Court File No. CV-23-00707394-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

Applicant

BOOK OF AUTHORITIES OF THE APPLICANT (MFC DISPUTE RETURNABLE APRIL 16, 2023)

April 15, 2024

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TO: THE SERVICE LIST

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I N D E X

1980 CarswellNat 654
Canada Arbitration

Bank of Montreal v. Wheeler

1980 CarswellNat 654, 25 L.A.C. (2d) 395

In the Matter of the Canada Labour Code

In the Matter of an Adjudication

Scott Wheeler (The Complainant) v. Bank of Montreal (The Employer)

Brown

Judgment: March 10, 1980

Counsel: *D. L. Michael* and others, For the Complainant.
D. K. Gray and others, For the Employer.

Subject: Constitutional; Employment; Labour

Headnote

Human Rights --- What constitutes discrimination — Religion — Work on religious holiday

Employee refusing to work Friday evening shifts because of religious beliefs — Complaint alleging infringement of Canadian Human Rights Act — Termination valid because of bona fide occupational requirement — Termination not amounting to discriminatory practice — Complaint dismissed — Canadian Human Rights Act, S.C. 1976-77, c. 33.

***Howard D. Brown*:**

AWARD

1 The complainant was terminated as an employee of the Bank as of June 8, 1979 as a result of his absence from regularly scheduled shifts on Friday evenings. The issue is whether his dismissal was unjust because of the complainant's religious beliefs as a Seventh Day Adventist by which he is precluded from working from Friday evening sunset until Saturday evening sunset. Following the dismissal as set out in the Employer's letter of June 8th, a complaint was registered with Labour Canada under Section 61.5 of the Canada Labour Code. The matter was subsequently referred to adjudication pursuant to that Act and came on for hearing as above noted. The parties to the complaint were given full opportunity to present their evidence and submissions to the adjudicator at that time. The grievor was hired by the Employer on or about April 6, l976 and was at the time of his dismissal an intermediate computer operator in the batch operations of the central area operations of Toronto regional data centre.

2 Mr. Watman is the batch operations manager, and said the function of the data centre is to act as a clearing house for check processing for southern Ontario, serving 270 branches. The cheques are sent to the centre from the branches, customers' accounts are deducted, and reports are produced concerning the updated accounts and returned to the branches the following morning. There are 249 employees in the data centre, 120 work in data preparation area, and 22 work in the batch operations, seven of whom operate the computers. The operation in which the complainant was employed is on a three-shift basis, 8:00 to 4:00 p.m., 4:00 to 12:00 p.m., and 12:00 to 8:00 a.m., commencing Sunday and concluding Saturday at 6:00 a.m. The complainant's job was to relieve the cheque sorter operators, and to run the computers to produce the reports for the branches. In that operation, there were seven people at his level, and those people are rotated monthly through the shifts. There is only one position available on days, three on evenings and three on nights, with different duties on each shift. These shifts are necessary because cheques come in from the branches in the early evening, and they have until 6:30 a.m. to get them through the accounts and to print the reports and have them ready for dispatch that morning. The heaviest shifts are evening and nights on Monday and Friday,

at which there is a peak volume. If an employee is not at work on those shifts, then someone else has to take over in order to meet their responsibility to have that work completed. People in other departments are not familiar with their jobs for which there is a long training programme of three months on the night shift, one month on evenings, and a month on days for a junior operator. When someone is required to fill in, there is overtime to be paid, and that is a matter of a complaint. When overtime is required on a weekend, it is assigned on a volunteer basis, or a name is pulled out of a hat if they are unsuccessful in getting someone. Supervisors also rotate through the shifts.

3 Mr. Watman said that the complainant was advised at the time that he was hired and when he signed the application for employment that he would be required to work shifts as assigned, and the shift schedules are set up a month in advance. At that time, and up until April, 1979 he did work through the three shifts assigned to him, moving from a junior operator to a promotion to an intermediate operator, which is a technical job and has a substantially higher rate of pay than jobs in other departments of the Bank. In April, he had discussed the Friday evening and night shifts with the complainant who subsequently wrote to Mr. Watman in that connection on April 2nd and stated:

> From now on, I will be unable to work on the seventh day Sabbath, which begins on Friday evening sunset and lasts until Saturday evening sunset.

Mr. Watman was on vacation when this letter was received, but the week following he investigated some alternatives to the complainant working on Friday evening shifts. There were three which he and his supervisors considered; to be assigned to steady nights, to be assigned to steady days, to be allowed to work a four-day week. He said the assignment to steady shifts would result in the complainant not getting total training, which would be required for promotions because of the different jobs on all three shifts. The other two people on nights would then always work Monday through Friday, which would create a morale problem because they are all single people, and do not always want to work Friday evenings. There was only one position on days which would mean that all the other intermediate operators would not get that job knowledge on that shift. The four-day week was rejected because the Employer would require a part-time employee for the fifth day or to pay overtime to some other employee to fill in, and of course would be a reduction in the complainant's income. The complainant did not have any other suggestions, nor did he advise the Employer of any other employee who would fill in for him on such shifts. The complainant did not work on Friday nights after the date of his letter, and did not call in before those subsequent shifts started. Mr. Watman did not find out those circumstances until the second Friday when it occurred. Then on April 25th, he sent a note to the complainant as follows:

> As discussed on April 19, 1979 with regard to your not working evening shifts, due to your religious beliefs, I regret to inform you that this request cannot be granted. At the start of your employment with the Bank, you signed a form which stated the standard working days, and you were at that time, made aware of the working hours within batch operations. Additionally, you have been working at the rotating shifts for the past three years. Therefore, we expect you to report for work on all shifts for which you are scheduled. Failure to comply with this could result in termination of your employment with the Bank...

