the *Bankruptcy and Insolvency Act* (BIA) and considering the real and substantial possibility that those earnings may dissipate, applied to the Court of Queen's Bench for an asset-prevention order under subsection 183(1) of the BIA. On May 27, 2003, Justice Léger allowed the trustee's application and ordered that the revenues from the appellant's crab-fishing license for the year 2003 be paid directly to the trustee. In his appeal, the Appellant contended that Justice Léger and the Court of Queen's Bench lack jurisdiction to make such an order.

Issue: In circumstances where the trustee cannot determine the surplus income and a real and substantial possibility that earnings may dissipate exists, does subsection 183(1) of the BIA authorize the Court of the Queen's Bench to make an order granting the trustee temporary control over the bankrupt's earnings, despite the silence of s. 68 on the subject?

Decision: The appeal was dismissed. The order under appeal fell squarely within the broad jurisdiction recognized by subsection 183(1) of the BIA.

Discussion: The Court cited a decision from the Ontario Court of Appeal in which it held that in regards to "a motion brought for the purpose of preserving a potential asset in anticipation of a future determination of the parties' rights under s. 68, […] the motions judge had jurisdiction to direct that any moneys awarded by the arbitrator as compensation for lost wages be paid into court until the parties' rights under s. 68 were determined."[1] In the case at bar, the Court of Appeal went one step further by stating that the court's earnings-related jurisdiction under subsection 183(1) of the BIA is not limited to making an order directing their payment into court. Under subsection 183(1) of the BIA, the Court of Queen's Bench may authorize acts required "for the due administration and protection of the bankrupt estate, even though there is no specific provision in the [BIA] expressly conferring such power and jurisdiction"[2]. Justice Léger concluded that the Appellant's earnings from crab-fishing were in need of protection and that the best approach was to proceed with the May 27, 2002, order. The Court of appeal concurred.

[1] Landry (Re) (2000), 192 D.L.R. (4th) 728 (Ont. C.A.)

[2] Houlden & Morawetz, 2004 Annotated Bankruptcy and Insolvency Act, (Toronto: Carswell, 2004), p. 774

In the matter of the bankruptcy of Earl Miles Cook Guilbride

British Columbia Supreme Court
Registrar Bouck

Docket: Victoria 160891

Facts: All of Mr. Guilbride's (the "bankrupt") assets, valued at over $1.2M, were transferred to Jeanne Carol Guilbride in an uncontested divorce order, dated four months prior to the proposal and subsequent bankruptcy. Due to the lack of funds in the estate and the considerable legal fees that would have been involved, Mr. Glover (the "trustee") did not apply to the Court to set aside the divorce order, nor did he pursue the transferred assets. Creditor Baker brought a motion pursuant to s.38 of the *Bankruptcy and Insolvency Act* (BIA) against the bankrupt and Ms. Guilbride, which was followed by an action alleging fraudulent preferences of the transferred assets. A settlement was reached, and the defendants were released and the opposition to the bankrupt's discharge was withdrawn. In his testimony, inspector Frame opposed the trustee's remuneration and submitted that it should be limited to 7.5% of the receipts on the basis that he provided no value for his services. He alleged that the matrimonial home was sold for an "unusual" price, even

though he had opposed the sale, claiming another developer would soon be making a higher offer. There were also many delays in the administration of the bankruptcy due, in part, to the aforementioned s.38 application. The trustee applied for an order fixing his remuneration in which he claimed the fees would consume the entire amount realized by the estate.

Issue: Given the opposition of one of the inspectors, was the trustee entitled to the claimed remuneration?

Decision: The trustee's conduct was appropriate at all times and he exercised sound judgment. Despite the delays in administering the bankruptcy, the creditors suffered no prejudice. Therefore, the trustee's claim was justified.

Discussion: Considerable weight should be given to the inspectors' approval or disapproval because they act on behalf of the creditors and are in a strong position to judge. On the basis of the objectives of the BIA, the Registrar stated that the trustee should be permitted to charge fees for the time spent and the results achieved. However, a trustee cannot expect the Court to accept overly generous charges that would cause prejudice to the estate. The Court should be cautious when exercising its discretion in adjusting the trustee's claim, especially when the inspectors have approved the fees. In the case at bar, two of the three inspectors had done so. The Registrar added that a balance must be achieved between both the creditors' and the bankrupt's interests. The trustee achieved this balance. He acted at the discretion of the majority of the inspectors. "He is not obliged to blindly follow the wishes of one creditor regardless of the potential cost to the estate and he is not obliged to pursue potential claims arising from allegedly fraudulent transactions in the absence of sufficient funds to do so." At no time did he act inappropriately.

In the matter of the bankruptcy of Lama Transport & Handling Ltd

Quebec Superior Court
Richard J.C.S.

Citation: [2004] J.Q. No. 7298

Facts: Lama Transport & Handling Ltd had signed a proposal and an agreement with a trustee, which stipulated that the latter would be paid $25,000 for "the complete administration of the proposal". On November 28, 2002, the Court granted two creditors' appeal of the trustee's decision to disallow their claims and, in doing so, had refused to approve the submitted proposal. As a result, Lama Transport was deemed bankrupt. December 2, 2002, the National Bank of Canada (the "Bank"), a secured creditor, mandated the trustee to act as its receiver to realize on the Bank's securities. As per this mandate, the trustee would receive a 5% commission on realized assets. The trustee realized $500,000 and received a commission of $24,372, but the Superintendent of Bankruptcy did not receive any levy pursuant to s.147 of the *Bankruptcy and Insolvency Act* (BIA). At the meeting of creditors held December 19, 2002, the trustee disclosed the mandate and was replaced by another trustee (the "trustee-petitioner"). On March 5, 2004, the original trustee presented two statements for taxation. The first was for the amount of $25,000 plus special fees of $6,508, which covered the period ranging from August 6 — the notice of intention — to the November 28 ruling. The second statement for taxation covered the period from November 28 to December 19 and was in the amount of $49,390. The Registrar taxed the statements as submitted. The trustee-petitioner therefore appealed to have the taxation reviewed.

Issues: Could the trustee act as such while acting for the benefit of a secured creditor? Should the appeal of the taxation be allowed?

Decision: The trustee could act for the benefit of a secured creditor while exercising his functions as a trustee. The Court ruled that the fees and disbursements should have been taxed at $25,000, as per the original agreement.

Discussion: In regards to the first statement, the Court determined that the trustee could not have ignored the fact that the rejection of the proposal would lead to bankruptcy and that the mandate would then continue until the first meeting of creditors. The trustee's duties had not closed upon the Court's refusal to approve the proposal. He was obliged to ensure the conservation of the estate, as indicated by subsection 61(2) of the BIA. Furthermore, the Registrar should not have taxed the legal fees in the amount of $6,508 incurred in the appeal of the decision to disallow claims made by two creditors.

Before ruling on the merit of the second statement, the Court had to establish whether the trustee could act as such and as the agent of the Bank at the same time. The BIA formally prohibit this situation unless certain

conditions are met. In *Meubles Daveluyville ltée v. Roynat Inc. & Ass.*, [2000] J.Q. no 926, the Court of Appeal recognized that a trustee who was acting pursuant to a mandate given from a secured creditor and who had met the requirements of s.13.4 could act as such while being exempt from the application of provisions such as s. 147 of the BIA. In the present case, the trustee had abided by the provisions of s. 13.4 of the BIA. In the execution of his mandate for the Bank, he had acted outside of the purview of the bankruptcy. He could therefore not expect to be taxed in this context as against the estate. He was allowed to act for the benefit of the Bank rather than for the unsecured creditors, but this did not give him any right to claim fees from the estate deriving from his activities under the mandate.

Appealed

Proofs of Claim and Distribution of Proceeds

In the matter of Citifinancial Canada East Corp. v. Morrow (trustee of)

Court of Queen's Bench of New Brunswick
Registrar Bray

Citation: 2004 NBQB 432

Facts: On April 26, 2002, Mark Wallace Morrow and Crystal Dawn Morrow ("bankrupts") executed two mortgages in favour of Citifinancial ("Applicant") for the sum of $43,485 and $14,747. The first mortgage was not registered but the second one was registered pursuant to the *Land Titles Act* ("LTA"). On July 29, 2004, the bankrupts filed an assignment in bankruptcy. Due to the failure of the applicant to provide proof of registration of the first mortgage, the trustee issued a Notice of Disallowance of the Applicant's claim to the extent of $44,917.

Issue: Did the trustee err in not determining the first mortgage to be an equitable mortgage which would be sufficient to grant the status of "secured creditor" for the purpose of the *Bankruptcy and Insolvency Act* (BIA)?

Decision: The judge found no error in the Notice of Disallowance issued by the trustee.

Discussion: The question of correctness of the trustee's decision must be analysed in light of subsection 72(1) of the BIA and subsection 61(1) of the LTA. Following subsection 72(1) of the BIA, it must be determined if any operational conflict between the BIA and the LTA exists. Consideration must be given to the relationship of equitable interests in real property under the LTA to decide the interpretation, in this case, of the principle that the trustee took the property of the bankrupts subject to the same equities as affected the property when it was owned by the bankrupts. The trustee submitted that subsection 61(1) of the LTA applied. A trustee in bankruptcy following an assignment can be considered to be a "person…taking a transfer for or interest in registered land from the owner thereof." The use of the disjunctive preposition "or" does not permit the exclusion of those taking an interest in property due to the operation of law and did not suggest that of this section be limited to purchasers for value.

Subsection 15(1) of the LTA mentions that a mortgage must be registered. This is not in conflict with the definition of "secured creditor" in the BIA nor with the underlying purpose of the legislation.

In the matter of Qualiglass Holdings Inc. v. Zurich Indemnity Co. of Canada

Alberta Court of Queen's Bench
Burrows J.

Citation: 2004 ABQB 577

Facts: Qualiglass Holdings Inc. ("Qualiglass") made a claim against Mr. Chinnery ("bankrupt"), its accountant, for damages resulting from professional negligence. This claim was made within the time frame of the accountant's professional insurance policy, but the latter did not report the claim to his insurer, Zurich Indemnity Co. ("insurer"), until after the policy had expired. The accountant later made an assignment into bankruptcy. Unaware of the bankruptcy, Qualiglass initiated proceedings against the accountant. The Registrar nevertheless allowed the action to continue in order to establish the amount of damages, on the condition that Qualiglass would not execute upon judgment. The insurer refused to defend the action and

to give coverage to the bankrupt because the claim was reported after the policy's expiry date. A judgment was subsequently rendered against the accountant.

To permit Qualiglass to execute upon the judgment, the Registrar granted leave to bring an action against the insurer under section 38 of the *Bankruptcy and Insolvency Act* (BIA). After the motion against the insurer was filed, the trustee assigned to Qualiglass the accountant's right to receive insurance coverage, pursuant to subsection 38(2) of the BIA. The insurer holds that the Registrar's order under section 38 of the BIA was not valid, nor was it filed within the prescribed time.

Issues: Pursuant to section 38 of the BIA could Qualiglass proceed with its action against the bankrupt's insurer?

In the affirmative, does the bankrupt's failure to report the claim within the policy period prevent Qualiglass from recovering its judgment debt from the insurer?

Decision: The Court concluded that Qualiglass had the right to initiate proceedings against the bankrupt's insurer under section 38 of the BIA. Furthermore, Qualiglass may recover its judgment debt from the insurer despite the bankrupt's untimely reporting of the claim.

Discussion: The bankrupt's right to indemnity under the insurance policy normally vests in the trustee. However, from the moment the Registrar granted his order under section 38 of the BIA, that right became vested in Qualiglass. The fact that the trustee did not assign his rights to Qualiglass before this motion was filed had no impact on the validity of this motion because the right to take proceedings against the insurer stems from the section 38 order only. The trustee's assignment was only a consequence of this order. The Court also held that this motion was filed within the prescribed limitation period, which arose when the bankrupt became legally obliged to pay for damages, not when the insurer advised the bankrupt of its refusal to provide coverage.

The judge decided that the making of the claim triggered the insurance coverage despite the fact that the claim had not been reported to the insurer before the expiration of the policy. The untimely reporting of the claim constituted an imperfect compliance with the terms of the policy, as opposed to non-compliance. The Court examined the reasons for this imperfect compliance and whether the untimely reporting caused any prejudice to the insurer. The insurer suffered no prejudice because the relevant evidence in the case at bar is of a documentary nature and had not been lost as a result of the reporting delay. Although the reasons for the imperfect compliance are not clear, the Court noted that there was no proof of fraudulent or wilful misconduct on the part of the bankrupt. It would therefore be inequitable not to order that insurance coverage be provided to Qualiglass.

In the matter of the bankruptcy of Nadia Hama

British Columbia Supreme Court
Baker J.

Citation: 2004 BCSC 463

Facts: Ms. Hama made an assignment in bankruptcy during a family law dispute. Different law firms having provided counsel during this dispute claim to be secured creditors holding a solicitor's lien. Anderson & Co. agreed to represent Ms. Hama on condition that the trustee in bankruptcy authorize that it be paid from the proceeds obtained from a judgment or settlement in priority over the other creditors. These other creditors included the law firm Stowe Ellis, who had ceased to represent Ms. Hama before her assignment. At one point in the procedures, Stowe Ellis claimed it was a secured creditor and had a solicitor's lien over Ms. Hama's litigation files pursuant s.79 of the *Legal Profession Act* (the "LPA"). In the alternative, it claimed to have a possessor's lien. Justice Boyd ordered the release of the files in favour of Anderson & Co. and declared Stowe Ellis to be a secured creditor. Eventually, a settlement was reached in the family law dispute and Anderson & Co. held funds on behalf of Ms. Hama. Stowe Ellis submitted that it was entitled to priority over the funds by reason of the declaration made by Justice Boyd. Anderson & Co. submitted that the bankruptcy was irrelevant to the question of priorities and that the Court must apply the common law rule which states that where more than one solicitor has been retained in a proceeding, the solicitor who was acting at the time the property was recovered or preserved has first claim against the fund, followed by the next to last solicitor and so on.

