Court File No. CV-16-11257-00CL

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 ARRANGMENT OF PRIMUS TELECOMMUNICTIONATS CANADA INC., PRIMUS TELECOMMUNICATIONS, INC. AND LINGO, INC.

SUPPLEMENTAL BOOK OF AUTHORITIES OF THE PURCHASER (BIRCH COMMUNICATIONS INC.)

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No.	Source
1.	S.M. Waddams, *The Law of Contracts*, 6th ed., Canada Law Book, (Toronto: 2010), pp. 192-194.
2.	G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed., Carswell (Toronto: 2011), pp. 647-649, 652-653.
3.	Houlden, Morawetz and Sarra, *Bankruptcy and Insolency Analysis*, 4th ed, Carswell (Toronto: 2005) at N115-116.
4.	Sarra, *Rescue! The Companies' Creditors Arrangement Act*, 2nd ed., Carswell (Toronto: 2013) at 266.

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the assignee to sue the obligor in his own name. In the case of legal choses a more complex procedure was required. The Court of Equity permitted the assignee to bring an action at law but in the name of the assignor. On the face of the pleadings at law no assignment appeared, and so there was no legal objection to the action. But if the assignor objected, the Court of Equity would compel compliance,[4] and since the Court of Equity enforced its orders by commitment to prison, they generally prevailed.

273 In 1873 the U.K. *Judicature Act* combined the powers of the Courts of Equity and Law in a single court.[5] A provision was included in the Act specifically dealing with assignments.

274 This provision has been re-enacted, with some variations, in all the Canadian provinces. The Ontario *Conveyancing and Law of Property Act* provides:

> 53(1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.[6]

Thus, assignment was finally authorized by statute, but with certain restrictions (absolute assignment,[7] not by way of charge) and with cer-

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[4] See *Glegg v. Bromley*, [1912] 3 K.B. 474 (C.A.). The assignor was also restrained from bringing his own action or collecting on the debt: *Jeffs v. Day* (1866), L.R. 1 Q.B. 372; *Norman v. Fed. Comm. of Taxation, supra*, footnote 1, at p. 27.

[5] See *Judicature Act* (Alta., N.B., Nfld. & Lab., N.S., N.W.T., P.E.I., Yukon); *Courts of Justice Act* (Ont.); *Court of Queen's Bench Act* (Man.); *Queen's Bench Act* (Sask.); *Supreme Court Act* (B.C.).

[6] See also *Judicature Act* (Alta.), s. 20(2); N.B., s. 31; Nfld. & Lab., s. 103; N.S., s. 43(5); *Law and Equity Act* (B.C.), s. 36; *Law of Property Act* (U.K.), s. 136(1). In Saskatchewan and Manitoba a different provision is in effect omitting requirements that the assignment be "absolute" and "not by way of charge only" and the requirement of notice to the obligor: *Law of Property Act* (Man.), s. 31; *Choses in Action Act* (Sask.), s. 2.

[7] See *Bank of Liverpool & Martins Ltd. v. Holland* (1926), 43 T.L.R. 29, 32 Com. Cas. 56 (assignment "absolute" even if assignee beneficially entitled only to part); *Hughes v. Pump House Hotel Co. Ltd.*, [1902] 2 K.B. 190 (C.A.) (assignment of balance owing from time to time under a building contract held "absolute"). See also *Dominion Creosoting Co. v. Nickerson Co.* (1917), 38 D.L.R. 69, 55 S.C.R. 303, leave to appeal to P.C. refused June, 1917 (assignment on its face as security not absolute); *Singh v. Industrial Mortgage and Finance Corp.* (1967), 61 W.W.R. 338 (B.C. Co. Ct.) (refusing to follow *Hughes*). Assignment of part of a debt is not "absolute": *Forster v.*

tain formalities (writing, under the hand of the assignor, written notice to the obligor).

It might be thought that the object of such a provision in the *Judicature Act* would be to abolish any distinctions based on law and equity, and to provide a single procedure for all assignments. The result has not been so simple. It was held, despite the ambiguous wording,[8] that the Act applied to equitable as well as to legal choses,[9] but nothing in the Act prohibited equitable assignments on the old pattern, and it has been held that these survive.[10] Consequently an assignment that fails under the Act, for example because it is not absolute, or not made by a signed writing or because written notice is not given to the obligor, may yet be effective as an equitable assignment. **275**

In consequence of the statute, therefore, there are four kinds of assignment, statutory assignment of equitable and of legal choses and equitable assignment of equitable and of legal choses.[11] No particular form is needed for an equitable assignment.[12] As between assignor and assignee, notice to the obligor is not required,[13] but notice is, from the point of view of the assignee, highly desirable in order to prevent the **276**

Baker, [1910] 2 K.B. 636 (C.A.); *Beatty v. Best* (1921), 58 D.L.R. 552, 61 S.C.R. 576; *Graner v. Insurance Co. of North America*, [1959] O.W.N. 150 (H.C.J.). Part of a debt is assignable under the Saskatchewan Act, *supra*; *MacDonald v. Royal Bank of Canada*, [1934] 1 W.W.R. 732 (Sask. C.A.).

[8] The Act refers to a debt or legal thing in action but speaks later of "trustee".