This was followed by a further discussion on May 2nd, as a result of the complainant's continued absence from work, and on May 7, 1979 Mr. Watman advised the complainant that he was suspended from his job with pay pending the Employer's decision. This was subsequently followed by a letter of termination referred to above. Mr. Watman said that they do face deadlines in the department, and when one or more employee is away it does create problems in getting the work out and with the morale in the closely knit unit. He said employees with other religious backgrounds do work shifts, including a Moslem, and all the employees in the department abide by the same rules as to working shifts on rotation. Another employee from another area or from batch operations would have to cover for any absent employees of the 22 employees in that operation. During the vacation period, they do employ part-time employees who are trained one year, and hopefully return the following year, but those students are not available during the year. He said they have had no real difficulty in obtaining employees on overtime if they are paid extra. Mr. Watman agreed that there were two employees for whom steady shifts were generally arranged; one for the reason of travel, and the other because of his inability to sleep when he is on the night shifts, but said that when those employees are required by the Employer to work the other shifts they do it. Those exceptions do not have any effect on the morale of the other employees because they do work on the other shifts as assigned, and are both senior operators, and experts

in the field. He did not think that the religious conviction had anything to do with the question of who would or could work the required shifts. He discussed the situation and the alternatives with his supervisor, and also the other supervisors in the department, but rejected the alternatives for the reasons he stated.

4 Mrs. MacIntyre, personnel services manager of the Employer, said that she discussed other positions which might be available to the grievor in May, 1979, and told him that his salary range and technical background left little open, and there were no technical positions available, which did not involve shift work. The complainant also did not advise her that he was prepared to take a substantial cut in pay. In any event, there were no administrative jobs available at the time at that salary range. An administrative job is put on a competition basis for which there are long waiting lists. The complainant did not suggest to her any positions in which he was interested.

5 The complainant said that the shift work was bothering him with regard to his religious beliefs, and discussed this problem in April with Mr. Watman. Twice after he did not come into work on Friday evenings, and failed to give notice because he said his supervisor knew why he was not in, and he presumed that he knew that the complainant would not be coming in. He said he studied for the Church for almost two years, and it was subsequently as he became a member of the Church that he decided in April, 1979 that he could not work on the Sabbath. When that decision was made he realized it would affect his employment, and he went to Mr. Watman concerning the problem. He did approach three other employees for a substitution, but their weekends were taken up and could not help him on short notice, but he said the group worked as a team and helped each other, and he had switched shifts for other employees as they had for him on long weekends before the religious arose. He suggested this to Mr. Watman, but he did not seem to take much interest in it. He did not consider another position, but did offer to take a fixed night shift, or to extend his hours. He did tell Mr. Watman that as of a certain date he would not be in on Friday nights. Therefore, he did not think he had to advise him each time he was not there. He agreed that when he was hired he knew that the work required shifts, and he was prepared to work shifts, and did so for three years. The other employees rotated shifts as he did, and he agreed that the same rules applied to all of them. He also agreed that if he worked steady days, then no one else could work that shift, as there is only one job, and if on steady nights then someone else would have to be spending more time, and would not be rotated as often. According to his religious beliefs, no work is to be performed between sundown Friday and sundown Saturday, so that he would not be able to work on an evening shift or night shift on Fridays, and if such a job now was open to him he could not fulfill the requirement.

6 At the outset, it should be noted that there is no dispute concerning the grievor's competence, work performance, or the sincerity of his religious beliefs. I am satisfied on his evidence and that of Mr. Corkum, the Minister of the complainant's Church, that members of the Church observe a day of rest from sunset Friday to Saturday each week, and must maintain that condition to continue to be a member of that Church. No exceptions are made by the Church, which does not have the authority to give dispensation.

7 The essential consideration to be made is whether the Employer discriminated against the complainant because of his religious beliefs in terminating his employment contrary to the Canadian Human Rights Act. Leaving aside that Act for the moment, it is clear that in the ordinary course of employment an employee is required to be available to do the work assigned to him by his employer on a regular basis, and his failure or persistent refusal to perform that work is a ground for dismissal on the basis of insubordination. In this regard, reference was made to re *Black Diamond Cheese and Canadian Food and Allied Workers, Local P-688*, 3 LAC (2d) 151 (Brandt). In this case, there is no doubt on the evidence of the complainant as well as the Employer that at the time the complainant was hired, the conditions relating to his employment were given to him, one of which was the Employer's requirement that he work on a three-shift basis through each of which he would rotate Sunday through Saturday, and he did in fact work under those conditions from the date of his hire up until April, 1979. The complainant progressed from a junior operator to an intermediate operator, and through the training periods required on the job, and was an integral part of the batch operations group. The evidence also establishes that the same requirements were made of all of the other employees in that group. There were two exceptions, but the evidence is that for those two employees for whom accommodations were made, worked as required in any of the shifts. The only thing that changed in the grievor's employment was his conversion to the Seventh Day Adventist Church, which resulted in his belief that he must adhere to the tenet of that Church in not performing work on the Sabbath, which meant that he could not work from sundown Friday to sundown Saturday.