Issues:

(1) Does s.79 of the LPA confer a lien and if so, does it extend to all fees and disbursements?

(2) Who has priority to receive payments where more than one lawyer has acted for the client in the recovery of the property and does the assignment in bankruptcy alter the priorities among the claimants?

Decision: The liens attach only to property recovered or preserved as a result of the lawyer's efforts. Priority of claims codified under s.79 of the LPA are unaffected by the intervening bankruptcy, the filing of proofs of claim and the authorization letter from the trustee. The solicitor who conducted the action to a conclusion has first claim on the fund, then the previous solicitor is entitled to his or her lien, and so on. The judge must determine what portion of the accounts for fees and disbursements of each claimant relate to work done to recover or preserve property.

Discussion: Two types of liens are recognized in order to secure a lawyer's right to be paid. The first is a possessor's lien over the documents and papers in the lawyer's possession, which ends when possession of the files is given up. This is the situation that most resembles that of Stowe Ellis when it was ordered to release the files with the condition of being a secured creditor. However, that order does not affect its rights created by the second type of lien, codified under s.79 of the LPA. However it must be noted that this lien will be recognized only when the solicitor can show that his or her work has resulted in the recovery or preservation of the property.

In the matter of the bankruptcy of Shawn Ashley Joseph Harvey

Alberta Court of Queen's Bench
Registrar Smart

Citation: 2004 ABQB 773

Facts: Mr. Harvey applied for employment insurance benefits in 1999 and when doing so did not disclose $10,239 in self employment business income, which was reported on his Income Tax return with CCRA. Mr. Harvey did not respond to a request seeking clarification as to when this income was earned. Mr. Harvey filed an assignment in bankruptcy on January 6, 2002. In August 2003, the Canada Employment Insurance Commission (the "Commission") advised Mr. Harvey of its decision that he had knowingly made false representations about his self employment activities to Human Resources and Development Canada ("HRDC"). In September 2003, HRDC forwarded a Notice of Debt for EI overpayments. The trustee sought a declaration that the indebtedness of Mr. Harvey to HRDC represented a pre-bankruptcy debt and was a claim provable in bankruptcy under s. 121 of the *Bankruptcy and Insolvency Act* (BIA). HRDC took the position that its claim for recovery became a debt due only when the Commission made the decision under s. 52 of the *Employment Insurance Act* (the "EIA") that Mr. Harvey had received money to which he was not entitled.

Issue: Although the events giving rise to HRDC's claim happened before the date of bankruptcy, was the claim provable in the bankruptcy, given that liability under paragraph 52(3(b) of the EIA was recognized after the bankruptcy?

Decision: The Registrar concluded that the claim was a claim provable under s. 121 of the BIA. As a result, the stay provisions prescribed by s. 69.3 of the BIA were in effect.

Discussion: If the claim was provable in bankruptcy, then its recovery was governed by the BIA and stayed, unless the trustee was discharged or the Bankruptcy Court allowed it to proceed pursuant to s. 69.4 of the BIA. In the case at bar, no such permission was granted. Rather, the Commission took the position that, since the notice of debt came after the date of the bankruptcy, the claim was not provable in the bankruptcy. Therefore, the recovery efforts were not stayed by s. 69.3 of the BIA. The Registrar did not agree. Nonetheless, he stated that if s. 52 of the EIA had the affect suggested by HRDC and the Commission, the claim was still provable following subsections 121(1) and (2) of the BIA, which clearly provide that a contingent or unliquidated claim is a claim provable in bankruptcy. Even if s. 52 of the EIA creates a true condition precedent to the claim, it is still a provable claim so long as it is not too remote or speculative in nature.[1] Hence, the obligation arose prior to the bankruptcy and was provable even though it may be interpreted that the liability to repay crystallized under s. 52 subsequent to the date of the bankruptcy.

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[1] Re Confederation Treasury Services Ltd. (1997), 43 C.B.R (3d) 4 ONCA.

In the matter of KKBL No. 297 Ventures Ltd. v. IKON Office Solutions Inc.

British Columbia Court of Appeal
Rowles, Hall, Smith JJ.A.

Citation: 2004 BCCA 468

Facts: IKON Office Solutions Inc. ("IKON") sought release from a commercial leasing agreement. In order to do so, it retained the services of an agent to market the building. KKBL No 297 Ventures Ltd. ("KKBL") purchased the building and subsequently leased the premises to Gun-for-Hire (Vancouver) Co. ("Gun"), thus discharging IKON from its obligations under the lease. Before finalizing the lease, KKBL concluded an indemnity agreement under which IKON agreed to guarantee Gun's monthly lease payments. A few months later, Gun became insolvent. After defaulting on its payments, Gun eventually vacated the building. IKON filed a petition for a receiving order against Gun.

Accordingly, Gun was declared bankrupt. During the first creditors meeting, the trustee disclaimed the lease entered into by Gun. As a result, IKON refused to make payments to KKBL pursuant to the indemnity agreement. Proceedings were initiated by KKBL in order to force IKON to fulfill its obligations under the agreement. The trial judge dismissed the motion, concluding that IKON was no longer required to discharge Gun's obligations under the lease because this lease had been terminated as a result of the trustee's disclaimer. KKBL launched an appeal from the dismissal of its action against IKON seeking damages for breach of the indemnity agreement. It argued that the applicable law had changed following the Supreme Court of Canada's ruling in *Crystalline Investments Ltd v. Domgroup Ltd.* ("Crystalline"), a decision that was rendered after the trial judge's decision.

Issues: Did the trustee's repudiation of the lease affect the indemnity agreement entered into by IKON and KKBL? In other words, were the conclusions of the Supreme Court in the Crystalline case applicable to the matter at issue?

Decision: Based on the ruling by the Supreme Court in Crystalline, the indemnity agreement was held to be effective. IKON, as guarantor under this agreement, was not discharged of its obligations.

Discussion: Before the Supreme Court's ruling in Crystalline, Canadian case law made a distinction between guarantors and assignors of a repudiated lease. Assignors of a lease were held liable to the landlord because they were considered to have primary obligations that survived a disclaimer of the lease. By contrast, when a lease was not assigned but merely guaranteed, the guarantors had secondary obligations that disappeared when the lease ended.

Therefore, the authorities relied upon by the trial judge are not valid anymore since the Crystalline ruling. In that case, it was held that the main purpose of repudiating leases was to relieve insolvent individuals from their obligations under a commercial lease. The legislator did not intend to protect third parties, such as guarantors or assignors. Therefore, post-disclaimer assignors and guarantors are to be treated equally and neither are to be exempt from liability.

In the matter of the bankruptcy of Meco Ltd v. Henry Sztern & Associates Inc.

Québec Court of Appeal
Nuss, Pelletier, Dalphond J.C.A.

Citation: [2004] J.Q. No. 5699

Facts: Until 1989, Steinberg — 9007-7876 QUÉBEC INC. — (the "Appellant") had retained Meco's services for the production of imaging products used for publicity purposes. During that time, the Canada Revenue Agency was of the opinion that the provision of such products was subject to federal sales tax (FST). After complying with the apparent statutory provisions, Steinberg learned that no FST was due on the sale of the aforementioned products. On January 3, 1992, Meco made an assignment into bankruptcy. On July 3, 1998, the Canada Revenue Agency ("CRA") reimbursed Meco for the amount of unduly paid FST. The trustee refused to hand over any amount of the FST to the Appellant, arguing that the FST was paid by the bankrupt and that the refunds belonged to it. The Appellant filed a proof of claim under subsection 81 (1) of the *Bankruptcy and Insolvency Act* (BIA) alleging that, since it was the maker of the payments to CRA through Meco, the reimbursement belonged to it. The trial judge upheld the trustee's submissions; hence, the appeal.

Issue: Did the Appellant have the right to a reimbursement of FST payments issued by CRA to Meco's trustee in bankruptcy?

Decision: The Court of Appeal confirmed the trial judge's decision by rejecting the Appellant's proof of claim for recovery of part of the refund. The Court recognised its position as an unsecured creditor.

Discussion: Under the provisions of the *Excise Tax Act*, Meco was at all times the taxpayer subject to FST payments and not the Appellant. From a legal standpoint, it was Meco that paid the tax. Steinberg argued that in the event of a reimbursement, Meco had agreed that the part corresponding to the Appellant's FST payments would be remitted to it. Thus, Meco recognised the receipt of an undue payment. The Appellant held that it was the owner of the FST reimbursements, that Meco acted as its agent and that, consequently, the amounts received did not form part of the bankrupt's estate. The Court ruled that this was not an assignment of a claim, nor a mandate as the Appellant suggested because this was Meco's claim against the CRA as opposed to Steinberg's claim.

In the matter of Mirant Canada Energy Marketing Ltd. (Re)

Alberta Court of Queen's Bench
Kent J.

Citation: 2004 ABQB 218

Facts: Robert Schaefer had a retention agreement with his employer, Mirant Services LLC of Atlanta, Georgia, in which it was stipulated that he would receive an "award amount" of USD $72,800 on September 30, 2004, and 2005, provided that he was still then employed by the company and that he had been performing in a satisfactory manner. He was transferred to Mirant Canada but the agreement was not assigned to the latter. On July 15, 2003, Mirant Canada applied for protection under the *Companies' Creditors Arrangement Act* (CCAA). Mr. Schaefer's employment was terminated on September 2, 2003. PricewaterhouseCoopers ("Monitor") accepted his severance pay claim of CAD $827,755 plus an award amount of USD $73,000, which Mr. Schaefer and Mirant Canada agreed upon. Two other employees were granted their full severance. However, the only amount that the Monitor approved for payment to Mr. Schaefer was the statutory severance of $18,184, the equivalent of four weeks' pay.

Issue: Was Mr. Schaefer entitled to immediate payment of the severance amount and of the award amount, or did he have an unsecured claim that would be dealt with in the course of the CCAA proceedings?

Decision: Mr. Schaefer's application for immediate payment of the severance pay was dismissed. The application for the award amount was dismissed, because there was no assignment to Mirant Canada.

Discussion: Mr. Schaefer argued that:

a) His job was crucial to the continued operation of the company post-CCAA. The court relied upon *Smoky River Coal Ltd., (re)* and did not find that the obligation to pay severance falls within a commercially reasonable contractual obligation essential for the continued supply of services.

b) Rod Pozca, President of Mirant Canada, had told him that the CCAA protection of the company would in no way affect his employment or compensation including the severance pay. The court concluded that this promise was irrelevant. The provisions found within the initial order excluded severance pay from categorisation as a post petition creditor. Rather, it fell within the discretionary payments that the Monitor may pay.

c) He is a post-petition creditor who is entitled to be paid in full, since his continued employment is equivalent to his having being re-hired after July 15, 2003. Furthermore, Mirant Canada took on the obligation to pay the severance in full by terminating him. The court concluded that the Monitor correctly exercised its discretion in regards to paying severance amounts in accordance with the purpose of the CCAA which is to provide protection to a company while it attempts to reorganize.

d) There was no basis for treating him differently from the two employees who were granted their severance other than the difference in amounts. The Court found that the Monitor applied the right test in determining whether or not payment of the full amount of the contractual obligation was appropriate. It had to balance the effect of non-payment on the continued operation of business and more specifically, the morale of the other employees against the economic effect on the company if payment was made.

In the matter of the arrangement plan of: Pangeo Pharma Inc., Pangeo Pharma (Canada) Inc., Lioh Inc., Medro Products (2001) Inc., 1375092 Ontario Inc., Institute of Applied Medicine Inc. and 9046-7093 Quebec Inc. (the debtor companies)

Quebec Superior Court
Journet J.C.S.

Citation: [2004] J.Q. no 706

Facts: On July 10, 2003, the Court appointed Ernst & Young as monitor for the debtor companies, which had filed an arrangement plan requiring that the creditors present all of their claims to the monitor before October 17, 2003. This deadline had been established by a court order. Livingston International prepared its proof of claim and filed it with the monitor on October 22 as an unsecured creditor, while the other creditors had already approved the plan brought forth at a meeting on October 21. On November 5, 2003, the Court approved the plan. The monitor then rejected Livingston International's proof of claim on December 18, 2003.

Issue: Was the monitor required to accept the proof of claim submitted by Livingston International, despite the fact that it was filed after the October 17, 2003, time limit?

Decision: The monitor was required to accept the proof of claim.

Discussion: No specific legislative provision requires a creditor to seek authorisation to file a proof of claim beyond the fixed deadline. Each case is different, and the Court uses its discretionary power to facilitate a party's ability to exercise its rights, as long as no prejudice is caused to the creditors in the process. In this case, the Court analysed four factors established by the Alberta Court of Appeal in order to resolve the issue of the creditor's proof of claim:

(1) Was the delay in producing the claim attributable to an error? The court found that the applicant's behaviour was negligent because the mandate to prepare the proof of claim was given on the deadline date. Hence, a verification of whether the creditor acted in good faith was needed. Good faith is presumed and considering that no evidence of bad faith was provided, the Court concluded that the applicant acted in good faith.

(2) The second criteria dealt with the possible consequences and prejudices deriving from an authorisation to produce a late claim. In the Court's opinion, the amount represented by the delayed claim was so minimal in comparison to the overall total of claims that no prejudice could result from its admission. Furthermore, there was no request for a new vote.

The third and fourth factors outlined by the Court did not apply in the case at bar because they relate to incidents in which the creditor would suffer a prejudice.

