Court File No. 31-OR-207744-T

*ONTARIO*
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**
**(IN BANKRUPTCY AND INSOLVENCY)**

**IN THE MATTER OF THE BANKRUPTCY OF SKYSERVICE AIRLINES INC.**

# BRIEF OF AUTHORITIES OF THE TRUSTEE

August 1, 2012

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**Attention: Mike Cacciavillani**

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# TAB 1

# BANKRUPTCY IN CANADA

## FOURTH EDITION

**John D. Honsberger, Q.C.**
**and**
**Vern W. DaRe**

CANADA LAW BOOK
A Division of the Cartwright Group Ltd.
240 Edward Street, Aurora, Ontario L4G 3S9
www.canadalawbook.ca

inspectors.[49] They are supervisors of the trustee and it is their function to instruct the trustee to take whatever steps they consider appropriate to protect the estate and the creditors.[50] There are seldom subsequent meetings of creditors, as the inspectors are considered to represent them in most circumstances.

The trustee has the discretion to call a meeting of creditors. This is mandatory when requested by 25% in number of the creditors holding 25% in value of proved claims.[51]

## 7.09 INSPECTORS

Inspectors are appointed by the creditors. On their behalf, the inspectors supervise the trustee and, thereby, are able to closely control the administration of an estate. In theory, the role of inspectors, as contemplated by the BIA, is one of leadership and initiative for the efficient administration of an estate. An inspector's function is to advise and assist the trustee and to allow creditors greater control over the trustee. In practice, as with the provisions for creditor control,[52] theory does not always prevail or mimic reality. In another time, when there was, perhaps, greater interest on the part of creditors, this might not have been the case.

At the present time, inspectors, however, are not always diligent in their duties. Competing demands on their limited time may also be a contributing factor. It is often difficult to obtain a quorum at meetings.[53] In the increasing number of estates with few or no assets, there is often very little for the inspectors to do in the circumstances; in recognition of this, the BIA was amended to dispense with inspectors in small estates where the realizable assets would not exceed $15,000.[54] In all other cases, until recently, it was mandatory, under the BIA, that the creditors appoint inspectors for the estate, whether or not they wanted them. This may be compared to the English Act — the original drafting precedent for the Canadian Act — where the creditors may, but need not, appoint inspectors.[55] Official control replaced inspector control in England, and increasingly, is replacing or augmenting the role of inspectors in Canada. Interestingly, this trend is reflected in the most recent

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49 BIA, s. 116(1).

50 *Fishman (Re)* (1985), 56 C.B.R. (N.S.) 316 (Ont. S.C. (Bkcy)).

51 BIA, s. 103.

52 See, in Chapter 22 of this book, "Secured Creditors", discussions under heading 22.01, "Restrictions on the Rights of Secured Creditors"; *Fishman (Re)*, *supra*, footnote 50.

53 The Tassé Report, *op. cit.*, footnote 13, at p. 68.

54 BIA, s. 49(6); Rule 130.

55 *Bankruptcy Act, 1914*, 4 & 5 Geo. 5, c. 59.

bankruptcy reforms to the BIA, which provide that creditors may appoint up to five inspectors or agree not to appoint any inspectors.[56]

## 7.0901 Appointment

Until 2009, for all estates where the realizable assets were expected to be $10,000 or more,[57] the creditors were required under the BIA — it was mandatory and not merely permissive — to appoint at least one, but not more than, five inspectors at the first meeting of creditors.[58] They had to appoint the inspectors themselves; they had no power to delegate their power of appointment.[59] An inspector, however, need not have been a creditor[60] or could have been a secured creditor,[61] but, it would seem, could not be a corporation.[62] Again, under the 2009 Insolvency Reforms, the appointment of inspectors is not mandatory, since creditors can agree not to appoint any inspectors.

## 7.0902 Appointment Subject to Appeal to the Court

On an appeal from the chair of the first meeting, the court may remove illegally elected inspectors, declare other inspectors to have been elected[63] or ratify the inspector's appointment, despite objections.[64]

## 7.0903 Powers, Duties and Rights of Inspectors

Inspectors are fiduciaries.[65] They represent all creditors and must perform their duties impartially.[66] They must be entirely disinterested and exercise a general supervision over all operations of the estate and protect the creditors

56 See BIA, ss. 56 and 116(1).

57 BIA, s. 49(6) and Rule 130 (as it read prior to the 2009 Insolvency Reforms).

58 BIA, s. 116(1) (as it read prior to the 2009 Insolvency Reforms).

59 *Banque Canadienne Nationale v. Mutual Life Insur. Co. of New York and Shragge* (1933), 14 C.B.R. 287 (Man. K.B.).

60 *F & W Stereo Pacific Ltd. v. Bottom* (1975), 22 C.B.R. (N.S.) 84 (B.C.S.C. (Bkcy)).

61 *Morrison v. Toronto Dominion Bank* (1980), 35 C.B.R. (N.S.) 218 (Alta. Q.B.).