For that reason, he advised his Employer, both verbally and by his letter that he would no longer be available to work Friday evening shifts, and in effect refused from then on to work those shifts, and did not.

8 Those parts of the Canadian Human Rights Act which are material to the matter before me are summarized as follows.

> 2. The purpose of this Act is to extend the present laws in Canada to give effect, within the purview of matters coming within the legislative authority of the Parliament of Canada, to the following principles:
>
> (a) every individual should have an equal opportunity with other individuals to make for himself or herself the life that he or she is able and wishes to have, consistent with his or her duties and obligations as a member of society, without being hindered in or prevented from doing so by discriminatory practices based on race, national or ethnic origin, colour, religion, age sex or marital status, or conviction for an offence for which a pardon has been granted or by discriminatory employment practices based on physical handicap; and...
>
> 3. For all purposes of this Act, race, national or ethnic origin, colour, religion, age, sex, marital status, conviction for which a pardon has been granted and, in matters related to employment, physical handicap, are prohibited grounds of discrimination.
>
> 7. It is a discriminatory practice, directly or indirectly,
>
> (a) to refuse to employ or continue to employ any individual, or
>
> (b) in the course of employment, to differentiate adversely in relation to an employee, on a prohibited ground of discrimination.
>
> 10. It is a discriminatory practice for an employer or an employee organization
>
> (a) to establish or pursue a policy or practice, or,
>
> (b) to enter into an agreement affecting recruitment, referral, hiring, promotion, training, apprenticeship, transfer or any other matter relating to employment or prospective employment, that deprives or tends to deprive an individual or class of individuals of any employment opportunities on a prohibited ground of discrimination.
>
> 14. It is not a discriminatory practice if
>
> (a) any refusal, exclusion, expulsion, suspension, limitation, specification or preference in relation to any employment is established by an employer to be based on a bona fide occupational requirement;

9 For the purposes of this complaint, it must be determined whether the Employer has done something which falls within the prohibited acts under the Statute, and in this regard consideration must also be given as to whether the Employer's practice falls within the exclusion set out in Section 14 thereof. Discrimination is prohibited on the basis of religion, among other things, and under Section 7 to differentiate adversely in relation to an employee on a prohibited ground of discrimination, which includes religion. That prohibition, however, is qualified by the exception contained in Section 14 relating to a bona fide occupational requirement. I note that the complainant, according to the evidence, was treated in the same manner as every other employee in that unit, and was not assigned any work or any shift because of or with an intent to interfere with his religious beliefs. The complainant made his own decision as to what he could and could not do in his job in relation to his religion, and notified his Employer accordingly. In order to accommodate that decision, to allow the grievor that time off or in other words not to work the shift to which he would regularly be scheduled, would affect the other employees in the group, requiring them to work overtime or extra Friday evening shifts so as to miss their rotation. The effect in denying the complainant's request at that time or to make an accommodation for him as a result of his religious conviction, was not to discriminate against him, but would, had the Employer conceded his position, have discriminated in his favour to the prejudice of the other employees, and to the Employer insofar as the additional costs might pertain. By including a saving provision in the above Act, there is a

recognition that an employer as a requirement of the enterprise and of the individual's job, may not be found to discriminate if that requirement is bona fide.

10 In re *The Borough of Etobicoke Fire Department*, the Divisional Court of the Supreme Court of Ontario in a decision released September 20, 1979, dealt with an award of a Board of Inquiry under the Ontario Human Rights Code. In that decision, the Court referred to *The City of North Bay* (1977) 17 O.R. (2d) 712, in which the Tribunal referred to the matter of bona fide occupational classification, as follows:

> Bona fide is the key word. Reputable dictionaries, whether general (such as Oxford and Webster) or legal (such as Black), regularly define the expression in one or several of the following terms, vis. honesty, in good faith, sincere, without fraud or deceit, unfaned, without simulation or pretence, genuine. These terms connote motive and a subjective standard, thus a person may honestly believe that something is proper or right even though objectively, his belief may be quite unfounded and unreasonable... Although it is essential that a limitation be enacted or imposed honestly or with sincere intentions, it must in addition be supported in fact and reason based on the practical reality of the workaday world and of life.

Mr. Justice O'Leary stated

> The test of bona fide as stated by the Board of Inquiry and approved of by the Court of Appeal in the City of North Bay case requires that the employer in imposing the age limitation act honestly or with sincere intentions and that the limitation be supported in fact and reason based on the practical reality of the workaday world.