In the matter of the bankruptcy of Thomas Blair Drummie

Court of Queen's Bench of New-Brunswick
Registrar Bray

Citation: 2004 NBQB 35

Facts: On March 23, 1994, Thomas Blair Drummie (the "debtor") concluded an agreement in which he hypothecated 2501 shares from the Ground Floor Holding Company Ltd. in favour of the Royal Bank of Canada (the "Applicant"). On March 29, 2000, the debtor made an assignment in bankruptcy in which the Applicant was a creditor. In May 2001, the Applicant filed a proof of claim for the amount of $310,801 with the hypothecation agreement as security for the claim. In July 2001, the trustee declared in writing that the documentation supporting the Applicant's claim to the security was reviewed and seemed to be in order. Afterward, in January 2002, the trustee rejected the Applicant's security claim under subsection 135 (2) of the *Bankruptcy and Insolvency Act* (BIA). He contended that the security was relative to a specific loan for the amount of $150,000 and that this loan was entirely reimbursed before the bankruptcy. The Applicant requested that the trustee's decision to reject the security be annulled.

Issues:

(1) Was section 37 of the BIA appropriate to allow a revision of the trustee's decision to reject the security claim produced?

(2) After having previously approved the security claim under section 135 of the BIA, could the trustee reverse his decision?

Decision: Nothing in the BIA prevents the trustee from reversing the decision he had previously rendered regarding the Applicant's security claim. If the Applicant considered the trustee's decision incorrect, it had a remedy under subsection 135 (4) of the BIA. Having not abided by the conditions prescribed in this provision, the Applicant could not seek a more general remedy under s.37 of the BIA in order to bypass the preliminary conditions of subsection 135 (4).

Discussion: The Applicant argued that even though the statute was silent concerning the ultimate purpose of the trustee's decision to approve the security claim, the Court should consider this decision as final by analogy to subsection 135 (1.1) and 135(4) of the BIA. The Court held that referring to s.37 of the BIA to avoid the time period prescribed in s.135 would be contrary to the BIA, which does not specify that a decision to approve or reject a security claim is final and conclusive. The Court had discretion to act under s.37 in order to avoid any injustice to the parties regarding the administration of assets. In doing so, the Court had to be sure that the trustee acted in accordance with his obligations under the BIA. Nothing in the present case indicated that the trustee acted improperly. A remedy under s.37 of the BIA is inappropriate in the present circumstances.

Property of the Bankrupt

In the matter of Amherst Crane Rentals Ltd. v. Perring

Ontario Court of Appeal
Laskin, Goudge, Feldman JJ.A.

Citation: 2004 O.J. No. 2558

Facts: Ashley James Perring died in 1998, naming his wife ("Respondent") executrix and sole beneficiary of his estate. Pursuant to the will and two separate designations filed with the administrators of the Registered Retirement Savings Plans ("RRSP"), the Respondent was the designated beneficiary of her deceased husband's two RRSPs. Following the Respondent's collection of the RRSP proceeds, the estate filed an assignment into bankruptcy in 1999. At the time of his death, the deceased owed $53,679 to the appealing creditor for breach of trust. The latter filed a proof of claim and initiated proceedings under section 38 of the *Bankruptcy and Insolvency Act* (BIA) in order to obtain payment of the debt from the beneficiary of the proceeds of the RRSP. This case deals with an appeal of the trial judge's decision that the creditor has no right to obtain payment of his debt from the RRSP proceeds.

Issues:

(1) Do RRSP proceeds devolve directly to the designated beneficiary, or do they form part of the deceased's estate?

(2) If they devolve directly to the beneficiary, can creditors to the estate lay claim to the RRSP proceeds?

Decision: The court decided that the RRSP proceeds devolved directly to the designated beneficiary and that the creditors had no right to these proceeds.

Discussion: The Court referred to Canadian case law rulings that section 53 of the *Succession Law Reform Act* had the legal effect of making RRSPs an exception to the general rule, despite the fact that the wording of this provision did not specifically exempt RRSP proceeds. The Court did not follow *Clark Estate v. Clark* (1997), where the Manitoba Court of Appeal decided that unpaid creditors of the deceased can claim RRSP proceeds collected by the designated beneficiary. There is no legal principle or statutory authority that enables creditors to justify such a claim. Therefore, RRSP proceeds devolve to the designated beneficiary upon death of their owner and the creditors lose their right to exercise any claim or security interest on these proceeds. Contrary to the appellant's allegations that equity gives precedence to claims of creditors, the Court asserted that the claims of a beneficiary were equally as important, since the latter had supported her spouse during his lifetime and is therefore justified in receiving RRSP proceeds.

In the matter of Bank of Nova Scotia v. Thibault

Supreme Court of Canada
McLachlin CJ and Bastarache, Arbour, Lebel and Deschamps JJ

Citation: 2004 SCC 29

Facts: The owner-annuitant, Thibault, had set up a self-directed Registered Retirement Savings Plan (the "Plan") with ScotiaMcLeod Inc. (the "trustee"), the terms of which were set out in a document described as a "declaration of trust". The provisions of the Plan included a stipulation that the funds were to be exempt from seizure. At the date of maturity, the assets of the Plan were to be used to purchase an annuity. Before the Plan's maturity, the trustee's sole obligation was to execute directives from the owner-annuitant and maintain the investments.

Before the Plan matured, the Bank of Nova Scotia (the "Bank"), one of the owner-annuitant's creditors, had a writ of seizure issued against the funds held by the trustee. Thibault applied to have the seizure annulled.

Issues:

(1) Did the Plan qualify as a seizure exempt annuity?

(2) Did the Plan qualify as a seizure exempt trust?

(3) Had the Quebec legislature demonstrated a desire to extend exemption from seizure to all RRSPs?

(4) What was the application, if any, of the provisions of the *Act to amend the Act respecting insurance and other legislative provisions*?

Decision:

(1) The Court concluded that, before the date of maturity, the Plan did not provide for the constitution of an annuity. Its analysis of the parties' rights under the Plan, from the time when the funds were given to the trustee to the time when they were to be liquidated, indicated that there was no alienation of the funds.

(2) The Court found that the holder of the assets of the Plan was a trustee in name only. Despite the use of terms such as "trust" or "trustee", the RRSPs of the type contemplated by the Plan could not constitute a genuine trust since the assets had not been transferred (via a patrimony by appropriation) before the maturity date of the Plan.

(3) The declaration made by the Quebec legislature in 2002 did not change the rules governing exemption from seizure in general, nor did it suggest that the legislature wanted to change the protection given to RRSPs. There is no statutory provision that operates to cover all RRSPs. Whether a particular investment vehicle is subject to seizure is ultimately governed by the rules of contract law that apply to the vehicle used.

(4) The amendment instituted by the *Act to amend the Act respecting insurance and other legislative provisions* did not change the rule requiring that capital be alienated, which is the central element of an annuity contract and which is missing in this case.

Discussion: This is an important case respecting annuities, trusts and the contractual provisions necessary to legally effect an exemption from seizure. To that end, the Supreme Court of Canada named an *amicus curiae* (i.e., a friend of the court) to argue in support of Thibault's position. In addition to the *ratio decidendi* (i.e., the principal rules of law upon which the decision was based), the Court took the opportunity to state in *obiter dicta* (i.e., in passing) several other declarations with respect to the applicability of Quebec law.

Ratio Decidendi: The central issue in this case was the characterization of the annuity contract, within the meaning of the *Civil Code of Québec*. To form an annuity contract, there had to be: (a) a debtor; (b) an annuitant; (c) an alienation of capital; (d) an obligation to pay; and (e) a specification of a periodic amount for a fixed time. The parties directed their argument mainly to the requirement concerning the alienation of the capital. In civil law, the act of alienation has a precise meaning. That act involves the idea of permanence. When property is alienated, the transfer of patrimony (i.e., property that can be properly estimated and executed for the benefit of a creditor) to another is final; it is permanent.

According to the Plan, before maturity, under section 3, "the trustee's sole obligation... will be confined to executing the directions of the [owner-annuitant]... and maintaining... the investments". During that first stage, the rights of the owner-annuitant were almost absolute. Nowhere in the Plan did it provide that the

owner-annuitant alienated the property or the value of the funds to the trustee before the maturity date. Given the lack of an alienation of the funds (one of the central elements of an annuity contract), no annuity contract was formed.

A secondary issue was whether the Plan constituted a genuine trust. Three requirements must have been met in order for a trust to have been constituted: (a) property must have been transferred from an individual's patrimony to another patrimony by appropriation; (b) the property must have been appropriated to a particular purpose; and (c) the trustee must have accepted the property.

The property was not transferred to a patrimony by appropriation before the maturity date of the Plan. Since the assets could have been withdrawn in whole or in part before the maturity date of the Plan, the Court concluded that, during the initial stage of the Plan, the owner-annuitant had not divested himself of his assets in favour of a patrimony by appropriation. Thus, no trust was created.

Obiter Dicta: The following declarations of law by the Court were not crucial to the outcome of the case but may be of some interest to restructuring professionals:

- Exemption from seizure is an exception created by law and *does not result from the mere intent of the parties*. Thus, the exemption from seizure stipulated in the Plan was effective only with respect to the trustee (ScotiaMcLeod Inc.) and the owner-annuitant (Thibault);
- In the *Act to amend the Act respecting insurance and other legislative provisions*, the Québec legislature declared that the ability to make a partial or total withdrawal of capital did not prevent an annuity contract from being considered as such. It should be pointed out, however, that it did not change the rule requiring that capital be alienated. Surrender stipulations are therefore valid in insurance contracts, for example, since the insurer retains ownership of the capital, subject to termination or a reduction of obligations. In this case, however, ownership of the assets of the Plan was never properly transferred (i.e., alienated) to the alleged trustee. Thus, an annuity contract was never formed in the first place.

In the matter of Beaudoin v. Canada

Canadian Tax Court
Angers J.C.I.

Citation: [2004] A.C.I. No. 110

Facts: In 1992, Mr. Beaudoin adhered to a registered retirement savings plan ("RRSP") offered by Société Nationale de Fiducie, now called Trust La Laurentienne ("La Laurentienne"). The RRSP was registered and admissible under the terms of the *Income Tax Act* (the "ITA") and the *Taxation Act* of the province of Quebec. In 1993, the Appellant's tax liability totalled $203,907. This caused the Minister of National Revenue (the "Minister") to send a letter to La Laurentienne requiring payment, which the latter did not act upon. In 1994, Mr. Beaudoin assigned his property to a trustee in bankruptcy except for the funds invested in his RRSP. In 1998, the Superior Court issued a certificate of absolute discharge to Mr. Beaudoin. Following the issuance of the *Statement of income arising from RRSP-T4RSP* form for the 2001 taxation year, La Laurentienne paid the amount of $84,761 to the Minister. On his tax accountant's advice, the Appellant claimed this amount as part of his RRSP. The Appellant then objected to the Minister's inclusion of this amount in his revenues and filed an appeal with the Tax Court.

Issues:

(1) Was the amount remitted to the Minister by La Laurentienne, a trust company acting for the Appellant, exempt from seizure?

(2) If not, did the forwarded amount correspond to a benefit as defined in the *Income Tax Act*?

(3) Did the amount received by the Appellant give him an advantage, assuming that this money was used to pay a debt extinguished since his absolute discharge?

Decision: The appeal was granted and the contribution was referred to the Minister for reassessment. The amount remitted to the Minister was exempt from seizure; however, the order allowing the bankrupt's discharge released his fiscal liability. Therefore, the money remitted by La Laurentienne did not constitute a benefit received by the Appellant under subsection 146(8) of the ITA. Following the transmission of the moneys, the appellant did not receive any amount nor did he benefit from any advantage.

Discussion: The Minister referred to paragraph 56(1(h) and to subsections 146(1) and (8) of the ITA to support his claim that the appellant was obliged to include the $84,761 benefit in his revenues. According to the Appellant, this amount was not exempt from seizure because it resulted from an annuity contract administered by a trust company. He argued that the rules relative to the retirement plan prevent the issuance of an annuity before the age of sixty. The Minister alleged that the Appellant could withdraw the money invested in his fixed term deposits at maturity. The Court stated that, in order to determine if an RRSP was not exempt from seizure in a bankruptcy case, the RRSP annuity contract must be analysed along with the laws relative to bankruptcy, the nature of the investment and the conditions allowing the appellant to claim the funds in his RRSP. In the case at bar, the proof was insufficient to lead to the conclusion that the amount of $84,761 was exempt from seizure. However, subsection 178(1) of the *Bankruptcy and Insolvency Act* (BIA) did not include fiscal liability in its list of debts that survive the discharge. The debt that the Respondent claimed was therefore extinguished, but the Court did not have the jurisdiction to order the Minster to refund La Laurentienne for the amount that was handed over, which was why the case was referred to the Minister for reassessment.

In the matter of Cochard v. Cochard

Alberta Court of Queen's Bench
Veit, J.

Citation: 2004 A.J. No. 669

Facts: In January 2001, Pierre Cochard issued a statement of claim for divorce and division of the matrimonial property. In February 2001, Darlene Agatha Cochard ("bankrupt") submitted a statement of defence and counterclaim. In July 2002, their matrimonial home was sold for $240,000 to Mr. Berry, the bankrupt's common-law partner, because of foreclosure proceedings initiated by their bank. The bankrupt underestimated the market value of the home in her statutory declaration since Mr. Berry resold it the same month and made a profit of $135,000.

The bankrupt requested that the trustee remit to her $20,000, the value of her half interest in the principal residence. She claimed that this amount is exempted from any division among creditors under subsection 67(1)(b) of the *Bankruptcy and Insolvency Act* (BIA) and subsection 88(g) of the *Alberta Civil Enforcement Act*. The bankrupt consented to the Court's order to particularize the nature of her claim. She nevertheless failed to abide by this order, stating she had filed an assignment in bankruptcy a few days prior to her consent and from that moment the trustee controlled all her financial affairs. Ms. Cochard had omitted to disclose her real estate transactions to the trustee. In addition, she requested that the trustee provide her with information regarding the legal fees incurred, including the name of the individual to whom these fees were paid.