[9] *Torkington v. Magee*, [1902] 2 K.B. 427, at pp. 430-1, revd on other grounds, [1903] 1 K.B. 644 (C.A.).

[10] *William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.*, [1905] A.C. 454 (H.L.); *Re Hart Bros. Construction Ltd.* (1954), 34 C.B.R. 116 (B.C.S.C.); *Colonial Mutual General Insurance Co. Ltd. v. ANZ Banking Group (New Zealand) Ltd.*, [1995] 3 N.Z.L.R. 1 (P.C.); *356447 British Columbia Ltd. v. Canadian Imperial Bank of Commerce* (1998), 157 D.L.R. (4th) 682 (B.C.C.A.). The assignor must still be joined (see *DiGuilo v. Boland* (1958), 13 D.L.R. (2d) 510 (Ont. C.A.), at p. 521, appeal to S.C.C. dismissed [1961] S.C.R. vii) but "no action is now dismissed for want of parties", *per* Lord Macnaghten in *William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.*, *supra*, at p. 462, applied in *Dell v. Saunders* (1914), 17 D.L.R. 279 (B.C.C.A.). See also *Performing Right Society v. London Theatre of Varieties Ltd.*, [1924] A.C. 1 (H.L.); *Three Rivers D.C. v. Bank of England*, [1995] 4 All E.R. 312 (C.A.).

[11] See *DiGuilo v. Boland*, *supra*, footnote 10.

[12] *William Brandt's Sons & Co. v. Dunlop Rubber Co. Ltd.*, *supra*, footnote 10; *Dominion Creosoting Co. v. T.R. Nickerson Co.* (1917), 38 D.L.R. 69 (S.C.C.); *I.F. Slessor & Co. v. Westeel Products Ltd.* (1965), 51 W.W.R. 1 (Sask. Q.B.); *Fraser v. Imperial Bank* (1912), 10 D.L.R. 232, 47 S.C.R. 313; *Kidd v. Harden*; *McConnal v. Harden*, [1924] 4 D.L.R. 516 (Alta. S.C. App. Div.); *Hughes v. Chambers* (1902), 14 Man. R. 163 (K.B.), at p. 169; *Re McRae Estate* (1903), 6 O.L.R. 238 (K.B.); *Cossill v. Strangman*, [1963] N.S.W.R. 1695 (S.C.); *C.B. Peacocke Land Co. Ltd. v. Hamilton Milk Producers Co. Ltd.*, [1963] N.Z.L.R. 576, at p. 585 (assignment by word of mouth); *Comptroller of Stamps (Vic) v. Howard-Smith* (1936), 54 C.L.R. 614 (intention of assignor is test).

[13] *Gorringe v. Irwell India Rubber & Gutta Percha Works* (1886), 34 Ch. D. 128 (C.A.).

obligor from paying the assignor, to give the assignee priority over any subsequent assignees,[14] and to prevent further "equities" arising, that is, defences that the obligor might develop against the assignor.

277 Consideration is not needed for an assignment under the statute.[15] A debt may be validly transferred as a pure gift. The question of when consideration is needed for the validity of equitable assignments is complex. An agreement to assign future property was recognized and enforced by Courts of Equity.[16] Its basis was a promise by the assignor to convey, and it was held, therefore, that the tests of contractual enforceability must be met.[17] An assignment of an existing equitable right, on the other hand, was regarded as a transfer of a piece of property which, if complete, was effective whether or not exchanged for value.[18] In the case of an equitable assignment of a legal chose, the cases are in conflict. Some have required consideration,[19] but others have held that a gratuitous transfer is effective if the donor has complied with all necessary formalities,[20] or even if the donor has done all that the donor could do personally to effect the transfer.[21]

278 Some rights of action are not capable of being assigned. Contracts involving personal relations, or personal skills, are not assignable.[22] A

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[14] *Dearle v. Hall* (1828), 3 Russ. 1, 38 E.R. 475; *Pettit & Johnston v. Foster Wheeler Ltd.*, [1950] 2 D.L.R. 42 (Ont. H.C.J.), affd [1950] 3 D.L.R. 320 (C.A.); *Rennie v. Quebec Bank* (1902), 3 O.L.R. 541 (C.A.), at pp. 544-5; *Sovereign Bank v. Int. Portland Cement Co.* (1907), 14 O.L.R. 511 (K.B.), at p. 518.

[15] *Harding v. Harding* (1886), 17 Q.B.D. 442, at p. 445; *Norman v. Fed. Comm. of Taxation* (1963), 109 C.L.R. 9 (Aust. H.C.), at p. 28.

[16] *Tailby v. Official Receiver* (1888), 13 App. Cas. 53 (H.L.); *Gordon v. Gordon*, [1924] 2 D.L.R. 74 (Sask. C.A.); *Holy Rosary Parish (Thorold) Credit Union Ltd. v. Premier Trust Co.* (1965), 51 D.L.R. (2d) 591, [1965] S.C.R. 503. Wage assignments, however, are now prohibited or restricted in several jurisdictions: *Wages Act* (Ont.), s. 7(7); *Fair Trading Act* (Alta.), s. 53; *Labour Standards Code* (N.S.), s. 89.

[17] *Norman v. Fed. Comm. of Taxation, supra*, footnote 15, at pp. 30-2 and 40.