62 *Grain Growers Co-operative Ass'n. Ltd. (Re)*, [1924] 1 D.L.R. 397 (Sask. K.B.), affd [1924] 3 D.L.R. 803 (C.A.), *per* Haultain C.J.S.

63 *Maritime Eduction Co. Ltd. (In re)*, [1930] 1 D.L.R. 642 (N.B.C.A.), affg 10 C.B.R. 425 (N.B.K.B).

64 *Judah Stober (Re)*, [1923] 1 D.L.R. 647 (Que. S.C. (Bkcy)).

65 *Bulmer (Re); Greaves (Ex p.)*, [1937] Ch. 499 (C.A.).

66 See *Imperial Bank of Canada v. Barber* (1921), 59 D.L.R. 523 (Ont. S.C. (Bkcy)); *Bryant, Isard & Co. (Re)* (1923), 4 C.B.R. 41 (Ont. S.C. (Bkcy)). See also BIA, s. 120(3) and (4), imposing certain duties on inspectors, including their review and approval of the trustee's accounts, final statement of receipts, disbursements and distribution of dividends.

at large.[67] They may not favour the debtor or obtain a personal advantage or benefit at the expense of the creditors.[68] Inspectors must not expose themselves to a conflict between their duties and interest.[69] They must, at all times, ensure that the trustee acts in accordance with the BIA. When the trustee fails, the inspector must take steps to remove the trustee.[70] Likewise, it is the inspector's duty to control a solicitor or anyone else who takes part in administering the estate.[71]

At a meeting of inspectors held by the trustee, an inspector may be accompanied by his or her solicitor. The inspector's solicitor, however, cannot take any part in the deliberation or propose, second or vote on any resolution.

The trustee is required to obtain the approval of inspectors on several matters. Inspectors are empowered to inspect the administration and permit certain acts, as well as approve other acts, subject to the approval of the court. The inspectors cannot, by taking a negative position with respect to the approval of the sale of assets of the estate of the bankrupt, indefinitely delay the sale.[72]

The permission of the inspectors is not required to give capacity to the trustee, but merely to protect the estate on matters relating to costs and proceedings made without the inspectors' knowledge and consent.[73]

## 7.0904 Creditor Control of Inspectors

The trustee, in the administration and distribution of the property of the bankrupt, must have regard to any directions that may be given by resolution of the creditors at any general meeting or by the inspectors. Any directions so given by the creditors shall, in case of conflict, be deemed to override any directions given by the inspectors.[74]

## 7.0905 Control of Court Over Administration of Inspectors

Under the BIA, the governing authority in the practical administration of the estate is to be the inspectors, not the court. Unless it is shown that

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67 *Brown Taxi Co. & Detroit Radiator Co. (Re)* (1922), 65 D.L.R. 136 (Que. S.C. (Bkcy)); *E.J. Callaghan Ltd. (In re)* (1932), 13 C.B.R. 356 (Ont. S.C. (Bkcy)); *Gulf of St. Lawrence Shipping and Trading Co. (In re)* (1921), 2 C.B.R. 214 (Que. S.C. (Bkcy)); *Crystal (In re); Hawthorne (Ex p.)*, [1925] 4 D.L.R. 178 (Ont. S.C. (Bkcy), affd [1925] 4 D.L.R. 1078 (C.A.); *Canadian Cereal and Flour Mills Co. (Re)* (1921), 67 D.L.R. 234 (Ont. S.C. (Bkcy)).

68 *Lapierre (Re)* (1933), 14 C.B.R. 356 (Que. S.C. (Bkcy)); *Global Plastic Packaging Ltd. (Re)* (2004), 2 C.B.R. (5th) 217 (Ont. S.C.J.).

69 *Bulmer (Re); Greaves (Ex p.), supra*, footnote 65. If inspectors were to expose themselves to a conflict, then they could be called upon to account.

70 *Bryant, Isard & Co., supra*, footnote 66, at p. 48.

71 *Gallard (In re); Gallard (Ex p.)*, [1896] 1 Q.B. 68.

72 *Compads Ltd. and Dumas and McLean (Re)* (1943), 25 C.B.R. 31 (Que. S.C.).

73 *Cartier v. Vermette* (1934), 16 C.B.R. 96 (Que. C.A.).

74 BIA, s. 119(1).

inspectors have exceeded their powers or acted fraudulently, unreasonably or not in good faith, the administration is to be governed according to their directions;[75] however, the decisions and actions of the inspectors are subject to review by the court at the instance of the trustee or any interested person. The court may revoke or vary any act or decision of the inspectors and may give such directions, permission or authority as it deems proper, or may refer any matter back to the inspectors for consideration.[76]

The court should not interfere with a consummated sale of assets, unless it is unreasonable or contrary to the interests of creditors in general. A sale is not necessarily unreasonable simply because the assets were not sold for the highest price that could be obtained in the circumstances.[77]

In one case, when inspectors permitted one person to increase his tender so that it was equal to the tender of another, without permitting the other tender to increase his tender, it was held that the inspectors did not act in the general interest of the creditors. It was also held that the practice of allowing a person to increase his bid after all the tenders had been examined, besides being unfair, constituted a dangerous practice that would tend to discourage tenders.[78]

## 7.10 TRUSTEE

The trustee has an important role in the administration and control of an estate. Under the BIA, the trustee is principally responsible for collecting the estate of the bankrupt, as well as liquidating and distributing the proceeds among the creditors.