11 The evidence which I have set out above indicates that at least for the period of the complainant's employment in batch operations, the work has been performed on a twenty-four hour, three-shift basis, Sunday through Saturday, and through which all the employees are required to rotate. They do so in order to obtain the variations in training on each of the shifts in order to prepare themselves for further promotion, and obviously to relieve each other from the otherwise necessity of staying on one perhaps unpopular and inconvenient shift for a lengthy period. The reason for the batch operations was set out by Mr. Watman, and it is with regard to the requirements of that department in relation to the branches which it services that such hours are required of the employees in that operation. The evidence is that the peak period during the week is on Monday and Friday evenings. That situation was not developed in order to affect the complainant's employment, nor to interfere with his life in any way, but is a practical and necessary requirement of the Employer's business. On the tests set out in the Borough of Etobicoke case and the cases referred to, I find that the Employer's practice was based on a bona fide occupational requirement of the job, which is imposed with proper consideration of its business, including the assignment of work to its employees on the shifts which it required in order to conduct the cheque clearing and reporting functions. Accordingly, I find that the Employer's practice is not discriminatory within the meaning of the Canadian Human Rights Act, as it was established to be based on a bona fide occupational requirement, and is therefore within the exception contained in Section 14 thereof.

12 I also have reference to re *Arvin Automotive of Canada Ltd., and U.S.W.A.*, 20 LAC (2d) 366 (Barton), which dealt with a discharge of an employee under a collective agreement, and the grievor, as a member of the Jewish faith, was not to be involved with open fire from sundown on Fridays until sundown on Saturdays, which is his religious day of rest. There was a refusal to do certain work assigned, and the Arbitrator said

> The dilemma which faced the Company was this. Because of the problem caused by the religious beliefs of the grievor, in order to accommodate the grievor, the Company would have to either schedule production and job assignments so that he would not have to work Friday night and Saturday, or create a special category for him based on the assumption that all his requests be excused from overtime would be reasonable ones which must be granted. In our view, however, unfortunate maybe, it would be asking the Company to go too far to require it to follow either of those alternatives. There is no doubt that the problem concerning the grievor's willingness to work on Friday evening or on Saturday arises from his religious belief. If these arguments are valid, it would seem to follow that a special case would have to be made for the grievor and that the work schedules would have to be designed around his ability to work...It would seem to us that insofar as Article 3.02 is concerned, the Company must show that it made reasonable efforts to accommodate the grievor. It is abundantly clear that it did so on several occasions, and thus no violation of Article 3.02 would seem to be proven.

13 There is nothing under the legislation to require this Employer to make any efforts to accommodate the complainant's religious beliefs within the working context, but in fact Mr. Watman and the other supervisors did consider three alternatives to his working Friday evenings. For the reasons he stated, each of those alternatives was turned down, and the reasoning behind the rejection of the alternative was based on the effect that they would have on the other employees' work as well as morale, and of course the third alternative in reducing the grievor's income as well as increasing the cost of the Employer by hiring a part-time employee or paying overtime. If an accommodation could be made in such a situation, it is reasonable to expect an employer to do so, but not to the extent to affect adversely its operations through cost or other employees, and the complainant did not offer or suggest any other alternatives to that mentioned by Mr. Watman. The evidence is also that there were no other positions available within his qualifications, nor in the administrative department, so that even if the issue was to be framed within the concept of reasonable efforts to accommodate an employee in the circumstances, I would conclude that the Employer did meet the reasonable standard in that regard.

14 There are some American cases to which I was referred by counsel for the Employer, and those particularly prior to the 1972 amendment in the Civil Rights Act, which supports the Employer's position. In re *Williams*, 260 A. 2d 889, an employee filed a complaint alleging that an employer committed an unfair labour practice when it terminated her employment because of her refusal to work her regular shift assignments which involved work between sundown on Friday and sundown on Saturday. The complainant claimed that since such refusal is based on a religious conviction as a Seventh Day Adventist the refusal of General Motors to allow her to absent herself from her regularly scheduled employment at such times on such days constituted religious discrimination. The Judge held that

> It is quite clear from the file of the Commission that General Motors did not discharge theplaintiff because of her religious creed. She was terminated because she refused to work her regularly assigned shifts.

In re *Riley and The Bendex Corporation*, 330 F. SUPP. 511, there was an action pursuant to the Civil Rights Act of 1964 in which the plaintiff alleged that the defendent violated his civil rights by terminating his employment for reason that he refused to work from sundown on Friday until sundown on Saturday of each week, assertedly because of his religious beliefs. The Court stated

> The defendent contends that it was not its intention to violate the Statute, nor did it discharge the plaintiff because of his religious belief, but solely because of his failure to follow rules of the Company in failing to work the hours assigned to him... The rules of Bendex require work on Saturday applied uniformly to all employees no matter what their religious affiliation happened to be...We believe that the defendent had a right to make rules and working conditions to be imposed upon its employees for the conduct of its business, if such rules are not in conflict with the law, and anyone accepting employment is bound to accept such rules and working conditions...An employer may not refuse to employ or discharge any person because of his religious beliefs, but surely the great and diversified types of American business cannot be expected to accede to the wishes of every doctrine or religious belief. If one accepts a position knowing that it may in some way impinge upon his religious beliefs, he must conform to the working conditions of his employer or seek other employment...It is our finding that the defendent did not in any respect discriminate against the plaintiff because of his religious beliefs. The assignment to the second shift came on the usual and normal conduct of the defendent's business, and was in no respect discriminatory against any foreman because of his religion. All of the foremen were treated equally...