[18] *Kekewich v. Manning* (1851), 1 De G.M. & G. 176, 42 E.R. 519.

[19] *Harding v. Harding, supra*, footnote 16; *Loeppky v. Lang*, [1925] 2 D.L.R. 610 (Sask. C.A.), at pp. 614-5; *Olsson v. Dyson* (1969), 120 C.L.R. 365.

[20] *Holt v. Heatherfield Trust, Ltd.*, [1942] 2 K.B. 1.

[21] *Re Rose; Midland Bank Executor & Trustee Co., Ltd. v. Rose*, [1949] Ch. 78; *Re Rose; Rose v. I.R. Commr's*, [1952] 1 Ch. 499 (C.A.).

[22] *Stevens v. Benning* (1854), 1 K. & J. 168, 69 E.R. 414; *Griffith v. Tower Publishing Co. Ltd., and Moncrieff*, [1897] 1 Ch. 21; *Sullivan v. Gray*, [1942] 3 D.L.R. 269 (Ont. H.C.J.) (contract to supply amusements at fair not assignable). See also *Belgo-Canadian Real Estate Co. v. Allan*, [1925] 1 D.L.R. 41 (Man. C.A.) at p. 46; *Kemp v. Baerselman*, [1906] 2 K.B. 604 (C.A.) (contract to sell eggs in exchange for promise of exclusive dealing not assignable); *Black Hawk Mining Inc. v. Manitoba (Provincial Assessor)*, [2002] 7 W.W.R. 104 (Man. C.A.). But see *Whiteley Ltd. v. Hilt*, [1918] 2 K.B. 808 (C.A.) (hire purchase agreement assignable); *Maloney v. Campbell* (1897), 28 S.C.R. 228 (obligation of purchaser of law to indemnify vendor against mortgage liability).

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about suing on behalf of the assignee, equity would compel him to allow the use of his name in a common-law court. For this "value" was necessary. Equity will not assist a volunteer; hence, consideration had to be shown for the assignment before courts of equity would use their procedure to make the assignor sue.[19] If there were collusion between assignor and debtor, equity would even compel performance by the debtor to the assignee, joining the assignor as a party to prevent any subsequent action by him.[20] It is still possible to obtain enforcement of an equitable assignment of a legal chose in action, by joining the assignor as a party, either as co-plaintiff, if he is willing, or as co-defendant if he is not.

Where the chose in action was equitable, for example, arising under a trust, no subsequent common-law proceedings against the debtor could arise, as was the case with a legal chose in action (which therefore meant that the original creditor, the assignor, had to be included to prevent duplicity of actions). Hence, the assignee was always allowed by equity to sue in his own name. This was, and still is, a real, complete, fully effective assignment. Equitable assignments still have the same effect in Canada, and in England, as they did prior to 1873. As Macdonald C.J. said in *Dell v. Saunders*,[21] which discussed both equitable and statutory assignments,

> [i]t is only when the right assigned is an equitable one. . . that the assignee can sue in his own name. The law in this respect has not been changed.

He was referring to changes made by a British Columbia statute (which was, and is in much the same form and to the same effect as the English and other Canadian statutes). Since there is still a difference between statutory and equitable assignments, it is necessary to determine, *inter alia*, whether what is involved in a given instance is an equitable or a statutory assignment. In that particular case it was held, by a majority of the court, that although a good equitable assignment had taken place, it was an assignment of a legal, not an equitable chose in action; hence the statute was inapplicable, and the assignee could not bring the action in his own name. The case concerned a conveyance of land which recited in the deed an agreement between the parties to pay the purchase price by instalments. The conveyance was expressed to be subject to that agreement. The right to payment was assigned by the vendor to a third party, the plaintiff in the action. When the plaintiff sued for the recovery of an overdue instalment which was payable to the original vendor (the assignor), it was held that, because the assignment was not in writing, as required by the statute, it was not a valid statutory assignment, and because it was an equitable assignment of a legal debt, that is, a legal chose in action, the plaintiff could not sue in his own name.

(B) *Requirements of a valid equitable assignment*

Before it may be concluded that an equitable assignment has been made, two issues must be determined. The first is whether the transaction is an assignment.[22] The second is whether, if it is an assignment, it is of an equitable or a legal chose.

19 *Richards v. Delbridge* (1874), L.R. 18 Eq. 11; *Holt v. Heatherfield Trust*, [1942] 2 K.B.1.

20 *Hammond v. Messenger* (1838), 9 Sim. 327.

21 (1914), 17 D.L.R. 279 at 281 (B.C.C.A.).

22 *McAvoy v. Royal Bank*, [1933] 3 W.W.R. 433 (Sask. C.A.); *Can. Credit Men's Trust Assn. v. Heinke* (1957), 23 W.W.R. 305 (B.C.S.C.).