Extensive powers and duties are imposed upon the trustee. While primarily administrative in nature, they include certain quasi-judicial powers. These include the admission and disallowance of proofs of claim and security. Most of the trustee's powers and duties are specifically granted under the BIA. Many of them, primarily relating to the property of the bankrupt, are conditional on the prior permission of the inspectors. The trustee also has important duties respecting the property of the debtor encompassed by a proposal.

As with the progressive diminution of creditor control, the role of the trustee has been reduced and replaced by greater official control.

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75 *Feldman (In re)* (1931), 13 C.B.R. 95 (Ont. S.C. (Bkcy)), affd 13 C.B.R. 313 (C.A.); *J.L. Jacobs & Co. Ltd. (In re)*, [1941] 2 D.L.R. 786 (Ont. S.C. (Bkcy)); *Pretty Fashion Inc. (In re)* (1951), 31 C.B.R. 217 (Que. S.C. (Bkcy)); *Geler (Re)* (2005), 12 C.B.R. (5th) 15 (Ont. S.C.J.).

76 BIA, s. 119(2).

77 *Fero (In re)* (1958), 37 C.B.R. 179 (Ont. S.C. (Bkcy)); *Katz (Trustee of) (Re)* (1991), 6 C.B.R. (3d) 211 (Ont. Ct. (Gen. Div.)); *Geler (Re)*, *supra*, footnote 75.

78 *Pretty Fashion Inc. (In re)*, *supra*, footnote 75.

# TAB 2

 
1984 CarswellQue 33, 51 C.B.R. (N.S.) 132, (sub nom. Dans l'affaire de la faillite de: Promedia Inc. et Maheu) [1984] C.S. 472

**C**

1984 CarswellQue 33, 51 C.B.R. (N.S.) 132, (sub nom. Dans l'affaire de la faillite de: Promedia Inc. et Maheu) [1984] C.S. 472

Maheu c. Rodrigue

Re PROMEDIA INC.; MAHEU, NOISEUX v. RODRIGUE and BOISVERT

Quebec Superior Court, In Bankruptcy

Dugas J.

Judgment: April 5, 1984
Docket: Montreal No. 500-11-001933-833



Counsel: *D. Roussin*, for bankrupt.

*M. Peacock*, for mis-en-cause.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate — Inspectors — Who may be appointed inspector.

Inspectors — Disqualification — Conflict of interest — Controller of corporate partner of bankrupt appointed inspector — At time of bankruptcy actions for accounting, to annul partnership agreement, and for damages, pending between partners — Partnership agreement providing for purchase of interest of bankrupt partner by remaining partner — Application by bankrupt for removal of inspector granted.

Proceedings by bankrupt — Application for removal of inspector — Controller of corporate partner of bankrupt appointed inspector — At time of bankruptcy actions for accounting, to annul partnership agreement, and for damages, pending between partners — Partnership agreement providing for purchase of interest of bankrupt partner by remaining partner — Intervention of bankrupt to be permitted only in rare circumstances but appropriate in this case — Application granted.

At the first meeting of creditors, the controller of a corporation in partnership with the debtor B. was named inspector in the bankruptcy. Litigation was pending between the debtor and its partner at the time of the bankruptcy, including an action for accounting and an action to annul the partnership agreement and for damages. The contract provided that in the event of the bankruptcy of one of the partners, the other would be obliged to purchase the interests of the bankrupt partner upon payment of 80 per cent of a predetermined value. If such value had not been predetermined as here, the price would be determined on the basis of the book value which

would be established by the auditor of the partnership. The bankrupt applied for an order removing the partner as an inspector.

**Held:**

Application granted.

Clearly, the interests of the bankrupt partner and those of the remaining partner were diametrically opposed. The trustee had to decide whether or not to continue the action for an accounting, whether or not to acquiesce in the demand for nullity of the agreement, whether or not the remaining partner was to be considered jointly and severally indebted to the creditors of the bankrupt inasmuch as the partnership had assumed the bankrupt's obligations towards these creditors, and other like matters. There was a conflict of interests at all levels.

It was insufficient that the inspector in question would be a significant aid in clarifying this complex bankruptcy. The Act furnishes to the trustee adequate instruments to obtain the information which he requires without it being necessary to give an inspector's seat to a representative of the partner. The company represented by the inspector in question was a party to civil proceedings the result of which would affect the composition of the bankruptcy. The prohibition in s. 94(2) of the Act applies to a representative of a corporation as much as to an individual who is engaged in litigation with the trustee. Indeed, the matter could well have been submitted to the court for determination by way of an application for directions.

As to the right of the bankrupt to submit the application, the debtor should be permitted to intervene only in rare circumstances but this was one of the circumstances in which it was appropriate.