Issues:

(1) Should the court order the immediate remittance to the bankrupt of $20,000, as her exemption in the matrimonial property?

(2) Should the trustee be compelled to disclose information regarding his legal fees?

Decision: The Court ruled against the immediate remittance of the $20,000 exemption in the matrimonial home and refused to order the trustee to disclose information regarding his legal costs.

Discussion: The bankrupt was unable to prove that the trustee would fail in his objection to her claim for an exemption of $20,000. Consequently, her request for immediate distribution of this amount was denied. Also, despite her failure to comply with the consent order, the matrimonial property defence was admissible. In fact, the petition in bankruptcy gave the trustee control over her legal proceedings. The trustee would decide whether to let Ms. Cochard undertake the proceedings, undertake them himself or abandon them altogether.

Furthermore, section 26 of the BIA does not allow the Court to order the trustee to disclose information regarding his other legal costs to the bankrupt. This information is not pertinent, and the proceedings are adversary, the bankrupt's claims being subject to the trustee's investigation.

The Court concluded that a trial was needed to solve the issues surrounding the property claims. Issues of fact regarding the sale of the home by Mr. Berry must be investigated, namely the purchasers' amount of interest in the property and the high profit received from its quick resale. Issues of law regarding matrimonial property exemptions and the validity of the bankruptcy assignment must also be considered.

In the matter of DaimlerChrysler Financial Services (Debis) Canada Inc., Appellant, and trustee in Bankruptcy, Respondent

Ontario Court of Appeal
Laskin, Feldman, and Armstrong JJ.A.

Citation: [2004] O.J. No. 1924

Facts: James Allen Fields (the "bankrupt") filed an assignment in bankruptcy on June 12, 2001 while DaimlerChrysler (the "Creditor") held a conditional sale contract against him on a 1998 vehicle. Even though the Creditor did not perfect its security interest on the car under the *Personal Property Security Act*, it filed a proof of claim in the bankruptcy for the remaining amount the bankrupt owed. The parties agreed that the residual value of the car was $11,000. The trustee rejected the Creditor's claim as a secured claim, but allowed it as an unsecured claim. The Creditor disagreed with the Court's decision to validate the trustee's decision and appealed on the basis that it has the right to its security interest and a priority over the trustee in the car because of an exemption from execution and from the bankruptcy estate for vehicles worth up to $5,000 given to the bankrupt under the *Execution Act* (EA).

Issue: Does the exemption from seizure apply only when the total value of the car is $5,000 or less, or does it apply to exempt the first $5,000 of the value of the bankrupt's equity in the car under section 2.6 of the EA?

Decision: The appeal was dismissed. The value of the vehicle was more than $5,000. Therefore, no exemption existed in this case.

Discussion: The Creditor argued that the exemption applied only to the first $5,000 of the car. The new amended section 2.6 of the EA states that motor vehicles that do not exceed $5,000 are exempt from seizure. In addition, subsection 3 of section 2.6 of the EA states that the chattel can be sold and any value exceeding the exemption limit can be given to the bankrupt. Furthermore, section 4 protects the sum that is paid to the bankrupt against seizure. Therefore, the Court could not rule in favour of an exemption. When amendments were made to the EA in 2001, section 4 was not amended to make it applicable to motor vehicles that became exempt. The Court reluctantly agreed with the trustee that section 2.6 of the EA is clear. As a result, an exemption can be applied only if a motor vehicle has a value of $5,000 or less.

In the matter of Grand River Conservation Authority v. Hargreaves

Ontario Superior Court of Justice
Fragomeni J.

Citation: 2004 O.J. No. 2163

Facts: Kirk Charles Hargreaves ("defendant") rented from the Grand River Conservation Authority (GRCA) a piece of land on which he owned a cottage. He filed for bankruptcy in 1998 and did not disclose his ownership of the cottage to the trustee. Since October 2000, the defendant wilfully and continually refused to pay rent because he submitted that the rent increases, service fees and taxes were improper. In April 2001, after having requested rent payments on numerous occasions, GRCA sent a letter to inform the defendant that the lease was terminated and that GRCA would proceed with the sale of the cottage located on the land in compliance with the terms of the lease. The lease stipulated that the landlord may cancel the lease and take possession of the tenant's personal property located on the rented land in order to sell it.

Issues:

(1) Did Hargreaves breach the lease?

(2) Had the lease been properly and validly terminated?

(3) Should the court exercise its equitable discretion and grant Hargreaves relief from forfeiture?

Decision: The defendant violated his lease. Therefore, the lease was cancelled. The GRCA could remove or dispose of the defendant's property or sell it. The defendant was not relieved from forfeiture.

Discussion: The defendant admitted owing rent arrears and taxes in addition to costs with respect to the failure of a previous motion before the court. The judge was of the opinion that the defendant violated the lease and that the lease was validly terminated.

The defendant alleged not being able to relocate the cottage situated on the rented land but requested that the cottage not be seized because of the lease cancel-

lation. The court maintained that, despite the defendant's complaints in regards to the cost of rent, services and taxes, he did not take any measures to solve the problem.

The power to grant relief from forfeiture is a recourse in equity that is completely discretionary. The factors to be considered in such situations were set out in *Saskatchewan River Bungalows Ltd v. Maritime Life Assurance Co*. They are the reasonableness of the defendant's conduct, the gravity of the breach and the disparity between the value of the defendant's property and the damages caused by his failure to respect the lease. In addition, *F.P.J. Properties Ltd. V. Parkway Finch Food Services Ltd*. set out criteria for granting relief from forfeiture for non-payment of rent. These criteria are: the tenant must come to court with clean hands, there must be no outright refusal by the tenant to pay rent, rent arrears must be short termed and the landlord must not have suffered serious losses because of payment delays. The Court was of the opinion that the defendant did not satisfy these criteria and should not be granted relief from forfeiture.

In the matter of Graphicshoppe Ltd. (Re)

Ontario Superior Court of Justice
Lax J.

Citation: 2004 O.J. No. 5169

Facts: On November 20, 2003, Graphicshoppe Limited made an assignment in bankruptcy. The terminated employees of the company filed a proof of claim with the trustee to recover pension contributions deducted from their wages, but not remitted to the employees' pension fund. The employees' pension plan with London Life was funded by regular payroll deduction of 4% and employer contributions of 1%. The trustee disallowed the employees' claim. The employees appealed the trustee's decision to the Registrar who ruled in the employees' favour. The trustee appealed the Registrar's decision.

The Registrar rendered his decision based on paragraph 67(1)(a) of the *Bankruptcy and Insolvency Act* (BIA). He relied upon the decisions in *Neal v. Toronto Dominion Bank and Edmonton Pipe Industry Pension Plan Trust Fund (*trustee *of) v. 350914 Alberta Ltd*. and stated: "I have considered the *Neal* and *Edmonton Pipe* decisions and the cases cited by counsel for the trustee and arrive at the conclusion that the position of the employees must prevail, notwithstanding that the identical funds were not in the bankrupt's bank account at the date of bankruptcy. I am bound by the decision of Macpherson J. in Neal and the decision in Edmonton Pipe provides for a reasoned basis for reaching my conclusion as to the "identifiable" aspect of the trust claim. There is also, in my view, something to be said of the fact that the trust funds in question are those that were deducted from the employees' paycheques, similar in nature to the deemed trust in favour of Her Majesty for CPP and EI payments."

Issue: Did the employees meet the common law requirement of "certainty of subject matter" to establish a classic trust to bring themselves within subsection 67(1)(a) of the BIA?

If so, can they assert a proprietary interest over the mixed funds?

Decision: The Registrar did not err in concluding that the trust was identifiable and met the test of certainty of subject matter. The judge concluded that he is not bound to apply the lowest intermediate balance rule ("LIBR"). It would have been unjust and inequitable to deprive the employees of their claims.

Discussion: *Edmonton Pipe* is the authority in determining if the employees met the common law requirements of certainty of subject matter. In this case, the moneys deducted from the employees paycheques were held in a trust and as in *Edmonton Pipe*, it was not segregated from the company's general funds. The Registrar's conclusion that the trust property was identifiable was consistent with the facts and reasoning in Edmonton Pipe and met the test of certainty of subject matter. The amount of the trust money was identifiable by using the formula set out in the collective agreement to calculate the amount of money to be deducted from each employee and held in trust. This amount was a defined percentage from each paycheque, which was known and deducted.

Furthermore, the court analyzed the rationale underlying the LIBR rule in *Law Society of Upper Canada v. Toronto-Dominion Bank*, and stated that the LIBR principle is a doctrine of "proprietary tracing", which is based on fictitious presumptions about the intentions of the wrongdoer. It was rejected by the court in *Toronto-Dominion Bank* except for the limited purpose

of serving as "the equitable vehicle which enables a claimant to have recourse to a mixed trust fund in the first place, but equity can move beyond the structures of the doctrine to provide a remedy to the claimant once the connection to the fund has been made." The judge ruled that he was not bound by the LIBR but he was bound to search for the method of allocating the loss which is the more just, convenient and equitable in the circumstances. Therefore, he allowed the proofs of claim of the employees and ordered to pay them the amount of $92,899.

Appealed

In the matter of Kugler v. Kugler

Saskatchewan Court of Queen' Bench
Baynton J.

Citation: 2004 SKQB 484

Facts: On September 23, 2002, Tracy Kugler made an assignment into bankruptcy. During a meeting of inspectors, the trustee agreed to assign the $50,000 judgment debt that her ex-husband owed to her (the "Applicant") to one of her creditors, but only to the extent of her indebtedness to the latter. The Registrar then allowed the assignee to enforce the debt the Applicant owed, and a writ of execution demanding payment of $10,000 was filed in August 2004. The Applicant therefore sought to set aside the writ of execution by claiming that he was not liable for instalments that were not yet payable at the date of the bankruptcy. He maintained that such instalments did not constitute property of the bankrupt under s.67 of the *Bankruptcy and Insolvency Act* (BIA). In addition, he alleged that his obligations toward the bankrupt were set-off by her indebtedness to him pursuant to an agreement for monthly child support payments of $200.

Issues:

(1) Were the instalments not yet due at the time of the bankruptcy considered as part of the bankrupt's property that vests in the trustee pursuant to s. 67 of the BIA?

(2) Had the bankrupt entered into an agreement for child support payments which could be set-off against the $10,000 amounts stated in the assignee's writ of execution?

Decision:

(1) Money payable to the bankrupt at a future date was considered to vest in the trustee under s. 67 of the BIA.

(2) No evidence supported the existence of a child support agreement that could be set-off against the writ of execution.

Discussion: The Court broadly interpreted the notion of property as defined in s.2 of the BIA in order to encompass money owed to the bankrupt that is payable at a future date. In accordance with s. 67 of the BIA, the trustee acquired all rights held by the bankrupt, including her right to demand payment for future instalments. These rights could be assigned. Therefore, the trustee's decision to assign these rights to the bankrupt's creditor was valid. As for the alleged child support agreement entered into with the bankrupt, the Applicant failed to prove its existence. Furthermore, he had omitted to file a proof of claim declaring his rights pursuant to such an agreement at the time of the bankruptcy.

In the matter of Lecerf v. Lecerf

Alberta Court of Queen's Bench
Topolniski J.

Citation: 2004 ABQB 501

Facts: Mr. Lecerf and Mrs. Lecerf — now Ms.Requier — (the "parties") had been married since 1983. Mr. Lecerf had contributed $35,000 from insurance and gift proceeds to the down payment of the couple's first home, which was registered in joint title before their marriage. That home was sold and the proceeds were used in the successive purchase of two other jointly titled homes, the last of which was the matrimonial home. During the marriage, Mr. Lecerf ventured into an auto painting and sandblasting business, which failed and left the family with debts in excess of $100,000. On May 15, 2001, the spouses separated. Ms. Requier then moved from Alberta to British Columbia, along with the parties' two children, where she has since earned a living from her new barbershop business. On January 28, 2004, Mr. Lecerf made an assignment into bankruptcy. Not fully understanding the legal consequences of the bankruptcy, the parties entered into a written agreement outlining the terms for settlement of all property differences. This agree-

ment stated, among other things, that Mr. Lecerf would receive the proceeds from the sale of the matrimonial home. The trustee argued that this agreement was not a settlement under the *Bankruptcy and Insolvency Act* (BIA). Regardless, he was prepared to adopt this agreement on the condition that he received one half of the net proceeds from the sale of the matrimonial home over $20,000, which was Mr. Lecerf's pro-rated exemption under the *Civil Enforcement Act*.

Note: Several issues pertaining to matrimonial law and division of property arise in this case. For the purpose of this summary, only issues regarding bankruptcy and the BIA will be considered.

Issues:

(1) Did Mr. Lecerf have a valid claim that the $35,000 down payment that he made on the parties' first home be excluded from distribution under section 7 of the *Matrimonial Property Act* (the "MPA")?

(2) In the affirmative, what was the effect of the bankruptcy on that exemption?

(3) Was an unequal distribution warranted, thus justifying upholding the January 28, 2004, agreement?

Decision:

(1) Mr. Lecerf's claim that the $35,000 down payment be excluded from distribution was valid, in part.

(2) The right to seek the MPA exemption in the present case was property within the meaning of the BIA, thus vested in the trustee as being part of Mr. Lecerf's estate.

(3) The Court concluded that it would be unjust to uphold the agreement.