Sometimes these issues are not clearly differentiated by the courts, and the general answer is given that the transaction in question was not an equitable assignment. This occurred, for example, in *Handley v. Crows' Nest Pass Lumber Co.*[23] in which order signed by employees of the company sent to an officer of the company directing the company to pay some of the wages of the employees to the owner of a hotel at which the employees were lodging was not an equitable assignment. In *Warren v. MacDonald Paving & Construction Ltd.*,[24] an agreement giving the plaintiff the right to remove sand from the land of the other party to the agreement was not an assignment. In contrast there may be a good equitable assignment of part of a fund if the fund is specified and the amount of the assignment is stated. In *G.F. Stephens & Co. v. Perdue*; *Werner v. Perdue*[25] the creditor gave a written order to a third party granting him a sum on the general balance owed to the creditor on a mortgage. This was a valid equitable assignment, with the result that the transferee of the mortgage took subject to the assignment in question. So, too, in *Kidd v. Harden*; *McConnal v. Harden*[26] a sale was negotiated by an agent. The vendor accepted the agent's cheque on the undertaking that the cheque would be met by a deposit in the agent's account to be made by the agent's principal, the purchaser, on the proceeds of the resale of the goods by the principal. This was held to be an equitable assignment of such proceeds in the principal's hands, when they reached him, in favour of the vendor. Therefore the principal could not withhold the deposit and use the proceeds of the resale to settle accounts between himself and the agent. Similarly in *Bitz, Szemenyei, Ferguson & MacKenzie v. Cami Automotive Inc.*[27] an irreversible direction to the defendant to pay part of the proceeds of a settlement to the plaintiff was an equitable assignment.

There may also be an equitable assignment of an as yet non-existent fund, consisting of *future* choses in action, such as debts which have not yet matured but which will come into existence or be paid in the future. Following the House of Lords decision in *Tailby v. Official Receiver*,[28] the Supreme Court of Canada held, in *Fraser v. Imperial Bank of Canada*,[29] that an assignment of future choses in action, to arise in the future out of a contract, bound the conscience of the assignor in equity, and became effective for all purposes when the subject-matter of the assignment came into existence, for example, when the debts were paid by debtors of the assignor.

No special form was, or is required in equity for a valid equitable assignment. As Lamont J.A. said in *Grant v. Morgan*,[30] "any form of words is sufficient, so long as they clearly show an intention that the assignee is to have the benefit of the debt

23 (1909), 11 W.L.R. 210 (B.C.C.A.).
24 (1996), 174 N.B.R. (2d) 354 (N.B.Q.B.).
25 [1931] 3 W.W.R. 90 (Alta. S.C.); *Beatty v. Best* (1921), 61 S.C.R. 576; *Sterling Collieries v. Jones*, [1924] 3 W.W.R. 955 (Alta. Chambers).
26 [1924] 3 W.W.R. 293 (Alta. C.A.).
27 (1997), 34 O.R. (3d) 566 (Ont. Gen. Div.).
28 (1888), 13 App. Cas. 523 (H.L.).
29 (1912), 47 S.C.R. 313.
30 [1924] 2 D.L.R. 1164 at 1165 (Sask. C.A.); *Bank of N.S. v. Nfld. Rebar Co.* (1987), 65 Nfld. & P.E.I.R. 165 (Nfld. T.D.); *Fox Lake Indian Band v. Reid Crowther & Partners Ltd.* (2005), 40 C.L.R. (3d) 282 at 290 (Fed. Ct.) *per* Kelen J.

assigned." *Lawson Graphics Pacific Ltd. v. Simpson*[31] was a case which was close to the line.[32] While it is clear that an oral assignment is acceptable,[33] the assignor in this case simply said to the assignee, "When we are paid, you will be paid." That was sufficient to constitute an equitable assignment of a debt that, eventually, was paid to the assignor.

Consideration is required unless there has been a completed transfer, that is, a gift. There is a distinction between a perfected and an imperfectly constituted transfer, in this respect at least. If the assignor has transferred the equitable title by whatever means that are suitable and appropriate, the courts will assist the assignee to enforce his right, whether or not value has been given.[34] If this has not been done,[35] or it cannot be done, since what is being assigned is a future chose in action,[36] consideration must be established, else the courts will not assist the assignee, except, possibly to the extent that the debtor owes the assignor.[37] In the case of future choses, the courts treated the assignment as a contract to assign in the future, hence the need for consideration.[38]

As between the assignor and the assignee, no notice to the debtor is required.[39] However notice to the debtor, though not essential, is desirable for at least two reasons. First of all, to prevent the debtor from paying the assignor, which would discharge him.[40] Second, to give the assignee priority over subsequent encumbrancers, for example, second or later assignees[41] (a doctrine which applies even though the chose in action is a *legal one).*[42] But no formal notice seems to be necessary,

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31 (1987), 12 B.C.L.R. (2d) 126 (B.C.S.C.).

32 *Ibid.*, at 133 *per* Southin J.

33 *Bank of N.S. v. Nfld. Rebar Co.*, above.

34 *Dickson v. Chamberland*, [1927] 2 D.L.R. 429 at 438 (Alta. C.A.) *per* Beck J.A.

35 *Curtis v. Langrock*, [1922] 1 W.W.R. 316 (Alta. C.A.); *Sanderson v. Halstead*, [1968] 1 O.R. 749 (Ont. H.C.).

36 *Sanderson v. Halstead*, above.

37 *Grant v. Morgan*, above.

38 *Tailby v. Official Receiver*, above.

39 *Holt v. Heatherfield Trust*, [1942] 2 K.B. 1; *Re Trytel*, [1952] 2 T.L.R. 32; contrast the situation with respect to statutory assignments, below, p. 652.