**Cases considered:**

*Eastern Paper Co., Re* (1922), 3 C.B.R. 586 (Que. S.C.) — *considered*

*Geiger, Re*, [1915] 1 K.B. 439 (D.C.) — *applied*

*Nash & Sons, Re; Ex parte Crofton, Craven & Worthington*, [1896] 1 Q.B. 13 (D.C.) — *applied*

*Wimco Steel Sales Co. Ltd., Re* (1970), 14 C.B.R. (N.S.) 288 (Ont. H.C.) — *applied*

**Statutes considered:**

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 16, 94(2).

**Authorities considered:**

Duncan and Honsberger, Bankruptcy in Canada, 3rd ed. (1961), p. 32.
Application to revoke appointment of inspector.

***Dugas J.*:**

1 A la première assemblée des créanciers, le ler septembre 1983, le mis-en-cause Richard Boisvert fut nommé inspecteur de la faillite de la requérante, malgré l'opposition farouche de la débitrice et de son président. On affirmait que monsieur Boisvert était en conflit d'intérêts. Par la présente requête, la débitrice Promédia Inc.

 
1984 CarswellQue 33, 51 C.B.R. (N.S.) 132, (sub nom. Dans l'affaire de la faillite de: Promedia Inc. et Maheu)
[1984] C.S. 472

demande la destitution de cet inspecteur.

2 1. Monsieur Boisvert est le contrôleur de Dialogue/Communications P.G.P. Ltée, avec laquelle Promédia a créé, le 2 avril 1983, la société "Le groupe Dialogue/Promédia" pour la poursuite en commun des activités commerciales des associés. Le contrat, signé le 17 juin 1982 (produit comme pièce R-1), opère rétroactivement au 2 avril précédent.

3 Un désaccord inconciliable s'est installé entre les partenaires dans les semaines qui suivirent et Promédia logea une action en reddition de compte contre son associé (500-05-014442-824) le 20 août 1983. Dialogue/ Communications répliqua par une action en annulation du contrat de société et en dommages-intérêts (500-05-015621-822) le 9 septembre suivant.

4 En 1983 un créancier, Boulanger Inc., a pris action contre la débitrice pour un compte de $10,545.60. La débitrice a prétendu qu'il s'agissait là d'une réclamation pour marchandise commandée par la société et reçue par elle après le 2 avril 1982. Elle a répliqué à l'action en poursuivant en garantie son associé. La déclaration en garantie fut produite lors de l'audition de la requête en faillite comme pièce I-4.

5 Le contrat de société a été produit comme pièce R-1.

6 Un premier examen sommaire fait voir que Boulanger est inscrit au rang des créanciers de Dialogue/ Communications et que son nom n'apparaît pas à la liste des créanciers de Promédia Inc.! Je ne sais qu'en penser, car les avocats ne semblent pas y avoir porté attention. De toute façon, comme ils ne m'en ont pas parlé, je n'y porterai pas attention plus longtemps.

7 Mais le contrat mérite qu'on s'y arrête. Chacun des associés transporte à la société ses actifs, consistant principalement en comptes à recevoir. En retour, la société assume les comptes payables du cédant. On établit pour chacun des associés la plus-value de l'actif cédé sur le passif transporté. L'entente établit ainsi la plus-value des actifs que Promédia a transportés à la société à $98,040. Les actifs transportés étaient évalués à $571,760 et les passifs à $463,720. La différence fut transformée en mise de fonds de Promédia dans la société. Les parties reconnaissaient en même temps que la mise de fonds de Dialogue/Communications excédait de $18,000 celle de Promédia et les associés convenaient que la société verserait cette somme à Dialogue/Communications avant le ler avril 1985.

8 Le contrat envisage la façon dont devrait être résolu un désaccord entre les parties. L'une des hypothèses envisagées est celle de la faillite de l'un des associés. L'associé restant est alors tenu d'acheter la part de l'autre en lui versant 80 per cent de la valeur qu'elles auraient préalablement fixée. Mais les associés ne semblent pas avoir fixé préalabement cette valeur. Le contrat prévoit alors que le prix sera en fonction de la valeur aux livres selon que l'aura établie ou l'établira le vérificateur des comptes de la société.

9 Il n'est point besoin d'en dire plus long pour montrer que l'intérêt de l'assuré failli et celui de l'assuré qui reste sont diamètralement opposés. Le syndic aura, à cet égard, d'importantes décisions à prendre: Poursuivra-t-il l'action en reddition de comptes de Promédia contre son associé? Acquiescera-t-il à l'action en annulation de contrat de société qu'a intentée Dialogue/Communications? Tiendra-t-il Dialogue/Communications co-débitrice solidaire des créanciers de Promédia, la société ayant assumé les dettes de Promédia envers les créanciers par l'art. 2 de la vente de Promédia à la société? Exigera-t-il que la société tienne Promédia libre de ses engagements envers le tiers, comme semble l'exiger l'art. 20 du contrat de société?