Discussion: The $35,000 gift and insurance proceeds that Mr. Lecerf contributed towards the down payment of the parties' first home was presumed to have been treated as joint matrimonial property since the aforementioned home and subsequent others were registered in joint titles. Accordingly, $17,500 was excluded from distribution — by virtue of the exemption — and $17,500 was subject to distribution under the MPA.

The issue was whether the definition of the word "property" under the BIA included a claim under the MPA. The answer would determine whether or not the trustee was entitled to pursue or defend a bankrupt's matrimonial property action for the benefit of the creditors. The Court proceeded to a historical analysis of case law from the Courts of Appeal of different provinces dealing with this issue, as well as the legislature's intentions regarding the MPA. The Court also made a point of quoting one of these case law by stating that "there are good reasons to avoid giving matrimonial property a different status from other property in bankruptcy [...] the potential for abuse by one spouse commencing a MPA action and agreeing to a generous order to defeat creditors". Other potential forms of abuse were also mentioned. In the end, the Court found that the right to seek the MPA exemption in the present case was property within the meaning of the BIA that was vested in the trustee. Furthermore, the trustee should not be deprived of any of the excluded property because he did not intervene or make submissions on this point at the trial. In regards to the agreement between the parties after the bankruptcy — and the consequential vesting of Mr. Lecerf's property in the trustee — given its timing, the Court agreed with the trustee in concluding that this agreement did not fit the definition of a "settlement" under section 91 of the BIA. After considering that the parties did not understand the consequences of the bankruptcy on their legal entitlements, the Court concluded that it would be unjust to uphold the agreement.

In the matter of Lintott v. Bank of Montreal

Manitoba Court of Queen's Bench
Menzies J.

Citation: 2004 MBQB 214

Facts: Lloyd and Nancy Lintott (the "bankrupts") made an assignment in bankruptcy on October 2, 2003. As of October 14, 2003, the Lintotts were indebted to the Bank of Montreal ("BMO") in an amount over $34,000. Mr. Lintott's collective agreement with his employer provided that he would be required to travel in the course of his employment and incur certain expenses, which were to be reimbursed. Following the assignment, moneys including Mr. Lintott's reimbursement for expenses before the assignment as well as a child tax benefit cheque were deposited in the bankrupts' account. BMO then seized the above moneys to apply against their debt, relying on the authority of security agreements. The bankrupts then brought an action for repayment of all the moneys on the basis that the moneys were exempt from distribution among creditors under the *Bankruptcy and Insolvency Act* (BIA).

Issue: Did the terms "total income" in section 68 of the BIA include moneys owing for services rendered prior to bankruptcy?

Decision: Section 68 is a complete code for determining what if any of a bankrupt's "total income" will be made available for distribution among creditors whether secured or not. The moneys in question fell in this category, and BMO was ordered to reimburse the amount taken from the Lintotts' account.

Discussion: BMO argued that s. 68 of the BIA had no application to money owed to Mr. Lintott for services rendered prior to the date of bankruptcy. The Court relied on *Wallace v. United Grain Growers Limited* (1997) 152 D.L.R. (4th) and other case law to conclude that the phrase "salary, wages and other remuneration" should be interpreted broadly. In the case at bar, the Court acknowledged that the reimbursement of expenses incurred in employment did not normally fall into the category of income. However, Mr. Lintott's collective agreement did require him to incur these costs under a promise of reimbursement from the employer. "Keeping in mind the public policy considerations behind s.68 and the need to interpret the section broadly, [the Court] was satisfied that the reimbursement of the expenses claimed by Lintott constituted part of his 'total income' within the meaning of s. 68 of the BIA."

"[Total] income is defined for the purpose of s.68 as including, notwithstanding s. 67(1)(b) and (b.1), all revenues of a bankrupt of whatever nature or source… [The Court] therefore concluded that s. 67 is superseded by the provisions of the current s. 68 in so far as the 'total income' of the bankrupt is concerned…" Hence, the moneys could only be made available for distribution to creditors pursuant to the provisions of s. 68 of the BIA. The fact that the expenses were incurred prior to the filing of the assignment in bankruptcy did not aid BMO in its position.

In the matter of R. v. Kalenuik

Ontario Superior Court of Justice
Dambrot J.

Citation: 186 C.C.C. (3d) 408

Facts: On June 9, 2002, Rosanne Kalenuik ("Applicant") was arrested and charged for possession of a narcotic for the purpose of trafficking. At the moment of the arrest, the Royal Canadian Mounted Police ("RCMP") seized $2,120 located in drawers in her bedroom and $64,020 found in the clothing area of the same room. On January 27, 2003, the charge against the Applicant was stayed by counsel for the Attorney General of Canada. On March 10, 2003, Ms. Kalenuik filed an assignment in bankruptcy, disclosing assets of a total value of $500 and creditors claims totalling $91,200 including a $64,000 claim from Canada Customs and Revenue Agency ("CCRA"). She did not list the funds seized by the RCMP in her statement of affairs. On December 11, 2003, the Applicant was discharged from bankruptcy.

On January 26, 2004, Ms. Kalenuik surrendered herself to the police on various charges related to the funds seized by the RCMP. On February 9, 2004, she commenced an application pursuant to subparagraph 462.34(4)(c)(ii) of the *Criminal Code* for an order for the release of the seized funds for the purpose of meeting her reasonable legal expenses.

Crown counsel notified the trustee in bankruptcy of this application and CCRA filed a proof of claim for $64,487. On March 3, 2004, the trustee advised the Applicant's creditors that it did not have the funds to initiate legal proceedings in order to lay claim to the seized funds. Therefore, on March 29, 2004, CCRA obtained an order pursuant to section 38 of the *Bankruptcy and Insolvency Act* (BIA) authorizing it to take proceedings in lieu of the trustee in order to preserve and receive the seized funds. Furthermore, the Applicant had refused to apply for legal aid to fund her defence.

Issues:

(1) Should the seized moneys be returned to the Applicant for the purpose of meeting her legal expenses pursuant to the subparagraph 462.34(4)(c)(ii) of the *Criminal Code*?

(2) If so does paragraph 67(1)(c) of the BIA find application, giving the creditors the right to recover the funds?

Decision: The Applicant did not satisfy the court that no other person appeared to be the lawful owner nor that she had no other means available to meet her expenses. Accordingly, the application was refused.

Discussion: In order to allow funds to be released to Ms. Kalenuik for the purpose of meeting her legal expenses, three pre-requisites must be met:

(1) The Applicant must have an interest in the property (subsection 462.34(1) of the *Criminal Code*);

(2) The Applicant must satisfy the court that she has no assets or means available to meet her legal expenses (subsection 462.34(4) of the *Criminal Code*);

(3) The Applicant must satisfy the court that no other person appeared to be the lawful owner or lawfully entitled to possession of the property (subsection 462.34(4) of the *Criminal Code*).

Having refused her request, the court did not address the issue as to whether paragraph 67(1)(c) of the BIA was applicable. However, the court did comment on the fact that if Ms. Kalenuik would have gained access to the funds in question, CCRA would have a superior claim defeating the Applicant's claim based on paragraph 67(1)(c) of the BIA. The latter paragraph provides that all property of the bankrupt at the date of the bankruptcy is divisible among creditors. Seized funds are not exempt from distribution. An order of discharge does not confer property that falls within the scope of paragraph 67(1)(c) of the BIA back to the bankrupt. Therefore, if the seized funds were found to be property of the bankrupt, then the trustee or in this case CCRA would have retained the right to recover them.

Directors' Liability

In the matter of the bankruptcy of Castor Holdings Ltd.

Quebec Superior Court
Journet J.C.S.

Citation: [2004] Q.J. No. 12145

Facts: On March 21, 1991, the board of directors of Castor Holdings Ltd. (the "debtor") adopted a resolution declaring dividends in the amount of over $15.5M. A Receiving Order was issued against the debtor in July 1992. On December 4, 1992, a Petition for Reimbursement of Dividends was filed against the directors of the debtor, jointly and severally, pursuant to the *Bankruptcy and Insolvency Act* (BIA). It was alleged that the directors had not opposed the payment of the declared dividends and that the latter were paid to the shareholders during the twelve month period preceding the date of the bankruptcy, at a time when the debtor was insolvent. In response, one of the directors presented a Motion for Declinatory Exceptions, alleging that the Superior Court of Quebec, before which the Petition was commenced, had no jurisdiction against him since his real domicile was not in Quebec, nor did he reside nor possess property in Quebec. The basis for his argument was that the Court did not have jurisdiction pursuant to the private international law of Quebec.

Note: For the purpose of this summary, only arguments and reasons pertaining to the jurisdiction pursuant to the Bankruptcy and Insolvency Act are presented.

Issue: Did the Superior Court of Quebec have jurisdiction over the director, pursuant to the BIA?

Decision: The Superior Court of Quebec had jurisdiction in the bankruptcy. Therefore, the whole bankruptcy case should be heard by the same court. The Petition for Reimbursement of Dividends, as part of the bankruptcy case, was rightfully instituted in the Quebec Superior Court sitting in bankruptcy.

Discussion: The fact that the debtor had carried on business in Quebec during the year preceding its bankruptcy was enough to establish that the locality of the debtor was in Quebec and that the Superior Court of Quebec had jurisdiction, pursuant to paragraph 2(1)a) of the BIA. Relying on the interpretation given by case law to subsection 81(5) of the BIA, the Court determined that the whole bankruptcy case should therefore be heard by the same court.

In the matter of Moriyama v. Canada

Tax Court of Canada
Bonner, T.C.J.

Citation: 2004 TCC 311

Facts: Amid some changes in the legal framework governing the distribution of satellite services and disagreements with its financial advisors, Jetcom Communications Inc. ("Jetcom") found itself in financial peril. From January to December 1997, almost all of Jetcom's GST returns were filed late and no payments were remitted. When Mr. Moriyama, the sole director of Jetcom, learned of the remittance problems, a series of cheques were issued in October 1997 to pay arrears. Jetcom then failed to remit payments from October 1997 to February 1998. In the following months, Mr. Moriyama made commitments and arrangements

with Canada Customs and Revenue Agency ("CCRA") officials to remain current and retire arrears. Nevertheless, a subsequent return was filed late and on December 4 1998, Jetcom became bankrupt. The amount due, including net tax, interest and penalties totalled $276,277. Due to the fact that GST returns periods ending October and November 1998 had not yet been filed, CCRA filed a first proof of claim related to reporting periods between August 1997 and August 1998. In January 2000, CCRA submitted an amended proof of claim to include Jetcom's liability for October 31 to November 30, 1998. The *Excise Tax Act* (the "ETA") imposes liabilities upon a director in respect of corporate failure to remit an amount of net tax. However, under subsection 323(3) of the ETA, a director is not liable if he or she has exercised a degree of care and diligence to prevent the failure. Furthermore, pursuant to paragraph 323(2)c), a director is not liable unless "a claim for the amount of the corporation's liability […] has been proved within six months after the assignment or receiving order."

This case deals with three issues:

(1) Application on behalf of Mr. Moriyama to vacate the assessment on the ground that the individual who issued it was not authorized to do so; rejected.

(2) Due diligence defence under subsection 323(3) of the Act; rejected.

(3) Validity of CCRA's proof of claim given the amendments and the late filing.

This case summary presents a discussion of the third issue surrounding the proof of claim only. Please refer to the complete decision for the analysis of the other issues.

Issue: Did the late filing of CCRA's amended proof of claim exclude Mr. Moriyama's liability under the Act?

Decision: Paragraph 323(2(c) of the ETA is a directory provision. Therefore, the late filing of the amended proof of claim was not fatal.

Discussion: CCRA argued that the amended proof of claim satisfied the paragraph 323(2(c) requirement of the ETA, which is directory in nature only. Counsel argued that the assessment under appeal was saved by subsection 299(5), which states that an appeal shall not be allowed by reason only of an irregularity in respect of any directory provision. In determining whether paragraph 323(2(c) is mandatory or directory, the Court relied on a balancing test, as set out in *Ginsberg v. The Queen*, 96 D.T.C.6372 (F.C.A.). The Court found that paragraph 323(2(c) was directory. The late filing of the amended proof of claim was therefore not fatal.

Appealed

In the matter of Peoples Department Stores Inc. (trustee of) v. Wise

Supreme Court of Canada
Iacobucci, Major, Bastarache, Binnie, LeBel, Deschamps and Fish JJ.

Citation: 2004 SCC 68

Facts: Following a purchase agreement entered into with Marks and Spencer Canada Inc ("M & S"), Peoples Department Stores Inc ("Peoples") became a wholly-owned subsidiary of Wise Stores Inc. ("Wise"). The majority shareholders were three brothers, who also acted as directors of Wise and Peoples. In an attempt to consolidate the overlapping corporate functions of these two corporations, the directors implemented a joint inventory procurement policy. Under this new arrangement, Wise would handle purchase orders from overseas suppliers while Peoples would deal with North American suppliers. Peoples would receive a fee for all purchases it made on behalf of Wise. However, the policy did not lead to the desired outcome. By June 1994, Wise owed approximately $18 million to Peoples. Following the announcement of disappointing financial results, M & S petitioned Wise and Peoples into bankruptcy. The assets of these two bankruptcy estates were hardly sufficient to satisfy trade creditors. Following the bankruptcy, Peoples' trustee filed a petition against the three directors, alleging that they breached their fiduciary duty and their duty of care towards Peoples` creditors under s. 122 of the *Canada Business Corporations Act* (the "CBCA"). The trustee also claimed that, contrary to s. 100 of the *Bankruptcy and Insolvency Act* (BIA), the directors had been privy to transactions allowing for the transfer of inventory for conspicuously less than fair market value. These transactions were conducted in the year prior to the bankruptcy. The trial judge's decision to hold the directors liable was overruled by the Court of Appeal.

Issues:

(1) Was the inventory transferred for conspicuously less than fair market value? In the affirmative, were the directors privy to these reviewable transactions under s.100 of the BIA?