At first instance in *B.A. Timber Co. v. Jones (No. 2)*, [1943] 2 W.W.R. 654 (B.C.S.C.) it was said that the assignee of a debt could only sue in his own name without providing notice of assignment to the debtor in two instances: (1) where the debtor was a party to or in agreement with the assignment; or (2) the assignor was a limited liability company which no longer had any corporate existence. On appeal, however, it was held: (1) that no notice to the debtor was required if the assignment was of a *charge* over property as contrasted with a debt; and (2) that what was involved in this case was *not* assignment: [1944] 2 W.W.R. 577 (B.C.C.A.) as regards the first point, contrast an English case, in which an option to renew a contract was assigned, *Warner Bros. Records Inc. v. Rollgreen Ltd.*, [1975] 2 All E.R. 105 (C.A.), in which it was held that, until notice was given to the debtor, *i.e.*, the other party to the option, the assignee of the option obtained no enforceable contractual rights against that party.

40 *Stocks v. Dobson* (1853), 4 De G.M. & G. 11. In *Warner Bros.*, above, it was said by Lord Denning M.R., relying on other cases, that notice of the assignment was necessary to perfect the title of the assignee of a debt or an option.

41 *Dearle v. Hall* (1828), 3 Russ. 1; *Fraser v. Imperial Bank of Can.* (1912), 47 S.C.R. 313; compare *Colonial Bank v. Butec Int. Chemical Corp.* (1986), 7 B.C.L.R. (2d) 381 (B.C.S.C.) where no proper notice was given to the debtor by the assignee, hence the latter had no claim upon shares allegedly transferred to the assignee, a collateral pledgee, by a blank transfer form.

42 *Marchant v. Morton, Down & Co.*, [1901] 2 K.B. 829.

the assignor has retained some interest in the original indebtedness and may therefore have a right of action of his own, quite distinct from that of the assignee.[62]

(iii) *Under statute*

(A) *Statutory intervention*

The situation in England was changed by the provisions of the Judicature Act of 1873 (now contained in section 136 of the Law of Property Act, 1925),[63] under which a new form of assignment was introduced in order to alleviate or eradicate some of the problems felt with respect to equitable assignments. In Canada, the following provinces adopted the English legislation *verbatim*: Alberta,[64] British Columbia,[65] New Brunswick and Labrador,[66] Newfoundland,[67] Nova Scotia,[68] and Ontario.[69] Two provinces, Manitoba and Saskatchewan, as well as the Northwest Territories and Yukon[70] have enacted legislation that is wider in scope. In those jurisdictions, *viz.*, Manitoba, Saskatchewan and the Territories, the limitations of the earlier equitable assignment have been swept away, and, as long as there is a written assignment signed by the assignor, the assignee has complete freedom to bring an action to enforce the debt without joining the assignor as a party.[71] The position in all the other jurisdictions resembles the narrow present-day position in England. In those, as in England,

> any absolute assignment by writing under the hand of the assignor (not purporting to be by way of charge only) of any debt or other legal thing in action, of which express notice in writing has been given to the debtor, trustee, or other person from whom the assignor would have been entitled to claim such debt or thing in action, is effectual in law (subject to equities having priority over the right of the assignee) to pass and transfer from the date of such notice the legal right to such debt or thing in action, all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

(B) *Requirements of a valid statutory assignment*

Although the statute speaks of "any debt or other legal thing in action", it would seem that the statute applies to *any* chose in action, whether legal or equitable, which

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62 *Sardara Singh v. Indust. Mtge. & Finance Corp. Ltd.* (1967), 61 W.W.R. 338 (B.C. Co. Ct.); compare *Elliott v. Le Page*, [1929] 3 D.L.R. 912 (Man. K.B.).

63 15 & 16 Geo. 5, c. 20.

64 Judicature Act, R.S.A. 2000, c. J-2, s. 20.

65 Law and Equity Act, R.S.B.C. 1996, c. 253, s. 36.

66 Judicature Act, R.S.N.B. 1973, c. J-2, s. 31.

67 Judicature Act, R.S.N.L. 1990, c. J-4, s. 103.

68 Judicature Act, R.S.N.S. 1989, c. 240, s. 43(5). The original Judicature Act of Prince Edward Island, R.S.P.E.I. 1974, c. J-3 (which dealt with this in s. 15) was not contained in the 1988 Revised Statutes. The relevant provision is now found in the Judicature Act, S.P.E.I. 2008, c. 20, s. 68(1).

69 Conveyancing and Law of Property Act, R.S.O. 1990, c. C.34, s. 53(1). Note the possibility of conflict between this provision and that of the Personal Property Security Act relating to the assignment of a "security interest" or of book debts not intended to be by way of security.

70 Law of Property Act, R.S.M. c. L90, s. 36; Choses in Action Act, R.S.S. 1978, c. C-11 on which see *West v. Soon* (1915), 24 D.L.R. 813 (Sask. C.A.).

71 Choses in Action Act, R.S.N.W.T. 1988, c. C-7; Choses in Action Act, R.S.Y. 2002, c. 33.

could have been assigned in equity prior to the statutory change in the law.[72] There are limitations of the kinds of things which are assignable.[73] As long as the chose is within the ambit of assignability, it may be dealt with in accordance with the statute.