10 Cette courte série de questions, qu'il serait facile d'allonger, me convainc qu'il y a plus qu'apparence de conflit entre Dialogue/Communications et le syndic. On peut dire qu'il y a conflit de tous les instants! Chaque réclamation devra être évaluée sous la lumière du contrat de société et des listes des comptes payables qui l'accompagnent pour déterminer à qui appartient la dette et dans quelle mesure la société en est responsable.

11 Le syndic réplique qu'il a besoin de monsieur Boisvert pour y voir clair dans ce dossier complexe. La loi sur la faillite, S.R.C. 1970, c. B-3, fournit au syndic les instruments dont il a besoin pour obtenir les renseignements qu'il désire, sans qu'il soit nécessaire de donner un siège d'inspecteur au représentant de l'associé. La compagnie dont monsieur Boisvert est mandataire est partie a des actions civiles dont le résultat affectera la composition de l'actif. L'article 94(2) de la Loi sur la faillite s'oppose à ce que cette compagnie ou son représentant agisse comme inspecteur:

> (2) Aucune personne, partie à une action ou procédure contestée par ou contre l'actif, ne peut être nommée ou agir en qualité d'inspecteur.

12 La prohibition s'applique au représentant d'une corporation, comme en a jugé Houlden J. dans l'affaire, *Re Wimco Steel Sales Co. Ltd.* (1970), 14 C.B.R. (N.S.) 288 (Ont. H.C.). Il a écrit [p. 290]:

> It will be obvious that Mr. Barber, representing the Algoma Steel Corporation, will be most anxious that the lawsuit against his company should be disposed of, and I believe this might very well colour his approach to any proposal that is submitted. In my opinion, it is imperative that an order should be made removing Mr. Barber as an inspector of the estate.

13 Je demeur étonné que le syndic n'ait pas lui-même soumis à la cour en vertu de l'art. 16, une question à ce sujet, comme la présente requérante l'a invité à le faire. Il pouvait le faire selon *Re Eastern Paper Co.* (1922), 3 C.B.R. 586 (C.S. Qué.). Il aurait dû le faire. C'est à cause du refus du syndic de soumettre à la cour une question relative à la capacité d'agir du mis-en-cause Boisvert que la requérante a dû loger elle-même une requête en destitution.

14 2. Faut-il cependant reconnaître au failli le droit de contester la capacité d'un inspecteur de sa faillite? Ne serait-ce pas là lui donner un moyen de pression sur le syndic et sur les inspecteurs à qui, seuls, incombe la responsabilité de l'administration?

15 J'ai posé ces questions à l'audience et les avocats ne m'ont signalé aucune jurisprudence et aucune opinion d'auteur sur la question.

16 Duncan et Honsberger, Bankruptcy in Canada, 3e éd. (1961), écrivent à la p. 32:

> *Bankrupt may not usually intervene.* It is settled practice not to allow a bankrupt to intervene in or take part in the proceedings, unless there are circumstances which justify a special order in his favour, but in a proper case the Court has a discretion to allow a bankrupt to attend on the taxation of costs.

17 Les auteurs invoquent l'autorité de *Re Geiger*, [1915] 1 K.B. 439 (D.C.), où il s'agissait d'un failli qui voulait intervenir dans la taxation des frais de la faillite. Il faut dire que le failli avait "racheté" sa faillite et qu'il devait, selon l'arrangement, rembourser au syndic les frais qui seraient taxés.

 
1984 CarswellQue 33, 51 C.B.R. (N.S.) 132, (sub nom. Dans l'affaire de la faillite de: Promedia Inc. et Maheu) [1984] C.S. 472

18 Lord Cozens-Hardy M.R., y'énonce, à la p. 446:

> It is the settled practice not to allow a bankrupt to intervene or to take part in the proceedings unless there are circumstances which justify a special order in his favour. That there is jurisdiction to make such an order is settled: *Re Nash & Sons; Ex parte Crofton, Craven & Worthington*, [1896] 1 Q.B. 13 (D.C.) et *Re Marsh; Ex parte Marsh* (1885), 15 Q.B.D. 340 (C.A.).

19 Dans l'affaire *Nash*, supra, Vaughan-Williams J. avait écrit [à la p. 17]:

> I have no doubt that it is within the inherent power of the Court to order that he shall attend at a taxation if the Court thinks it right.

20 Il existe donc un pouvoir inhérent chez le juge siégeant en matière de faillite d'admettre le débiteur à intervenir. L'intervention du débiteur ne doit cependant être admise dans de rares circonstances.

21 Considerant que le débiteur a prié le syndic de soumettre à la cour la question débattue et que le syndic a refusé de le faire;

22 Considerant l'importance des questions à résoudre et l'intérêt évident de l'associé de la débitrice que ces questions soient résolues dans un sens qui soit favorable à la compagnie qu'il représente: affaire *Wimco*, supra;

23 Considerant l'intérêt de la faillite à ce que ces questions soient débattues contradictoirement;

24 Considerant l'intérêt de la débitrice à ce que les droits que lui confère le contrat de société ne soient pas mis en péril par un comité d'inspection favorable à l'associé ou qui, à cause de la présence d'un représentant de l'associé, laisse croire qu'il n'est pas impartial.