(2) Did directors of the insolvent corporation owe a fiduciary duty or a duty of care to the creditors?

Decision:

(1) The inventory transactions respected the requirements of s.100 of the BIA.

(2) The obligations of directors under s.122 of the CBCA extended to a duty of care only.

Discussion: The Supreme Court of Canada determined that the difference between the consideration the bankrupt received, and the set market price of the inventory was slightly over six percent. The Court did not consider that this disparity constituted a conspicuous difference within the meaning of s.100 of the BIA. The Court held that the main objective pursued by s.100 was to avoid transactions capable of hindering the value of the bankrupt's estate to the detriment of creditors. The term "privy" was largely interpreted to include the directors of the bankrupt corporation because they were the controlling minds behind the disputed transactions. In addition, the transaction must have been made with those individuals' knowledge and for a consideration conspicuously greater or less than fair market value. Finally, they must have directly or indirectly benefited from it. Those conditions were not present in the case at bar. The good faith of the parties and the consideration received from the transfer of property are among the various factors that guided the Court in the exercise of its discretion.

Furthermore, the new procurement policy was adopted in the best interests of the corporation as it presented a potential solution to the corporation's inventory problems. In implementing this policy, the directors acted in accordance with their fiduciary duty as prescribed in s. 122 of the CBCA. This fiduciary duty did not extend to creditors because the latter had access to other remedies to protect their interests. However, the Court held that directors did have a duty of care towards creditors. The directors did not breach this duty because their decision to put the policy into effect was reasonable in light of all the circumstances.

Levy

In the matter of 501666 B.C. Ltd. (c.o.b. Electric Zoo Graphics) (Re)

Supreme Court of British Columbia
Registrar Blok

Citation: 2004 BCSC 1703

Facts: This matter involved the taxation of a trustee's statement of receipts and disbursements. All proceeds of the estate were paid to Dr. Bridger, a dentist and secured creditor. Dr. Bridger filed no proof of claim in the bankruptcy nor did he appoint the trustee as an agent or receiver. The bankrupt, too, failed to disclose Dr. Bridger's security interest in its statement of affairs.

Issue: Did the Superintendent's levy apply as against the proceeds?

Decision: The Registrar ruled that the levy is not payable.

Discussion: Counsel for the Office of the Superintendent of Bankruptcy ("OSB"), referring to subsection 147(l) of the *Bankruptcy and Insolvency Act* (BIA), emphasized the first use of the word "otherwise" in that subsection and urged the Registrar to conclude that the levy ought to be paid. Counsel also referred the Registrar to two cases that supported his argument: *Re Alger Press Limited* and *Re Zutphen Bros. Construction Ltd*. Counsel for Dr. Bridger, in return, referred to *Re Brittain Steel Ltd* where Justice Saunders ruled that for a levy to be payable, the creditor must file a proof of claim.

In his decision, the Registrar relied on *Re Brittain Steel*. In his view, he is bound by Justice Saunders' decision: "In my view, a levy is not payable in the case of a secured creditor who has not filed a proof of claim."

Appealed

In the matter of Coffey (Re)

Supreme Court of Newfoundland and Labrador
Orsborn J.

Citation: 2004 NLSCTD 22

Facts: In March 2000, James Coffey obtained a $60,000 line of credit from CIBC. In January 2002, he obtained a second line of credit for $80,000 from the Bank of Montreal in order to repay CIBC and also obtained an extra line of credit. Julie Coffey is a co-borrower on the latest line of credit. The bank approved the new line of credit because Mr. Coffey would obtain a diploma in medicine in May 2003 and, from that moment on, he would receive a salary of approximately $32,000. In June 2002, Mr. Coffey in addition to his line of credit also received a student loan of $6,000 to $7,000 but he still needed more funds to complete his final year of studies. Mr. Coffey discussed his financial situation with a trustee in bankruptcy who, after considering Mr. Coffey's relatively low income compared to his debts, recommended that Mr. Coffey file an assignment in bankruptcy. Mr. and Ms. Coffey filed an assignment in bankruptcy in September 2003 despite the fact that their creditors were not pressuring them to repay their debts.

Issue: Should the bankrupts be absolutely discharged, conditionally discharged, or should the bankrupts' discharge be refused?

Decision: James Coffey was discharged on the condition that he consent to an order for $80,000 in favour of the trustee. The order would not be executed as long as Mr. Coffey complies with the payment schedule established by the judge. As for Julie Coffey, she was discharged unconditionally.

Discussion: The court was not prepared to grant an absolute discharge because the value of Mr. Coffey's assets was not equal to fifty cents on the dollar on the amount of his unsecured liabilities as prescribed under paragraph 173(1)(a) of the *Bankruptcy and Insolvency Act* (BIA). Furthermore, he did not establish that he "cannot justly be held responsible" for the amount of his unsecured liabilities.

The bank loan advanced to Mr. Coffey was not granted in consideration of his current ability to pay, but in consideration of his future ability to pay. Mr. Coffey's anticipated ability to pay the loan after his studies was not questioned and nothing in Mr. Coffey's situation changed since the date the Bank of Montreal accepted to grant the line of credit. Mr. Coffey is not under pressure from creditors, and a release of his debts would not offer him a fresh start, but it would allow for the continuation of a steady path so that he may achieve his degree in medecine. To permit a discharge in the circumstances would hinder the integrity of the bankruptcy process. The Court was of the view that a conditional discharge must be granted. It must reflect James Coffey's present and anticipated ability to pay his liabilities.

The court also held that, in the circumstances, the trustee's recommendation to grant an absolute discharge was not in accordance with his duty to maximize the estate for the benefit of the creditors.

In the matter of the bankruptcy of Cyrenus Joseph Dugas

New Brunswick Court of Queen's Bench
Registrar Bray

Citation: 2004 NBQB 200

Facts: Peter Gaudet, Adam Gaudet, and 508571 N.B. Ltd.(the "Creditors") opposed Mr. Dugas' (the "bankrupt") discharge claiming that he had not paid a debt of $2,050,000. This debt was the result of a judgment arising from an action for breach of contract involving the sale and purchase of a snow crab licence, the quota and benefits attached, and a fishing vessel. The Creditors argued that the fishing licence, if surrendered, could have generated surplus income in order to substantially reduce, if not completely eliminate, the liabilities of the estate. The Creditors also argued that the bankruptcy was nothing but a tactic to avoid having to pay the judgment debt. Furthermore, the trustee stated that the bankrupt could have made a viable proposal. It is to be noted that the trustee also opposed the discharge on the basis of subsection 173 (1) of the *Bankruptcy and Insolvency Act* (BIA). For his part, the bankrupt argued that the judgment debt was not the cause of his bankruptcy, but rather was the result of aggressive recovery attempts made by the Creditors. Furthermore, he indicated that his creditors aggressive attempts to collect made it impossible for him to make any proposals. In addition, he stated that his waiver of revenues for the 2003 fishing season gave him immunity from a evaluation by the trustee pursuant to s. 68 of the BIA.

Issue: Given the circumstances, was it appropriate to grant the bankrupt's discharge? If so, what were the appropriate conditions, if any, to be imposed?

Decision: The Court granted a suspended discharge. In addition, the following conditions were imposed:

(1) The bankrupt must complete and submit a financial statement for each month of the bankruptcy;

(2) He must cooperate fully with the trustee and remit all surplus income until the end of the suspension of the discharge;

(3) In the event that the bankrupt transfers his rights in the fishing license in a non-arm's length transaction, 30% of the consideration will be used to calculate his income for the purposes of s. 68 of the BIA.

(4) If such a transfer is in an arm's length transaction, the calculation of income shall include 70% of the consideration.

Discussion: In the case at bar, the bankrupt's inability to pay the judgment debt was the main cause for bankruptcy. Although the bankrupt maintained that this inability was the result of the Creditors' aggressive collection action, the Registrar found no fault with the Creditors' actions.

In regards to the possibility of filing a proposal, the Registrar explained that there was no reason why a proposal would not have succeeded under normal business circumstances. He added that although a snow crab license was not in itself an asset which could be seized and sold for the benefit of the Creditors, it would have been erroneous to suggest that the bankrupt had no right to the benefits emanating from the license. The earning potential of the bankrupt arising from the license was to be scrutinized in order to establish the conditions of discharge. To withhold income arising from the license would not only have hindered the creditors, but would also have gone against the principles of the bankruptcy legislation representing the public interest. Finally, it appeared that the value of the bankrupt's assets was not equal to fifty percent of the debts and that the bankrupt failed to maintain proper books and records.

Appealed

In the matter of the bankruptcy of Pierre Gadoury

Quebec Superior Court
Registrar Pellerin

Docket: 500-11-022518-043

Facts: On June 16, 2003, Pierre Gadoury (the "debtor") made an assignment in bankruptcy. In the bankruptcy documents, the debtor maintained that he had never before declared bankruptcy in Canada. As it turned out, not only had the debtor declared bankruptcy in 1989, but he had not yet been discharged at the time of the second filling. Therefore, the trustee motioned to have the second bankruptcy annulled.

Issue: Could the debtor make an assignment in bankruptcy while still undischarged from a prior bankruptcy?

Decision: The Court annulled the second assignment in bankruptcy.

Discussion: The Court concluded that the legislature clearly intended that prerogatives under the *Bankruptcy and Insolvency Act* (BIA) be reserved to debtors who are not undischarged bankrupts. First, s. 49 presents the requirements to be eligible to file an assignment in bankruptcy. A person must be insolvent, and the s. 2 defines such a person as being "a person who is not bankrupt". Secondly, the Court concluded that since subsection 71(2) of the BIA vests property in the trustee, "it seems obvious that the legislature could not have conceived the possibility for a debtor to simultaneously submit creditors to two different bankruptcy cases".

The debtor contested the trustee's motion relying on two similar cases. However, in one of the cases, the judge recognized that the courts had established the principle according to which, because of the forementioned provisions, the filing of a second bankruptcy by an undischarged bankrupt was null *ab initio* — from the start. In the case presented by the debtor's lawyer, the judge had concluded otherwise. In the case at bar, the Court set aside the latter's reasoning and applied the rule establishing that an undischarged bankrupt cannot file for a second bankruptcy.

In the matter of Robert Ross Garfat (Re)

Supreme Court of British Columbia
Registrar Bouck

Facts: Mr. Garfat ("bankrupt") is 51 years old and resides with his wife, Ms. Johnson. The couple lives in a modest home inherited from Ms. Johnson's mother. No rent nor mortgage debts are claimed in the statement of receipts and disbursements. Mr. Garfat had obtained a student loan form Human Resources Development Canada ("HRDC") in order to finance his post-secondary education for which he completed his last year of study in 1989.

After his studies, Mr. Garfat worked free lance before becoming director of a theatre company in Vancouver. He made minimal payments on his student loan since 1989. Six years ago, when the couple moved to Vancouver Island, Ms. Johnson became the owner of a bookstore of which Mr. Garfat considered himself an employee, even though he received monthly earnings equivalent to half the store's profits. To this day, the store has generated very little revenue. Mr. Garfat chose not to seek employment elsewhere because he believed that stores like "Chapters" offer short-term jobs that pay only minimum wages, but he acknowledged that the minimum wages are higher than his current earnings. He contended that he would not integrate well with a group and that he liked the challenges related to his current employment.

Mr. Garfat declared numerous discretionary expenditures, including monthly expenses ranging from $700 to $800 for groceries and the purchase of a $300 motor for a hot tub he considered essential due to Ms. Johnson's arthritis. He made reference to the importance of healthy eating to explain why he spent so much on groceries. Mr. Garfat and Ms. Johnson each own a vehicle that needs repairs and maintenance. Mr. Garfat admitted that, by filing for bankruptcy, his main objective is to discharge his student loan.

Issue: Despite HRDC's opposition, does Mr. Garfat have the right to an absolute discharge?

Decision: The Court was of the opinion that an application for absolute discharge must be rejected in light of Mr. Garfat's refusal to take responsibility for his student loan. For four months starting January 2004, the bankrupt had to submit to the trustee his account statements along with surplus income payments according to the Superintendent's guidelines. The Court did not fix minimal monthly payments but expected that Mr. Garfat's expenses would diminish.

Discussion: HRDC alleged that the bankrupt was voluntarily under-employed, that he admitted that his willingness to discharge his loan motivated him to declare bankruptcy and that for these reasons the bankrupt should not be granted an absolute discharge. HRDC also contended that by eliminating discretionary expenditures relating to vehicle repairs and by reducing food expenses, the bankrupt would be able to transfer his surplus income to HRDC.

The Court considered that an absolute discharge of the bankrupt would prejudice HRDC, the only significant creditor. To erase the loan would be to abuse the system, given that the bankrupt benefited from an education funded by Canadian taxpayers and made minimal efforts to repay the loan. Despite Mr. Garfat's statements, the court believed that the bankrupt did not seriously consider paying back the loan. The bankruptcy did not result from misfortune, but rather from the bankrupt's epiphany: having reached the age of fifty, he wanted a fresh start. Nevertheless, even if Mr. Garfat obtained a better paying job, it was unlikely that significant payments would be made to the creditor. In addition, even if Mr. Garfat lowered his expenses, most of the money would go to the trustee, and payments made to the creditor would not be sizeable. Considering the bankrupt's personality, it was doubtful that he would be able to maintain employment in a large organization such as "Chapters" and nothing suggests that his field of study would open the door to higher paying job opportunities.

In the matter of Jefferson (Re)

British Colombia Supreme Court
Registrar Baker

Citation: 2004 BCSC 144

Facts: Mr. Jefferson ("bankrupt") applied for his discharge pursuant to section 172 of the *Bankruptcy and Insolvency Act* (BIA). His former wife, Ms. Larsen, opposed the discharge by invoking grounds referred to in section 173(1) of the BIA. She is an unsecured creditor by virtue of a decision rendered during the divorce proceedings. Her counsel also raised questions as to Mr. Jefferson's credibility and degree of disclosure of documents.