A valid statutory assignment involves: (i) that the assignment be absolute; it must be an assignment of the whole debt or chose in action;[74] which excludes from the ambit of the statutory provisions an assignment by way of charge although the mortgage of a debt may be an absolute assignment; (ii) that the assignment is in writing signed by the assignor; (iii) that the assignee prove that express notice of the assignment, in writing, has been given to the debtor.[75]

Consideration for the assignment need not be shown for it to be effective under the statutory provisions (provided all the other requirements of the statute are satisfied).[76] Whether the chose is legal or equitable, therefore, and whether it is for consideration or by way of gift, whether the gift is perfected or not, the assignment will be enforceable under the statute, because the statutory transaction is a transfer of property, *not a* contract.[77]

(C) *Effects of a valid statutory assignment*

Where the statute is satisfied then the assignee may sue in his own name, without joining the assignor as a party.[78] As Macdonald C.J. said in *Dell v. Saunders*,[79]

> [l]egal choses in action could and have been recovered by suit in the name of the assignor. It is here that the law has been changed. The Act gives the assignee of a legal chose in action who complies with its provisions the right to sue in his own name, but when a legal chose in action is assigned otherwise than in conformity to the Act, he must still sue in the name of the assignor.

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72 *Re Pain*, [1919] 1 Ch. 38. For example, the assignor's interest in a trust fund: *Nash v. Landry* (1986), 7 B.C.L.R. (2d) 129 (B.C. Co. Ct.); affirmed (January 27, 1988), Doc. Vancouver CA006816 (B.C.C.A.).

73 Below, pp. 654-657.

74 *Bitz, Szemenyei, Ferguson & MacKenzie v. Cami Automotive Inc.* (1997), 34 O.R. (3d) 566 (Ont. Gen. Div.). This is quoted by Phillips J. in *Parrish & Heimbecker Ltd. v. All Peace Auctions Ltd.* (2001), 309 A.R. 62 at 76 (Alta. Q.B.); additional reasons at (2002), 326 A.R. 383 (Alta. Q.B.), above, note 58.

75 See, *e.g.*, *Pettit & Johnston v. Foster Wheeler Ltd.*, [1950] O.R. 83 (Ont. H.C.); affirmed subject to variation as to interest [1950] O.W.N. 474 (Ont. C.A.); *Watson v. C.F. Hart Ltd.* (1986), 59 Nfld. & P.E.I.R. 308 (Nfld. Dist. Ct.) (lack of notice in writing defeated assignee's claim). Compare *Dalhousie Lbr. Co. v. Walker* (1916), 44 N.B.R. 455 (N.B.C.A.); *Dell v. Saunders* (1914), 17 D.L.R. 279 (B.C.C.A.); *Griffiths v. Kenney*, [1917] 1 W.W.R. 800 (B.C.S.C.); *Grant v. Cameron* (1891), 18 S.C.R. 716; *Allux Ltd. v. McKenna*, [1962] O.W.N. 258 (Ont. Div. Ct.); *DiGuilo v. Boland*, [1958] O.R. 384 (Ont. C.A.); affirmed [1961] S.C.R. vii (note). Contrast *Won Wah Low Co. v. Wong*, [1962] O.W.N. 165 (Ont. H.C.).

76 *Law Society (Saskatchewan) v. McLeod* (1993), 115 Sask. R. 144 (Sask. Q.B.); affirmed September 13, 1994 (Sask. C.A.); leave to appeal to S.C.C. refused (1995), 137 Sask. R. 320 (note) (S.C.C.).

77 *Re Westerton*, [1919] 2 Ch. 104. Contrast the situation where the assignment is equitable: above, p. 649. In *Bank of N.S. v. Nfld. Rebar Co.* (1987), 65 Nfld. & P.E.I.R. 165 (Nfld. T.D.), a statutory assignment to the bank had priority over an equitable assignment to the plaintiffs: it was earlier in time. But this might also have been because the statutory assignment transferred property.

78 *Won Wah Low Co. v. Wong*, above. For the right of the assignee to claim actual, not merely nominal damages, see *Darlington Borough Council v. Wiltshier Northern Ltd.*, [1995] 1 W.L.R. 68 (C.A.).

79 Above, at 281. Compare *Trubenizing Process Corp. v. John Forsyth Ltd.*, [1943] S.C.R. 422 at 428-529 *per* Davis J.

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authorizing it to suspend the monthly payments. The Court of Appeal held that the order did not violate the collective agreements, since the debtor did not have the funds to make the payments and the obligation was continuing. Similarly, the Superior Court did not violate the collective agreements by authorizing the monitor to stop paying employee benefits for persons who had not worked for the debtor since the making of the initial order under the *CCAA*: *Re Mine Jeffrey inc.* (2003), 40 C.B.R. (4th) 95, 2003 CarswellQue 90 (Que. C.A.).

If the monitor carries on the business of the debtor, the monitor does not become personally liable to pay a claim where the liability arose before or on the monitor's appointment: ss. 11.8(1) and (2). Sections 11.8(3) to (8) protects the monitor against liability for environmental damage.