25 La cour, dans l'exercice de sa discrétion, accorde au débiteur de soumettre la question qu'il soulève, et, disposant de la requête, l'accueille; revoque l'inspecteur Richard Boisvert, avec depens contre la masse.

*Application granted.*

END OF DOCUMENT

# TAB 3

**Ontario Supreme Court**
**Canadian Triton International Ltd., Re**
**Date: 1997-10-22**

In The Matter of the Bankruptcy of Canadian Triton International Ltd.



Ontario Court of Justice, General Division (In Bankruptcy) Farley J.

Heard: October 15 and 17, 1997

Judgment: October 22, 1997

Docket: 31-205425T

*Steven G. Golick, for Price Waterhouse Limited, Interim Receiver and Trustee in Bankruptcy.*

*Keith M. Landy, for the Bankrupt, Canadian Triton International Limited.*

*J. Carfagnini, for Babak Movahedi.*

*Justin R. Fogarty, for Tradean Ltd., Alan Tyson and Mastin's Manitoulin Limited and GAC International Consultants Inc. and member of the Creditors Committee.*

*Steven Graff, for Duferco International Trading, Ltd.*

*Patrick Shea, for Doyle Salewski Lemieux Inc., the Trustee named in the Proposal of Canadian Triton International Ltd.*

*Chris Reid, for Nantong, S.A.*

*Stephen Turk, for Crown Resources Corporation, S.A. and Dr. Ati Olfati.*

*J.A. Fabello and R. Matheson, for Services Dowell Schlumberger, S.A.*

***Farley J.*:**

**Endorsement**

[1] Price Waterhouse Limited ("PWL") in its capacity as interim receiver ("Interim Receiver") of Canadian Triton International Ltd. ("Triton") and in its capacity as Trustee in Bankruptcy of Triton ("Trustee") moved i. for advice and directions with respect to the outcome of four resolutions tabled and voted on at a meeting of creditors held on October 8, 1997 and in particular, as to the entitlement of creditors to vote at such meeting, and ii. for an order approving of the activities of the Interim Receiver as disclosed in the fourth and fifth reports of

the Interim Receiver. The hearing proceeded as scheduled on October 15, 1997 but was held over to October 17, 1997 to allow Doyle Salewski Lemieux Inc. ("Doyle") the trustee named in the proposal of Triton (which proposal was defeated on October 8, 1997 resulting in the bankruptcy) to provide possibly missing documentation and for others to provide any further material in regular fashion. Unfortunately there seems to have developed a practice in this case of interested persons forwarding and advancing material irregularly and at the last minute. Regular material would be by way of affidavits with exhibits or reports of court officers, not correspondence. An example of inappropriate timing would be that at the start of the hearing on the morning of October 15th I received a number of affidavits; before breaking for lunch I observed that I was wondering if I would receive additional material - which I did that afternoon (it having been prepared over the lunch hour). This affidavit of Robert Stein representing Duferco International Trading Ltd. ("Duferco") was said to have two exhibits attached - they were not. As well, the material handed up to me included a cross motion of Alan Tyson ("Tyson"), Tradean Limited ("Tradean"), GAC International Consultants Inc. ("GAC") and Mastin's Manitoulin Limited ("Mastin's"), (collectively "Fogarty Clients") to adjourn the motion of PWL above "to allow sufficient time for [the Fogarty Clients] to file responding material, iii. directing that cross examinations be conducted on the affidavit of Bernard Frankel filed in support of the proof of claim of Crown Resources Corporation, S.A., (iv) pursuant to section 116(5) of the *Bankruptcy and Insolvency Act,* removing Ata Olfati and Bernard Frankel as inspectors and substituting two inspectors in their place pending resolution of all claims; (v) directing a date for the validity of the proofs of claim before this Court...". Notwithstanding that this hearing was adjourned to October 17, 1997 with an invitation to any one to file any other relevant material, the Fogarty Clients did not submit any further material nor were they represented at the resumption. In today's world of communication capability it is not sufficient to baldly assert that more time is required without giving any justification. In his letter to Mr. Golick of October 17, 1997, Mr. Fogarty indicated that he did not have any submissions to make with respect to the form of proof of claim of Tradean, GAC and Tyson. In support of the cross motion by the Fogarty Clients an affidavit of A.J. Reynolds Mastin, barrister & solicitor and manager of Mastin's sworn October 14, 1997 was advanced. Paragraph 4 of that affidavit related to a telephone hearing before me (I being in Quebec City and essentially all representatives of the interested parties being in the boardroom of counsel for PWL in Toronto and other by conference phone). At the start of that hearing some counsel interrupted others on a repeated basis as well as referring to irregular material. I therefore advised that I

would allow them 10 minutes to sort out their order of speaking and that I only wished deal with regular material. Mr. Mastin indicates within paragraph 4 that: "the Court did not allow my Counsel or any other Counsel to make reference to the Resolution which was very important to the Creditors, namely that the Penguin Offer should be delayed until a Proposal was voted on." That resolution was not mentioned in any material regular or irregular; it was not mentioned in any way nor the fact that it had not been commented upon by the Interim Receiver. Under the circumstances I do not see that any one was inappropriately prevented from raising anything material to my attention.