It is clear from the instant matter that the assignment to the shift on Friday evenings resulted from the normal and regular conduct of the batch operations, and not as a result of any discrimination with regard to religious beliefs of the grievor or anyone else. Reference also can be made to re *Dewey v. Reynolds Metals Company*, 429 F. 2d; re *Stimpel and State Personnel Board*, 85 CAL. REPTR, 799; re *Eastern Greyhound Lines, Division of Greyhound Lines*, 265 N.E. 2, 745; re *Otten v. Baltimore and O.R. Co.*, 205 F. 2d, 61, in which case the plaintiff was employed in the Union shop, but refused to become a member of the Union on the basis of his religious beliefs. The Court of Appeal in that case stated:

> The first amendment protects one against action by the Government, though even then not in all circumstances. But it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities. A man might find it incompatible with his conscience to live in a city in which open saloons were licensed,

> yet he would have no constitutional right to insist that the saloons must be closed. He would have to leave the city or put up with the inequitous dens, no matter what economic loss his change of domicile entailed. We must accommodate our idiosyncracies, religious as well as secular, to the compromise as necessary in communal life; and we can hope for no reward for the sacrifices this may require, beyond our satisfaction from within or our expectations for a better world.

After the 1972 amendment, reference can be made to *Transworld Airlines Inc., v. Hardison*, 432 U.S. 63. In that case, the respondent's religious beliefs prohibited him from working on Saturdays, and attempts were made to accommodate him, but was discharged by the company after it had rejected a proposal that the respondent work only four days a week on the ground that this would impair critical functions of the airline. His claim was that the employer discriminated against him on the basis of his religion, and on the guidelines in effect at that time requiring an employer, short of undue hardship, to make reasonable accommodations to the religious needs of its employees. The Court held that the company had made reasonable efforts, and said at Page 84

> To require TWA to bear more than a de minimis costs in order to give Hardison Saturdays off is an undue hardship. Like an abandonment of the seniority system, to require TWA to bear additional costs, when no such costs are incurred to give other employees the days off that they want, would involve unequal treatment of employees on the basis of their religion. By suggesting that TWA should incur certain costs in order to give Hardison in effect require TWA to finance an additional Saturday off, and then to choose the employee who will enjoy it on the basis of his religious beliefs.

15 Having reviewed the Canadian Statute and the various cases applicable to that consideration, as well as the American decisions referred to above, it is abundantly clear that the evidence before me and the law supports the Employer's position that it did not discriminate against the complainant on the basis of his religious beliefs. I find that the Employer's practice is covered by Section 14 of the Canadian Human Rights Act, and is therefore an exception to the prohibitions against discriminatory practices among which is included religious beliefs. The Employer's reasons for the assignment of the complainant to the shift work were properly based on appropriate business considerations. I find that it dealt reasonably with the complainant's position when he made it known to his Employer in April of his refusal to work further Friday evening shifts. That refusal was not consistent with the Employer's requirements in its regular operations for which he was hired. This is not a matter of missing an incidental shift, but the complainant advised the Employer that he could not longer in the future work Friday evening shifts which he would be required to do. The Employer's business cannot be expected to be adjusted on such a basis to suit personal preferences and requirements, which would in this case, have a detrimental effect, not only on its business, but on the other 21 employees in the operation over a long period of time. By arriving at his personal decision concerning his religion and the context of the job, it follows that he could no longer meet the normal and reasonable requirements set by his Employer, which he had followed up to that time. It was the complainant's decision to take himself out of the requirements attributable to his position, and having done so he was no longer able to meet those requirements. I cannot find in these circumstances that he was discriminated against by the Employer, or that his dismissal was not justified on any other grounds.

16 It is therefore my award for all of the foregoing reasons and having regard to the evidence and submissions of the parties, that the complaint is dismissed.

End of Document

1980 CarswellQue 59
Quebec Superior Court, In Bankruptcy

Tremblay, Re

1980 CarswellQue 59, [1980] C.S. 468, 36 C.B.R. (N.S.) 111, J.E. 80-460

Re TREMBLAY; GINGRAS, ROBITAILLE, MARCOUX LTEE v. BEAUDRY and PARADIS

Moisan J.

Judgment: May 1, 1980
Docket: Quebec No. 200-11-000-446-792

Counsel: *L. Fournier*, for trustee.
C. Courtemanche, for bankrupt.
R. Blais, for respondents.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Avoidance of transactions prior to bankruptcy — Fraudulent and illegal transactions — Reviewable transactions under Act

Avoidance of transactions prior to bankruptcy — Fraudulent conveyances — Reviewable transaction — Criteria for determining arm's length relationship — Question of fact — Parties dealing at arm's length — No moral or psychological leverage sufficient to diminish or appreciably influence freedom of decision of other party — Application rejected.