Issue: Did the conduct and the actions of Mr. Jefferson, during his bankruptcy, lead the court to believe that section 172 and 173(1) of the BIA should be applied, hence, suspending or imposing a condition on the bankrupt's discharge?

Decision: The bankrupt failed to fulfill his duties under section 158 of the BIA. He was granted a conditional discharge and had to pay his trustee the sum of $50,000. His discharge is also suspended for six months, starting on the date of the payment.

Discussion: The bankrupt's evidence relating to his assets, their value and his financial affairs was inaccurate and unreliable. The Registrar stated that Mr. Jefferson misrepresented his situation in an attempt to facilitate his discharge by omitting to provide accurate information about his financial situation. The bankrupt's declarations regarding his reasons for bankruptcy were inconsistent. The Registrar rejected Mr. Jefferson's allegations that his assignment in bankruptcy was triggered by financial difficulties, and concluded that the bankruptcy was a result of the judgment rendered in favour of Ms. Larsen.

With respect to Mr. Jefferson's income during the bankruptcy, the Registrar concluded that it was very difficult to accurately or reliably calculate it given that he did not provide any significant evidence to justify recent or current income. The Registrar stated that the amount of $57,828 established as Mr. Jefferson's income by Judge Pratte during the divorce, 10 months prior to the bankruptcy, set an appropriate benchmark for determining his current income.

The sale of the residential property to Ms. Middleton, his new partner, was done under suspicious circumstances and accentuates doubts in regards to his demeanour throughout the proceedings. In this regard, the Registrar indicated that Mr. Jefferson's lack of knowledge regarding the appraisal amount of the residence led the court to believe that either the bankrupt was not honest in his evidence or rather that he was extremely casual in regards to his attitude towards his own assets and bankruptcy. This approach was also evident in respect of his financial obligations. In terms of the value of the bankrupt's company and the purchase of its assets, the Registrar asserted that the bankrupt has continued his business activities under a new name. On different occasions, the bankrupt offered contradicting answers in response to questions relating to his use of Ms. Middleton's credit cards as well as undeclared funds. The Registrar concluded that the bankrupt's carelessness to properly list and value his shareholding interest in his company and in his statement of affairs, in addition to his lack of any effort to deliver the books and records, led to the application of section 172 and 173(1) of the BIA.

In the matter of David Michael Morgan (Re)

Supreme Court of British Columbia
Registrar Bouck

Citation: 2004 BCSC 1602

Facts: On February 25, 2004, Mr. Morgan ("bankrupt") made an assignment in bankruptcy. His debts consisted mainly of a student loan in the amount of $13,756, which he borrowed in the mid 1980s. The bankrupt, having had a low income for the past 14 or 15 years, made no effort to pay his student loan until June 22, 1994, when Human Resources Development Canada ("HRDC") obtained a judgment against the bankrupt in the amount of $12,711. However, during the bankruptcy, Mr. Morgan suffered a workplace injury, at which time his income was reduced to $1,588 per month, an amount below the Superintendent's guidelines regarding surplus income. In addition, the bankrupt was required to pay spousal and child support, leaving him with an income of between $80 and $150 during his bankruptcy.

The bankrupt did not pay his student loan in full because he could not afford to do so. HRDC opposed Mr. Morgan's request for an absolute discharge primarily because he did not try to repay the rest of his loan and he would probably never have tried do it but for the judgment. HRDC submitted that the bankrupt had the ability to pay more than $150 per month to his creditors.

Issue: Should the Court grant an absolute or conditional discharge to Mr. Morgan?

Decision: An absolute discharge was not appropriate in the circumstances. The court ordered a conditional discharge but without an order to pay a specific sum.

Discussion: First, the bankrupt performed all of his duties. The Court shared HRDC's opinion that if it were not for the judgment, Mr. Morgan would not have paid his loan and would have ignored completely its repayment. The Registrar ruled that to grant an absolute discharge would condone such a conduct.

Secondly, the Court mentioned that Mr. Morgan did not only have his student loan to repay but he also had two children and an ex-wife to pay, and that his future earning capacity was uncertain. The Court ordered the bankrupt to provide the trustee with statements of income and expenses for the next nine months. The Bankrupt also had to give the trustee, every month, any surplus income that he might have had the previous month.

In the matter of Wasylyshen v. Canada (Minister of National Revenue)

Saskatchewan Court of Queen's Bench
Kyle J.

Citation: 2004 SKQB 362.

Facts: Mr. Wasylyshen, a third time bankrupt, had lost his right to practice law due to the misappropriation of certain funds. He applied to the court for an order for a discharge from bankruptcy. His assets included hunting and fishing equipment valued at $250. He sold $1,300 worth of furniture and transferred an automobile to his daughter. Prior to July 23, 2003, he had not made any income tax payments. On June 6, 2003, the date of his assignment in bankruptcy, his liability towards the Canada Customs and Revenue Agency ("CCRA") totalled approximately $270,000. The Canadian government wrote off over $360,000 worth of unrecoverable claims, namely unpaid income taxes, unremitted payroll, etc. In light of the fact that the bankrupt's behavioural pattern had remained unaltered, CCRA requested that his discharge be suspended for a period of no less than three years.

Issues:

(1) Did the circumstances surrounding this case warrant a suspension of the bankrupt's discharge?

(2) Did the bankrupt's assets, namely the hunting and fishing gear, the furniture sale proceeds and the automobile, vest with the trustee?

Decision: The Court ordered that the bankrupt's discharge be suspended for two years. During this period, the bankrupt would be required to file his tax returns in a timely manner and pay a $2,050 fee to the trustee. The bankrupt's assets, with the exception of the hunting and fishing gear, vested with the trustee.

Discussion: The facts of this case left very little hope that the bankrupt will improve his financial position or reduce his indebtedness in any significant manner. In the matter at hand, the Court sought to discourage self-employed individuals from violating Canada's taxation laws. It recognized that the bankrupt, as a taxpayer in a democratic society, had basic obligations witch should not be overlooked. The Court also concluded that the realization value of the furniture was not exempt and that these proceeds should have been paid to the trustee. In addition, it was improper for the bankrupt to give an automobile to his daughter less than one year before the date of his bankruptcy.

Post Discharge

In the matter of John Chaloux v. Kingston Fairways Golf Course, Kevin Comstock et James Staley

Ontario Superior Court
Belch J.

Citation: [2004] O.J. No. 336

Facts: Following injuries on a golf course the Applicant, John Chaloux, commenced legal proceedings against the Kingston Fairways Golf Course ("Kingston") and his assailants for personal injuries and general and special damages. At one point in the proceedings, Mr. Chaloux discussed the possibility of discontinuing the action against Kingston. However, the court still needed to address the issue at the defendant's costs in the amount of $2,500. During this period, the Applicant made a voluntary assignment into bankruptcy. The trustee served notice of the bankruptcy proceedings, and the trial judge ordered a stay of the civil proceedings. The trustee informed the defendant's law firm that it appeared in the bankruptcy as a creditor for costs in the amount of $5,000. A representative of the law firm notified the trustee that the firm should be removed as a creditor as agreement or court order fixing costs existed. Moreover, the defendant argued that there should not be a stay of proceedings pursuant to section 69.3(1) of the *Bankruptcy and Insolvency Act* (BIA) because compensation for the personal injury does not vest in the trustee. The bankrupt obtained his discharge before the defendant could prepare the necessary paper work to have the stay of proceedings lifted.

Issues:

(1) Did an action for compensation for personal injury vest the in the trustee in bankruptcy?

(2) Are the costs a debt incurred after a bankrupt's discharge and, therefore, not a debt extinguished by the plaintiff's assignment?

(3) If the costs survive, what is an appropriate quantum?

Decision:

(1) The judge decided that the Applicant's action for personal injury cannot be vested in the trustee.

(2) As no court order for cost was rendered, the costs could not be a provable claim in the bankruptcy.

(3) The judge established the costs at $5,250 plus GST and disbursements.

Discussion: The court was satisfied on the authority of *Holley v. Gifford Smith Ltd*. by the Court of Appeal in 1926. In that case the judge said that if the plaintiff's claim is personal in nature, the right of action does not become the property of his trustee in bankruptcy. Moreover, no jurisprudence or subsequent legislation shows that this decision, which relates to the damages caused by mental suffering, is not to be followed. The judge added that there was no transmission of interests under the terms of rule 11.01 of the Ontario Rules of Civil Procedure and that the motion for a stay of the proceedings should not have been granted under s. 69 of the BIA.

No evidence showed that the defendant improved his situation while waiting one year before he brought an action to lift the stay of proceedings. Also, the court supported the defendant who argued that the costs are not a provable claim under the terms of section 121(1) of the BIA. The judge considered the similarities between the English legislation and section 121(1) of the BIA and acknowledged that *Glenister v. Rowe* is only a persuasive decision since it is from another jurisdiction. This case law dealt with costs resulting from an appeal, but it also applied to the costs of a lower authority court. This decision stressed that, even if the costs are a possible future debt, they cannot be regarded as a possible responsibility because of their discretionary nature. In other words, a claim for costs becomes a liability only when an order for costs is rendered.

Finally, there was a general agreement between the parties that $2,500 was adequate compensation. Moreover, the expenses of correspondence amount to $250, and the costs for the motion are $2,500 for a total of $5,250, plus GST and disbursements.

In the matter of Marino (trustee of) v. Marino

Ontario Court of Appeal
Charron, Lang, Laskin JJ.A.

Citation: [2004] O.J. no. 3104

Facts: In April 1997, Mr. and Mrs. Marino (the "bankrupts") made an assignment in bankruptcy in which Deloitte & Touche LLP acted as trustee. The bankrupts were told that they could remain in their home and that the trustee would not make a claim against their house as the trustee did not feel it worthwhile to realize on this asset given the outstanding mortgages and tax arrears. A series of events and correspondence clearly indicated that there was no claim, nor any intention to claim, any interest in the home. The bankrupts were discharged in January 1998 and were again reassured there was and would be no claim against their home. Throughout the administration of the estate, several different employees of Deloitte & Touche LLP worked with the Marinos as the trustee's representatives. Relying on the statements made by the trustee, the bankrupts made payments on outstanding mortgage arrears and planned home renovations. Mrs. Marino's trustee was discharged in respect to Mrs. Marino's bankruptcy that summer. In June 1999, twenty six months after the bankruptcy, sixteen months after their discharge, and eight months after the trustee's discharge as Mrs. Marino's trustee, the latter finally registered a claim against the home, pursuant to subsection 74(2) of the *Bankruptcy and Insolvency Act* (BIA). Correspondence was exchanged until the trustee filed a motion for possession and directions for the sale of the Marino home and the distribution of the sale proceeds to the creditors.

The trustee argued that the vesting, pursuant to subsection 71(2) of the BIA, continued after the discharge and that any delay by the trustee was irrelevant because the property was vested in the trustee and remained so. The trustee argued that the bankrupts had the option of applying to the Court for a vesting order under section 37 of the BIA. The bankrupts argued that they relied upon the trustee's representations and that they would not have paid arrears or principal on the mortgages, nor would they have

undertaken substantial improvements to the home, if not for those representations.

The motion judge found that too much time had passed for the trustee to advance a claim against any equity in the property. He noted that the trustee's late effort to realize against the house was "inconsistent with the Act's philosophy of providing bankrupts with a fresh start". He concluded that the home was "incapable of realization" within the meaning of section 40(1) of the BIA and ordered the property vested in the Marinos. The case at bar was the trustee's appeal of the motion judge's decision.

Issues:

(1) After his discharge as Mrs. Marino's trustee, did the trustee still have the authority to sell her interest in the house?

(2) In regards to Mr. Marino's interest, did the trial judge err in his application of s. 40 of the BIA, by deciding that the home was "incapable of realization"?

(3) Was the trustee estopped, or otherwise prohibited in equity, from realizing his interest in the home?

Decision:

(1) Absent any application for re-appointment, the trustee had no authority to deal with the property unless the dealing was "incidental" to the administration of the estate, which it was not.

(2) It could not be concluded that the home was an asset "incapable of realization".

(3) The representations and conduct of the trustee and the Marinos' actions in relying on them estopped the trustee from now realizing upon the property.

Discussion: Pursuant to subsection 41(10) of the BIA, after discharge as trustee, the latter continues in its position only for "such duties as may be incidental to the full administration of the estate". The sale of Mrs. Marino's interest in the home was not merely incidental to the administration of the estate, especially considering the home was her only asset with any significance. If unsatisfied, the trustee could have sought re-appointment as trustee to complete the estate's administration, pursuant to subsection 41(11) of the BIA.

In regards to Mr. Marino's interest in the home, the trustee was still active as Mr. Marino's trustee. The undischarged trustee was not restricted to incidental issues regarding Mr. Marino's interest in the home, as he was with Mrs. Marino's interest. Although throughout the administration of the estate the trustee continuously indicated that the house would not be realized, it could not be concluded that the trustee considered the asset as "incapable of realization". Hence, the trustee could have decided to realize on the asset. The only issue was the delay in realizing the asset.

To rely on promissory estoppel, Mr. Marino had to establish that:

1) the trustee, by words or conduct, made a promise or assurance which was intended to affect his legal relationship with Mr. Marino and intended Mr. Marino to act upon it; and

2) Mr. Marino, relying on the representation, acted on it or in some way changed his position.