[2] Some counsel advised on October 15, 1997 that they had not had enough time to obtain instructions as to the aspect of the approval of the Interim Receiver's activities as reflected in the fourth and fifth report. I advised that they should obtain these instructions by October 17, 1997. No one appeared then to object but Mr. Golick advised of Mr. Fogarty's letter: an order will go approving of these activities. Mr. Fogarty's letter of October 17, 1997 to Mr. Golick indicates that his clients "do not take issue with respect to the activities described therein with the exception to their position not being taken as an approval of the action and fees incurred by the Trustee with respect to Ata Olfati".

[3] I think it helpful to observe that the balance of the PWL motion deals with the question of who is entitled to vote at the October 8, 1997 meeting and that because of the size of the asserted claims it was only necessary to deal with the voting capacity of Crown Resources Corporation SA ("Crown"), Duferco, Nantong, S.A. ("Nantong") and Tradean. As Mr. Fogarty observed in his October 17th letter to Mr. Golick: "Ultimately I agree that the matter will rise and fall on how the claim of Nantong, S.A. and Crown Resources Corporation are characterized and those submissions have already been well canvassed before the court." I would also observe that the question here is only with respect to entitlement to vote (on October 8, 1997) and not to entitlement to any distribution of the estate of Triton.

[4] I was directed to certain sections of the *Bankruptcy and Insolvency Act* R.S.C. 1985, c. B-3, as amended ("BIA"), namely ss. 105(1), 108(1), (3), 109(1), 121(2), 124(1), (2), (3), (4), 125 and Form 61 They are set out for ease of reference as well as s. 51(1), Form 38, s. 109(2) and s. 121(1):

> s. 51(1) The trustee shall call a meeting of the creditors, to be held within twenty-one after the filing of the proposal with the official receiver under subsection 62(1), by

sending in the prescribed manner to every known creditor and to the official receiver, at least ten days before the meeting.

(a) notice of the date, time and place of the meeting;

(b) a condensed statement of the assets and liabilities;

(c) a list of the creditors with claims amounting to two hundred and fifty dollars or more and the amounts of their claims as known or shown by the debtor's books:

(d) a copy of the proposal;

(e) the prescribed forms, in blank, of

(i) proof of claim,

(ii) in the case of a secured creditor to whom the proposal was made, proof of secured claim, and

(iii) proxy,

if not already sent; and

(f) a voting letter as prescribed.

s. 105(1) The official receiver or his nominee shall be the chairman at the first meeting of creditors and shall decide any questions or disputes arising at the meeting and from any such decision any creditor may appeal to the court.

s. 108(1) The chairman of any meeting of creditors has power to admit or reject a proof of claim for the purpose of voting but his decision is subject to appeal to the court.

(3) Where the chairman is in doubt as to whether a proof of claim should be admitted or rejected, he shall mark the proof as objected to and allow the creditor to vote subject to the vote being declared invalid in the event of the objection being sustained.

s. 109(1) A person is not entitled to vote as a creditor at any meeting of creditors unless he has duly proved a claim provable in bankruptcy and the proof of claim has been duly lodged with the trustee before the time appointed for the meeting.

(2) A creditor may vote either in person or by proxy.

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

(2) The court shall, on the application of the trustee, determine whether any contingent claim or any unliquidated claim is a provable claim, and, if a provable claim, it shall value the claim, and the claim shall after that valuation be deemed a proved claim to the amount of its valuation.

s. 124(1) Every creditor shall prove his claim, and a creditor who does not prove his claim is not entitled to share in any distribution that may be made.

(2) A claim shall be proved by delivering to the trustee a proof of claim in the prescribed form.

(3) The proof of claim may be made by the creditor himself or by a person authorized by him on behalf of the creditor, and, if made by a person so authorized, it shall state his authority and means of knowledge.

(4) The proof of claim shall contain or refer to a statement of account showing the particulars of the claim and any counterclaim that the bankrupt may have to the knowledge of the creditor and shall specify the vouchers of other evidence, if any, by which it can be substantiated.

s. 125 Where a creditor or other person in any proceedings under this Act files with the trustee a proof of claim containing any wilfully false statement or wilful misrepresentation, the court may, in addition to any other penalty provided in this Act, disallow the claim in whole or in part as the court in its discretion may see fit.

Form 38 dealing with voting letters (ss. 51(1)(f) and 66.15(3)(c)) contains the following provision and instruction.

...to record my (*or* our) vote_____(for *or* against) the acceptance of the proposal (*or* consumer proposal) made on the___day of___...