T. made an assignment in bankruptcy on 14th August 1979. On 18th May he had sold to one Gilles Paradis, acting as a prête-nom for B., an immoveable property for a price equal to the aggregate of the mortgages to which it was subject. The trustee, claiming that the transaction in question was a reviewable transaction, initiated proceedings, claiming a sum of $57,000, representing the alleged difference between the price paid and the fair market value of the immoveable property.

Held:

Application dismissed.

The application of s. 78 of the Act is subject to three conditions:

(1) The transaction must have taken place during the twelve months preceding the bankruptcy.

(2) The transaction must have been made at a price manifestly different from fair market value, that is, for an inadequate consideration.

(3) The transaction must be reviewable.

It is the latter condition which is the essential condition of this recourse, for it is here that one finds the essential distinction between this section and various other sections of the law which deal with the disposition of property by the bankrupt.

The transactions in which a bankrupt engages during the relatively brief period which precedes his bankruptcy are subject to an attentive examination by the trustee and must in principle give rise to a certain suspicion on his part. Three types of transaction, or, rather, three types of situations, characterize transactions entered into by the bankrupt. First, there are those cases where the bankrupt had the intention of conferring, and, in fact, deliberately conferred, an advantage on a co-contracting party. This type of situation is governed by ss. 69 to 77 of the Act. Secondly, there is the kind of transaction where the bankrupt, dealing entirely voluntarily and with total freedom of action, consummates a transaction which is disadvantageous for him. In this case, generally, the trustee can do nothing, because he is obliged to take the patrimony of the bankrupt in the state in which it is at the moment of the assignment of bankruptcy. Thirdly, there is a category of transactions considered "reviewable transactions", which is not further defined but which deals, with respect to s. 78, with goods and services, and, with respect to s. 79, with dividends and redemptions of shares.

The notion of reviewable transactions was introducted to capture transactions, disadvantageous to the bankrupt and therefore to his creditors, where the bankrupt was either related, within the definitions contained in the Act, to his co-contracting party,

or was not dealing at arm's length with him. The meaning of "otherwise than at arm's length" is, however, elusive. The concept has its source in the Income Tax Act, but the jurisprudence, as it relates to bankruptcy, is practically non-existent. The doctrine provides that the court has wide discretion to say whether or not persons who are not related were dealing at arm's length when a particular transaction took place. In the absence of a better definition, a transaction at arm's length could be considered to be a transaction between persons between whom there are no bonds of dependence, control or influence, in the sense that neither of the two co-contracting parties has available any moral or psychological leverage sufficient to diminish or possibly influence the free decision-making of the other. Inversely, the transaction is not at arm's length where one of the co-contracting parties is in a situation where he may exercise a control, influence or moral pressure on the free will of the other. Where one of the co-contracting parties is, by reason of his influence or superiority, in a position to pervert the ordinary rule of supply and demand and force the other to transact for a consideration which is substantially different than adequate, normal or fair market value, the transaction in question is not at arm's length.
In the present case, the parties had known each other for some 25 years. They lived across the street from each other, but they never socialized with each other. Their sole relationship consisted of that of neighbours living on the same street and occasionally greeting each other. There was no familial relationship. They had had another, previous, financial transaction, which appeared perfectly normal. Although T. may have concluded a transaction which was unfavourable to him, his consent was not obtained by influence, pressure or control over his free will. In the circumstances the impugned transaction took place at arm's length and was not subject to revision.

APPLICATION to revise reviewable transaction.

***Moisan J.*:**

1 Le failli a fait cession de ses biens le 14 août 1979.

2 Le 18 mai précédent, it avait vendu à l'intimé Gilles Paradis un immeuble situé en bordure du boulevard Hamel, pour le prix des hypothèques qui le grevaient, $85,000. Il appert clairement de la preuve que Paradis a agi comme prête-nom pour l'intimé André Beaudry.

3 Le syndic soutient qu'il s'agit d'une transaction revisable selon la Loi de faillite, S.R.C. 1970, c. B-3, et réclame $57,000 représentant la différence entre le prix payé et la juste valeur marchande de l'immeuble.

4 L'article 78(1) se lit:

> 78.(1) Lorsqu'une personne qui a vendu, acheté, loué, engagé, fourni ou reçu des biens ou des services *au moyen d'une transaction revisable* fait faillite dans les douze mois qui suivent la transaction, le tribunal peut, à la demande du syndic, enquêter pour déterminer si le failli a donné ou reçu, selon le cas, une juste valeur du marché en contrepartie des biens ou services sur lesquels porte la transaction.

(Souligné par moi-même.)

5 Les paragraphes (2) et (3) ajoutent que le jugement peut ordonner le paiement de la différence, et indiquent les modalités entourant l'établissement des valeurs mises en cause.