Where a court order under the *CCAA* provided that severance amounts could be paid at the discretion of the monitor, and the monitor refused to pay the full amount of a severance claim having regard to the effect the payment would have on other employees, the court found that the monitor had properly exercised its discretion: *Re Mirant Canada Energy Marketing Ltd.* (2004), 2004 CarswellAlta 352, 1 C.B.R. (5th) 252 (Alta. Q.B.); additional reasons at (2004), 2004 CarswellAlta 561, 1 C.B.R. (5th) 261 (Alta. Q.B.).

In *Re Air Canada* (2003), 42 C.B.R. (4th) 173, 2003 CarswellOnt 2464 (Ont. S.C.J. [Commercial List]), the court refused to make an order limiting the administrative charges to a fixed amount. However, it ordered that the professional parties whose charges were being paid out of the debtor's assets were to provide the service list within two weeks of the 1st and 15th of each month their accruing fees and disbursements together with any information of actual or threatened lawsuits against them in their professional capacity while acting for the debtor, and the charges were to be limited so as to exclude gross negligence or wilful misconduct.

The court dismissed an objecting claimants' motion for the appointment of an investigator to investigate certain pre-*CCAA* transactions entered into by the debtor on the basis that the monitor prepared a detailed, impartial report discussing the results of the monitor's independent review of the Corporate Transactions Report and of the matters and transactions considered therein; no stakeholder made any formal allegation that the review conducted by the monitor was flawed or incomplete in any way; there was no evidence that the monitor had refused to provide information or to provide access to documents requested by stakeholders; and there was no utility in duplicating the work of the monitor: *Re Muscletech Research & Development Inc.* (2006), 2006 CarswellOnt 6230, 25 C.B.R. (5th) 231 (Ont. S.C.J.).

The court held that the function of the monitor was to determine the validity and amount of a claim on the basis of the evidence submitted; however, the creditor has the burden of proving its claims: *Re Pine Valley Mining Corp.* (2008), 2008 CarswellBC 579, 41 C.B.R. (5th) 43 (B.C. S.C.). In supplementary reasons, regarding the admissibility of a monitor's report, the court held that it would be guided by the following principles: 1) presumptively, a monitor's report is admissible in evidence at a hearing concerning the subject matter of the report; 2) in unusual circumstances, an officer of the court, such as the monitor, may be cross-examined on its report; 3) the monitor must remain neutral as between the various stakeholders in a *CCAA* proceeding; and 4) the court should strive to protect the monitor from close involvement in the adversarial process between the claimants: *Re Pine Valley Mining Corp.* (2008), 2008 CarswellBC 712, 51 C.B.R. (5th) 49 (B.C. S.C.).

The monitor owes a fiduciary duty to the stakeholders; is required to account to the court; is to act independently; and must treat all parties reasonably and fairly, including creditors, the debtor and its shareholders. In the instant case, the monitor's capacity to report to the secured creditor was limited to the parameters of two provisions in the initial order. Read contextually, neither the express language nor the spirit of the two clauses authorized the

authorizing it to suspend the monthly payments. The Court of Appeal held that the order did not violate the collective agreements, since the debtor did not have the funds to make the payments and the obligation was continuing. Similarly, the Superior Court did not violate the collective agreements by authorizing the monitor to stop paying employee benefits for persons who had not worked for the debtor since the making of the initial order under the *CCAA*: *Re Mine Jeffrey inc.* (2003), 40 C.B.R. (4th) 95, 2003 CarswellQue 90 (Que. C.A.).

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monitor to issue certain information; its authority was limited to relaying non-confidential raw data obtained from the debtors. The monitor exceeded its statutory and court ordered authority. Topolniski J. concluded that the fairest approach was to deprive the monitor of any charges associated with the misconduct: *Re Winalta Inc.* (2011), 2011 CarswellAlta 2237, 84 C.B.R. (5th) 157 (Alta. Q.B.).

The Ontario Superior Court of Justice was satisfied that the work performed by a monitor in respect of a two-time insolvency ending in bankruptcy was reasonably related to the trustee's request; however, the fees charged by the monitor for such work were unreasonable. Brown J. noted that while it might have been appropriate for the monitor to ask a partner or senior manager to participate in the archive review, it was not reasonable for the monitor to bill the time spent by those persons on clerical work at rates more appropriate for the sophisticated advisory tasks. With respect to the fees billed by the monitor's counsel, the court found that the cost of the legal work performed was disproportionately high when measured against the simplicity of the request made by the trustee. As result, Brown J. did not authorize the payment out of the creditor payment pool for the full amount of the legal fees charged by the monitor's counsel. Justice Brown observed that "we are reaching the end of the era where the fees for professional services, such as the giving of legal or insolvency advice, are calculated and billed on an hourly rate basis. I think court-appointed officers, when called on to perform routine clerical or administrative tasks, must explore, as part of the prudent discharge of their duties, alternative billing arrangements, including capped fees, instead of persisting in employing the hourly rate fee-billing system which has been popular for the last half-century": *Re TNG Acquisition Inc.*, 2014 CarswellOnt 5837, 19 C.B.R. (6th) 135, 2014 ONSC 2754 (Ont. S.C.J. [Commercial List]).