The Court found that not only did the trustee give assurances to the Marinos, but the Marinos also did not engage in any conduct that would have misled the trustee. The motion judge found as a fact that the Marinos acted honestly. They continued to reside in the home and build equity. The trustee gave assurances as of 1997 that he would not proceed against the house. If it were not for this assurance, the Marinos could have moved to another property and begun their "fresh start" contemplated by the BIA. The Court concluded that the motion judge made no error in deciding that any equity in the family home belonged to the Marinos.

In the matter of Multi Broyage DLC Inc. (Re)

Quebec Superior Court
Lemelin J.C.S.

Citation: 2004 WL 1434624

Facts: Multi Broyage DLC Inc. ("debtor") made an assignment in bankruptcy on September 25, 2003, with Ernst & Young inc. ("trustee") appointed as trustee. The latter made an application for recovery of moneys against Doppstadt d'Amérique du Nord inc. ("Respondent"). Before this application was heard, the trustee was discharged on April 21, 2004.

The attorney for the creditors wanted to file a motion for recovery of moneys. The court informed him that the trustee had already been discharged. The respondent's attorney argued, as a preliminary argument, that

the motion must be dismissed as inadmissible because the trustee, having been discharged, had neither the interest nor the authority to appear in judicial proceedings. The attorney for the creditors asked the court to reinstate the trustee so that he may return to his duties in compliance with subsection 41(11) of the *Bankruptcy and Insolvency Act* (BIA). The respondent's attorney insisted that the court first deal with his preliminary argument.

Issue: Despite the trustee's discharge, does he have the authority to present a motion for the recovery of moneys?

Decision: The court dismissed the motion for the recovery of moneys.

Discussion: The court was of the opinion that the trustee did not have the status to appear before the court because, at the trustee's request, he had been discharged under subsection 41(4) of the BIA. The administration of the estate was complete, and the accounts were approved and taxed. The special resolution resulting from the creditors' meeting, during which the trustee was appointed, no longer had any effect because of the trustee's discharge. The trustee acted as a representative of the creditors and, without this necessary designation, he could not administer the bankruptcy. The trustee therefore no longer had the legal capacity or standing to continue its action against the Respondent.

The attorney for the creditors argued subsection 41(10) of the BIA. This section had been interpreted as restricting the exercise of the trustee's powers after its discharge to powers that are purely administrative. The court is of the opinion that the motion for recovery of moneys goes beyond what is considered a purely administrative act.

In the matter of Sangha (Re)

Supreme Court of British Columbia
Master Groves

Citation: 2004 BCSC 799

Facts: In 1994, Kundan Singh Sangha ("bankrupt") hit his daughter and her boyfriend ("pedestrians") with his car in a manner that was clearly intentional. Insurance Corporation of British Columbia ("ICBC") reached a settlement with the pedestrians as compensation for their injuries pursuant to subsection 21(1) of the *Insurance (Motor Vehicle) Act*, which was paid. Alleging that committing an intentional act of violence breached the insurance, ICBC commenced proceedings against the bankrupt to recover the amount of the settlement. A judgment was granted in favour of ICBC in the amount of $316,937 plus interest and costs. Shortly after, Sangua made an assignment in bankruptcy in which the amount owed to ICBC represented 97% of the total amount of the claims filed against his estate.

Issue: Is section 178 of the *Bankruptcy and Insolvency Act* (BIA) sufficiently broad to allow ICBC's judgment to survive the discharge of bankruptcy?

Decision: The trial judge's order in favour of ICBC is an order in the nature of a penalty. The claim falls within the parameters of paragraphs 178(1)(a) and 178(1)(a.1) of the BIA. The trial judge ordered that the judgment was a debt not to be released by order of discharge.

Discussion: For a judgment to fall within paragraph 178(1)(a) of the BIA, the court must be satisfied that the order sought is one relative to a "fine, penalty of restitution order or other order similar in nature… ." This case involved an order similar in nature to a penalty. The court was satisfied that ICBC's claim fell within the parameters of paragraph 178(1)(a.1) of the BIA because ICBC's award was one for damages in a civil proceeding involving intentional bodily harm.

However, the problem was that the award for damages was clearly not an award to a victim directly, but rather to the insurer as a subrogated claim.

The Court looked at the provisions of paragraph 178(1)(a.1) in their general sense and considered their purpose. The Court pointed out that the "statutory mechanism of discharge was created to give the honest but unfortunate debtor a fresh start. It was not intended to be a tool upon which perpetrators of violent crimes could rely to avoid paying for their actions. ICBC's order is exactly what the legislator had in mind when creating the exceptions to discharge. Society's interest in punishing such behaviour far outweighs any benefit that might be gained from releasing the bankrupt from this type of debt.

In the matter of Young (Re)

Nova Scotia Supreme Court
Registrar Cregan

Citation: 2004 NSSC 147

Facts: Tracey Madeline Young ("bankrupt") filed an assignment in bankruptcy. However, she had no realizable assets nor sufficient income to cover the trustee's costs and fees under Rule 128 and section 68 of the *Bankruptcy and Insolvency Act* (BIA). Therefore, on the day of her assignment in bankruptcy, she entered into an agreement with the trustee whereby she would cover his costs and fees for a total of $1,550. Before being discharged from bankruptcy, she paid the trustee a total of $650.

Following her discharge, she paid a further amount of $900 in order to satisfy the terms of the agreement. The trustee then submitted to the Office of the Superintendent of Bankruptcy his statement of receipts and disbursements. The Superintendent responded by issuing a negative letter of comment based on the Manitoba Court of Appeal's decision in *Re Berthelette*. In that case, the Court decided that the bankrupt's fee agreement with her trustee was a claim provable in bankruptcy and that, once discharged, the bankrupt had no legal obligation to make payments. The Superintendent therefore requested that the trustee return the $900 paid by the bankrupt after her discharge or that he justify this payment before the Court through the taxation of his fees.

Issue: Is the bankrupt's obligation under the fee agreement enforceable after her discharge? In other words, does the judgment in *Re Berthelette* apply in this matter?

Decision: The Registrar followed the judgment rendered in *Re Berthelette* and concluded that fee agreements reached on or before the filing of an assignment in bankruptcy do not survive a discharge. The trustee was therefore ordered to return the bankrupt's $900 payment.

Discussion: The Registrar concluded that *Re Berthelette* applied because the facts of that case are very similar to those of this case. However, the trustee highlighted the Quebec Court of Appeal's decision in *Re Vanderbanck*, where it was concluded that payments made after discharge pursuant to a fee agreement do indeed survive a bankruptcy. The Court admitted that this judgment is favourable to the trustee's position, but also pointed out that it was rendered before the *Re Berthelette* decision. The *Re Berthelette* case is much more persuasive and has been followed by the courts. It stated that an agreement made on or before the day of the assignment gave rise to a claim provable in bankruptcy. As a result, the bankrupt's obligations under the agreement did not survive a bankruptcy discharge. It remained unclear whether fee agreements made after the filing of an assignment could be enforced. However, the Registrar suggested that such agreements should not be enforceable either.

In the matter of Marchand Syndics Inc. v. Attorney General of Canada

Quebec Superior Court
Mongeon J.

Citation: 2004 J.Q. No.5004

Facts: Marchand Syndics Inc., Georges E. Marchand and Bruno Marchand ("trustees") were the subject of conservatory measures from the Office of the Superintendent of Bankruptcy ("OSB") regarding 48 files that had not been closed. The conservatory measures entrusted H.H. Davis & Associés Inc with the task of pursuing the administration of the files and to see to their closing. The trustees went to the Superior Court and obtained an interim safeguard order from Justice Guibault regarding the conservatory measures. They also asked the Superior Court to lift the series of conservatory measures. In addition, they contested the constitutionality of sections 14.02(5), 14.03 and 14.03(1)(d) of the *Bankruptcy and Insolvency Act* (BIA) and also subsection 18(1) of the *Federal Court Act* ("FCA") and requested a stay of the conservatory measures during the proceedings on the ground that these statutory provisions were constitutionally invalid. The Attorney General of Canada filed a motion for declinatory exception alleging that the Superior Court had no jurisdiction to modify or revise the decisions of the Superintendent of Bankruptcy ("Superintendent").

Issues:

(1) Which of the Quebec Superior Court or the Federal Court had jurisdiction to revise or modify the conservatory measures?

(2) Notwithstanding the aforementioned judicial question and in reference to the issue regarding the constitutional validity of sections 14.02(5), 14.03 and 14.03(1)(d) of the BIA and also section 18(1) of the FCA, was it appropriate to make an order suspending the application of these provisions during the proceedings based on the principles laid out by the Supreme Court of Canada in *RJR MacDonald v. Canada and Manitoba v. Metropolitain Stores (MTS) Ltd.*?

Decision: The Court declared that the Superior Court had no jurisdiction in matters relevant to the modification and revision of the Superintendent's decisions. The judge rejected the request for a stay of application of sections 14.02(5), 14.03 and 14.03(1)(d) of the BIA and also section 18(1) of the FCA. Finally, the temporary enforcement of the safeguard order was maintained until April 15, 2004.

Discussion: First, the provisions of sections 14.01 to 14.03 of the BIA must be read as a whole. Thus, the Federal Court has the jurisdiction to hear a judicial review of the Superintendent's decision regarding conservatory measures.

Secondly the trustees' application for a safeguard order in the context of the constitutional debate arising from sections 14.02(5), 14.03 and 14.03(1)(d) of the BIA and section 18(1) of the FCA must meet three tests:

(1) The seriousness of the issue;

(2) The irreparable character of the prejudice; and

(3) The balance of convenience.

The first test was met because it is important to respect natural justice laws by submitting this issue to a judicial or quasi-judicial tribunal with a minimum level of independence towards the parties. The second test was met because the limitations imposed on the exercise of the trustees' profession clearly caused an immediate and irreparable prejudice. However, the third test was not satisfied, meaning that it would go against the public interest to presume the invalidity of the contested provisions instead of presuming their validity. Consequently, the trustees had no right to the stay requested.

In the matter of McMahon v. Canada (Attorney General)

Federal Court
Lemieux J.

Citation: 2004 FC 540

Facts: The Superintendent of Bankruptcy ("Superintendent") decided to suspend the license of Ron J. McMahon ("trustee") for two months on the ground that he had mismanaged funds. The Superintendent rendered this decision approximately seven months following the three-month time limit prescribed by subsection 14.02(4) of the *Bankruptcy and Insolvency Act* (BIA). The trustee subsequently applied for a judicial review to raise objections in regards to this delay. Pending the result of this application, the trustee continued to practice as a licensed trustee in bankruptcy.

Issue: Must the word "shall" found within the English version of the provisions of subsection 14.02(4) of the BIA be read as mandatory or directorial within the context of this case?

Decision: The word "shall" is to be read as directorial. The judicial review application was dismissed and the trustee's licence was suspended for two months as previously decided.

Discussion: Although the word "shall" is to be construed as imperative under section 28 of the *Interpretation Act of Canada*, the jurisprudence has interpreted it as directorial in certain circumstances. Three principal factors are considered by the courts in order to determine if the word "shall" is to be read as directorial. First, the duty being discharged must be a public duty. Secondly, the court must consider where the balance of convenience lies. Thirdly, the court must determine whether the law prescribes a penalty for failure to comply.

In this case, the Superintendent was discharging a public duty and the BIA did not provide for a penalty for failing to render a decision within a three-month time limit. Furthermore, the focus on the prejudice to the parties yielded that the trustee had suffered little inconvenience because he continued to practice as a trustee

during the Superintendent's deliberation. In fact, the trustee made no allegation that his practice had suffered financially or that his reputation had been affected by the delay.

A reversal of the Superintendent's decision would compromise the disciplinary measures conducted under the BIA, measures that affect the public interest. Nevertheless, the disposition of this judicial review did not give the Superintendent the licence to render decisions under subsection 14.02(4) of the BIA beyond the prescribed time limit.

Appealed

Professional Conduct: Judicial Review

In the matter of Musique Kasma Inc. (Re)

Quebec Superior Court
Registrar Leblanc

Citation: 2004 CarswellQue 2460

Facts: A business enterprise, Musique Kasma Inc. ("Kasma"), made an assignment in bankruptcy. Three years later, following the trustee's omission to provide the explanations and documents sought in respect of his statement of receipts and disbursements, the Office of the Superintendent of Bankruptcy ("OSB") issued a negative first letter of comment. No bank account had been opened in the name of the bankrupt's estate, and no client card existed. The trustee had conducted all transactions from his operations account. Because no deposits were collected, the trustee, in order to close this file comprised of receipts amounting to $33.51, had to provide an amended statement of receipts and disbursements in which he contributed $688,33 to cover the disbursements. As a result, the Superintendent of Bankruptcy sought taxation of the statement of receipts and disbursements in which no trustee fees were anticipated. However, in light of the trustee's omissions, the Superintendent of Bankruptcy was unable to verify the transactions conducted by the trustee and criticized him for the following:

a) Having breached his duty by not opening a trust account at the bank in the name of the estate, pursuant to subsection 25(1) of the *Bankruptcy and Insolvency Act* (BIA);

b) Not having made the payments by means of cheques drawn on the estate's account, as prescribed by section 25(2) of the BIA.;

c) Not having kept proper books or records of administration, in accordance with subsection 26(1) of the BIA.

Issue: Does the bankruptcy Registrar have jurisdiction over the questions raised by the Superintendent?

Decision: The Registrar taxed the trustee's disbursements at $688.33 and his fees at $0.

Discussion: The Registrar concluded that the legislator intended that the decision of a Registrar acting within his or her jurisdiction be of the same legal force as an order rendered by the Court. Despite this conclusion, the Registrar indicated that this jurisdiction did not include the authority to "correct or sanction a trustee's misconduct." However, within the powers of taxation, the Registrar can sanction a trustee for wrongdoings by reducing the fees. Nonetheless, the Registrar could not intervene in this matter because the trustee had no fees.

Insolvency Case Law Digest

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