6 L'application de cet article entre en jeu si l'on peut réunir différentes conditions:

7 (1) la transaction a été faite dans les 12 mois précédant la faillite;

8 (2) la transaction s'est faite à un prix qui s'écarte manifestement de la juste valeur du marché, donc pour une considération inadéquate; et

9 (3) la transaction est revisable. (L'article dit: "au moyen d'une transaction revisable".)

10 Cette dernière condition nous apparaît essentielle: c'est par elle qu'on retrouve la distinction essentielle entre cet article et divers autres articles de la Loi qui touchent à la disposition de ses biens par le failli.

11 En effet, envisagées dans leur ensemble, les transactions d'un failli dans la période relativement courte qui précède sa faillite sont sujettes à un examen attentif du syndic et doivent en principe soulever une certaine suspicion de sa part. Il nous apparaît qu'il peut survenir trois types de transaction ou si l'on préfère trois ensembles de situations caractérisant les transactions faites par le failli.

12 On peut les résumer comme suit:

13 (1) Il y a tout d'abord les cas où le failli a eu l'intention de et a, en fait, délibérément conféré une gratuité ou un avantage privilégié à un co-contractant. Cette situation fait appel aux articles 69 à 77 de la Loi de faillite et plus particulièrement à ce qu'on appelle "les dispositions et privilèges" ou en anglais "settlements and preferences".

14 (2) Il y a les cas où le failli, transigeant de façon parfaitement autonome, libre et volontaire, a bâclé une transaction désavantageuse pour son patrimoine. Dans ces cas, en règle générale, le syndic ne peut rien faire puisqu'il doit prendre le patrimoine du failli dans l'etat où il se trouve au moment de la cession de biens.

15 (3) Par les art. 78 et 79, qui étaient sous l'ancienne numérotation les art. 67A et 67B [décrétés par 1966-67, c. 32, art. 12], le législateur s'attaque à une troisième catégorie de transactions que l'on désigne sous le nom de "transactions revisables", sans pour autant définir clairement le sens de cette expression. L'article 78 concerne les biens et services; l'art. 79, les dividendes et rachats d'actions.

16 Cette notion de transaction revisable nous ramène aux art. 3 et 4, introduits dans la Loi à la même époque, en 1967 [par 1966-67, c. 32, art. 1]. Ces articles évoquent les notions de transactions à distance ou non à distance, de personnes liées et de groupes liés.

17 Dans la présente cause, aucune des parties ne soutient qu'il pourrait s'agir de personnes ou de groupes liés de sorte qu'il n'y a pas lieu de s'arrêter à l'art. 4. Il est cependant essentiel de citer l'art. 3:

> 3.(1) Aux fins de la présente loi, une personne qui a conclu avec une autre une transaction autrement qu'à distance est réputée avoir conclu une transaction revisable.
>
> (2) La question de savoir si des personnes non liées entre elles au sens où l'entend l'article 4 traitaient l'une avec l'autre à distance, à un moment donné, est une question de fait.
>
> (3) Des personnes liées entre elles au sens où l'entend l'article 4 sont réputées ne pas traiter l'une avec l'autre à distance, tant qu'elles sont ainsi liées.

18 Le paragraphe (1) de cet article nous donne à sa manière, une définition de la transaction revisable: c'est la transaction intervenue entre deux personnes "autrement qu'à distance".

19 Il faut donc s'interroger sur le sens de cette expression. Le texte anglais utilise l'expression "otherwise than at arm's length". Cette version anglaise n'est pas non plus très éclairant.

20 On peut penser que l'expression "à distance" ou "at arm's length" nous vient de la Loi de l'impôt sur le revenu du Canada, 1970-71-72 (Can.), c. 63. L'article 69 [modifié par 1974-75-76, c. 26, art. 37; 1977-78, c. 32, art. 13] parle des contreparties insuffisantes et, à son paragraphe 1(*b*), utilise en anglais l'expression "at arm's length"; en français, il s'exprime comme suit:

> (*b*) Lorsqu'un contribuable a disposé d'un bien
>
> (i) en faveur d'une personne avec laquelle *il avait un lien de dépendance* sans contrepartie ou moyennant une contrepartie inférieure ...

(Souligné par moi-même.)

21 La jurisprudence, suivant les recherches que nous avons pu faire, est presque inexistante.

22 En doctrine, on peut citer Houlden and Morawetz, Bankruptcy Law of Canada, Cumulative Supplement (1979), à la p. 7:

> If persons are related to each other as defined in Sec. 4, then they are deemed not to deal with each other at arm's length (Sec. 3(3)). If persons are not related to each other, it is a question of fact for the court whether or not at a particular time, they were dealing with each other at arm's length. There is, therefore, no complete definition in the Act of 'arm's length'; *the court has a wide discretion* to say whether or not persons who are not related were dealing at arm's length when a particular transaction took place.
>
> If a transaction is entered into, otherwise than at arm's length, it becomes what is called a 'reviewable transaction'. The consequences of a transaction being a 'reviewable transaction' or being between 'related persons' do not flow from Secs. 3 and 4. The consequences are found in other sections of the Act (Sec. 36(3), Sec. 74, Sec. 78, Sec. 87(6) and (7), Sec. 108).