The Ontario Superior Court of Justice affirmed the decision of the Master who had found that communications between an entity and its proposed monitor, in the event that a *CCAA* filing would occur, were covered by solicitor-client privilege: *Trillium Motor World Ltd. v. General Motors of Canada Ltd.*, 2014 CarswellOnt 11941, 20 C.B.R. (6th) 332, 2014 ONSC 4894, [2014] O.J. No. 4012 (Ont. S.C.J.).

N§116 — Duties of the Monitor

See notes accompanying ss. 23 to 25.

In approving series of agreements that provided the debtors with certainty with respect to ongoing funding, resolution of inter-company issues, and a settlement with taxing authorities, the court held it was appropriate to place reliance on the views of the monitor, who had the benefit of intensive involvement for over a year and was active in the negotiations leading up to the proposed settlement: *Re Nortel Networks Corp.* (2010), 2010 CarswellOnt 1044, 64 C.B.R. (5th) 269 (Ont. S.C.J. [Commercial List]).

N§117 — Limits on Who Can Act as Monitor

Section 11.7(1) specifies that when an initial order is made in respect of a debtor company, the court shall appoint a monitor the business and financial affairs of the company; and the person so appointed must be a trustee within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*. See N§153 for details of the monitor's obligations.

Section 11.7(2) specifies that except with the permission of the court and on any conditions that it may impose, no trustee may be appointed as monitor in relation to a company if the trustee is or, at any time during the two preceding years, was (i) a director, an officer or an employee of the company, (ii) related to the company or to any director or officer of the company, or (iii) the auditor, accountant or legal counsel, or a partner or an employee of the

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be required to fulfill. The issue of confidentiality is thorny, as the monitor, as an officer of the court, could have an obligation to disclose information it knows, while the monitor has a concurrent obligation to keep information confidential. Breton suggests that in view of the fact that situations change in the course of the restructuring proceedings, the auditor could face problems arising from its position as auditor, and not from its position as monitor, if it assumes the role of monitor in a *CCAA* proceeding.[29]

Chapter 47, when proclaimed in force, will restrict the ability of an auditor to act as monitor, except in particular circumstances, as discussed later in this chapter.

5. Officer of the Court

Canadian courts have held that the monitor is an officer of the court and has an obligation to act independently and to consider the interests of the debtor and its creditors.[30] The courts have also held that the duty of the monitor is to act in the interests of all stakeholders with an interest in the proceeding.[31] This broader notion of the monitor's duties recognizes that multiple stakeholders may be interested in the proceedings. The Ontario Superior Court of Justice in *Royal Oak Mines* held that the monitor's role is to be neutral and to act in the best interests of all concerned.[32] In *PSINet Ltd.*, Mr. Justice Farley of the Ontario Superior Court held that there was no jurisprudence to support an argument that a monitor represents the interests of creditors in the same way as a trustee in bankruptcy, receiver or liquidator, given that the monitor does not act as an asset collector for purposes of distribution to creditors.[33]

The need for the monitor's impartiality goes to the perception of parties, particularly those that are not repeat players in the system, so that the integrity of the insolvency system is maintained. As an officer of the court, the monitor's obligation is to review the parties' positions and then give an opinion based on its expertise. The expertise that the monitor brings to the proceeding is financial expertise, not legal expertise. Even where the monitor has retained legal expertise, its role is not to become the advocate of the debtor corporation or any other party. This kind of legal advocacy can lead to failed confidence in the integrity of the system.

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[29] Jean-Daniel Breton, "Senate Committee Recommendation no. 35 – A Career Limiting Move?", in *Annual Review of Insolvency Law, 2004* (Toronto: Carswell, 2005).

[30] *Fairview Industries Ltd., Re* (1991), 11 C.B.R. (3d) 43, 109 N.S.R. (2d) 12 (N.S. T.D.) at para. 75; *Siscoe & Savoie* v. *Royal Bank* (1994), 29 C.B.R. (3d) 1 (N.B. C.A.) , leave to appeal refused (1995), 32 C.B.R. (3d) 179n (S.C.C.); *United Used Auto & Truck Parts Ltd., Re* (1999), 12 C.B.R. (4th) 144 (B.C. S.C. [In Chambers]), at para. 20, affirmed (2000), 16 C.B.R. (4th) 141 (B.C. C.A.), leave to appeal allowed but appeal discontinued (2000), 2000 CarswellBC 2132 (S.C.C.); *Hickman Equipment (1985) Ltd., Re* (2002), 34 C.B.R. (4th) 203 (Nfld. T.D.) at para. 33.

[31] *Royal Oak Mines Inc., Re* (1999), 11 C.B.R. (4th) 122 (Ont. Gen. Div. [Commercial List]) at para. 6.

[32] *Ibid.*

[33] *PSINet Ltd., Re* (2002), 30 C.B.R. (4th) 226 (Ont. S.C.J. [Commercial List]), at para. 12, affirmed (2002), 32 C.B.R. (4th) 102 (Ont. C.A.), discussed in the context of being a representative of creditors for purposes of the *PPSA*.

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 ARRANGMENT OF PRIMUS TELECOMMUNICTIONATS CANADA INC., PRIMUS TELECOMMUNICATIONS, INC. AND LINGO, INC.

Court File No. CV-16-11257-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMOTION RECORD

Proceeding commenced at Toronto

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