(Souligné par moi-même.)

23 A la lumière de ces textes, notre conception de la transaction à distance peut, à défaut de mieux, s'exprimer ainsi: Il s'agit de transactions entre personnes qui n'ont entre elles aucun lien de dépendance, de contrôle ou d'influence, en ce sens qu'aucun des deux contractants ne dispose d'un levier moral ou psychologique suffisant pour diminuer ou influencer sensiblement la liberté de décision de l'autre.

24 Inversement, la transaction n'est pas à distance si un des co-contractants se trouve dans une situation telle qu'il peut exercer un contrôle, une influence ou une pression morale sur le libre arbitre de l'autre.

25 On peut aussi cerner le concept en disant que la transaction n'est pas à distance si l'un des contractants peut, par sa position d'influence et de supériorité, déjouer ou infléchir en sa faveur la loi de l'offre et de la demande, et forcer l'autre à transiger pour une contrepartie qui s'éloigne sensiblement de la valeur marchande normale et adéquate.

26 Dans le présent cas, l'intimé Beaudry a admis dès l'interrogatoire hors cour que la transaction a été faite au nom de l'intimé Paradis, mais pour son bénéfice et avantage. La raison donnée, sa situation juridique de divorcer au niveau conditionnel en attente d'un jugement irrévocable nous apparaît raisonnable. Au surplus, personne ne conteste le fait ni ne le commente défavorablement.

27 Beaudry et le failli se connaissaient depuis de nombreuses années au moment de la transaction du 18 mai 1979. Beaudry déclare qu'il connaissait le failli depuis environ 25 ans, soit depuis l'époque où ils ont emménagé dans la même rue. Pour sa part, Tremblay fixe cette époque à 15 ou 16 ans. Ces deux personnes demeurent en face de biais, ce qui leur fait dire qu'ils sont des voisins. Ils ne se sont jamais fréquentés d'aucune façon, n'ont jamais pratiqué quelque sport ou activité de loisir en commun; leurs seules relations ont consisté à se saluer comme résidents de la même rue. Il n'existe évidemment entre eux aucun lien de parenté quelconque. La première transaction financière intervenue entre les parties est survenue en septembre 1978, alors que Tremblay a sollicité un emprunt de $7,500 de la part de Beaudry. Il explique qu'il savait que Beaudry, médecin, était vraisemblablement en mesure de lui avancer de l'argent. En garantie de ce prêt, Beaudry s'est fait consentir un gage sur deux véhicules appartenant à Tremblay; n'ayant pas reçu remboursement de son prêt, il a pris possession des véhicules au printemps 1979. D'après les documents produits, cette prise de possession serait survenue le même jour que la signature du contrat notarié concernant l'immeuble, mais Tremblay déclare qu'en fait la prise de possession fut effectuée un mois ou deux mois avant cette date, et que l'on aurait profiter de la rencontre chez le notaire pour signer un document à cet effet.

28 En regard de la transaction elle-même qui a fait passer l'immeuble du patrimoine de Tremblay à celui de Beaudry avec Paradis comme prête-nom, la preuve, très brève, ne révèle en aucune façon que Beaudry ait exercé une influence ou une pression quelconque pour amener Tremblay à céder l'immeuble. C'est au contraire Tremblay qui a représenté à Beaudry qu'il s'agissait

d'un immeuble récemment refinancé qui se payait automatiquement par ses revenus et qui présentait un placement intéressant. Il a de plus fait valoir qu'ayant personnellement des difficultés financières, il lui paraissait opportun de se départir de cet immeuble.

29 Il s'agit en somme de représentations et de discussions entre un vendeur et un acheteur éventuel comme il en survient quotidiennement dans le cours des affaires. Il ne s'agit pas ici de se demander si Tremblay, le vendeur, utilisait des arguments véridiques et logiques ou faisait des représentations conformes à la vérité, ni de se demander si Beaudry, l'acheteur, a été dupé par des représentations tendancieuses, comme il le prétend, ou a effectivement bâclé un marché intéressant à moyen ou long terme. La question qui se pose est uniquement de savoir si le consentement de Tremblay a été obtenu par l'exercice d'une influence, d'une pression ou d'un certain degré de contrôle sur sa libre volonté. Il importe de savoir si Tremblay a vendu pour un prix manifestement inférieur à la juste valeur marchande parce qu'il existait entre lui et l'acheteur un lien de dépendance susceptible d'influer manifestement sur l'établissement du prix de la transaction.

30 Le syndic avait le fardeau d'établir cette preuve, suivant l'art. 3(2) de la Loi de faillite. Il n'y est pas parvenu à notre satisfaction. Bien au contraire.

31 Venant à cette conclusion, il n'est pas nécessaire de discuter la question de savoir si le prix diffère manifestement de la juste valeur marchande de l'immeuble.

32 Par ces motifs, la cour rejette la requête du syndic; dépens contre la masse.

Application dismissed.

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Court File No. CV-23-00707394-00CL

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

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF TACORA RESOURCES INC.

Applicant

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

BOOK OF AUTHORITIES OF THE APPLICANT
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