*NOTE a person is not entitled to vote unless the proof of claim has been lodged with the Trustee before the time appointed for the meeting. In the case of the corporation the voting letter should be accompanied by an appropriate resolution.*

Form 61 dealing with proof of claim (ss. 50.1(1), 51(1)(e), 66.14(b), 81.2(1), 102(2), 124(2) and 128(1)) contains the following:

3. That the said debtor was at the date of the bankruptcy (*or* the proposal *or* the receivership), namely the___day of_____and still is indebted to the above named creditor (referred to in this form as "the creditor") in the sum of $_____as shown by the statement of account (*or* affidavit) attached hereto and marked "Schedule A", after deducting any counter claims to which the

debtor is entitled. (The attached Statement of Account or affidavit must specify the vouchers or other evidence in support of the claim.).

The original proposal of Triton was that dated September 10, 1997; it was further amended, most recently by amendment dated October 3, 1997. Doyle at the October 8, 1997 meeting indicated that there would be further amendments. At that time there was a motion put to the meeting that it be adjourned three weeks to enable Triton to file a further amended proposal and provide the letter of credit contemplated by the proposal.

[5] It would seem to me to be reasonably obvious that the determination as to who is allowed to vote at a particular meeting has to be decided on the basis of what information (i.e., the appropriate material) was available to the Chair of the meeting (in this case the Official Receiver) at the time the vote was conducted. See *Andrew Motherwell of Canada Ltd., Re* (1923), 4 C.B.R. 265 (Ont. S.C.) at p. 268: "Again I do not see how I can allow any new

material to go in at this stage. We must deal with the proxies as of the date the votes were cast under them." In other words, it would be inappropriate to go back after the meeting and attempt to cooper up any observed deficiency with the material filed for the purpose of voting. That is not to be confused with material *then available* to the Chair. If it were otherwise, then there could be a (never ending) string of attempts at bolstering the material so that it was objectively satisfactory and that the estate would continue to be in a state of uncertainty as to any vote taken. Any appeal from the Chair's decision should be in accord with the appeal provision and be on a single appeal basis. That is not to imply that the material could not be coopered up for any *future* vote or for the purpose of entitlement to any future distribution. The time for lodging the proxy according to Holden and Morawetz, "The 1997 Annotated *Bankruptcy and Insolvency Act*" (1996; Toronto, Carswell Co.) ("H & M") at p. 335 "must, however, be filed with the Chair before the taking of the vote, not afterwards: *Britannia Canning Co., Re* (1938), 19 C.B.R. 250 (Ont. S.C.)."

[6] As well, it would appear that a creditor can vote on a proposal by way of voting in person or by proxy (s. 109(2)) but also by way of voting letter (s. 50(1)(f) and Form 38). However, it is obvious from the voting letter form that it is an instruction for the trustee of the proposal to vote for or against the (specific) proposal of the debtor which is dated a specific day. It is not an instruction to vote on some other proposal. The Duferco voting letter instructed the trustee of the proposal, Doyle, to vote in favour of the Triton proposal dated September 10, 1997 and not on any amended proposal which was before the creditors on October 8, 1997. Query in any event whether Duferco provided a corporate resolution as required by Form 38. I would observe in passing that it may well be that the trustee instructed by a voting letter could use that authority to vote in favour of an adjournment of the meeting called for the purpose of considering that specific proposal so that that specific proposal could be voted on at a later date (but not that another or materially amended proposal be voted on at a later date). I note that Duferco also executed a proxy in favour of Robert P. Stein ("Stein") (which proxy is also dated September 18, 1997 as was the voting letter). In my view it would appear that Stein could vote on any matter at the meeting (or any adjournment) provided that he not vote against the proposal dated September 10, 1997 contrary to the express wishes of his principal as set out in the voting letter. However, it is also clearly obvious to me that a proxy must be present at the meeting in order to vote. Stein was not present at the October 8, 1997

meeting. No one else held the proxy from Duferco at that meeting. I am of the view that Duferco could not vote at the October 8, 1997 meeting.

[7] Nantong filed a proof of claim dated September 19, 1997 for $19,777,650 US "as shown by the statement of account (or affidavit) attached hereto and marked "Schedule A"." There was no Schedule A attached, at least anything which was marked Schedule A. However the fax transmittal page carried the following message reproduced in its entirety: "Also attached is the Judgment and Statement of Claim." The judgment was that of Paisley J. dated July 26, 1996 giving summary judgment to Nantong against Triton and its principal Vladimir Katic for the Canadian equivalent of the $19,777,650 US together with cost of $15,000. The Statement of Claim was the one in relation to this judgment. Curiously enough there was no indication in the material transmitted to the trustee of the proposal, Doyle, that the Court of Appeal had set aside Paisley J.'s judgment. The Court of Appeal's decision is reported as *Nantong S.A. v. Katic* (February 26, 1997), Doc. CA C25404 (Ont. C.A.). The total endorsement was as follows:

> We are of the view that there are genuine issues for trial especially with respect to misrepresentation. The appeal is allowed, the order of Paisley J. set aside and the case remitted for trial. Costs of the motion for summary judgment and the appeal will be in the cause.

Ms Conway's October 14, 1997 affidavit handed up to me on October 15th indicates:

> 2. In response to the request of Doyle Salewski Lemieux Inc. as the Trustee in the Proposal of Canadian Triton International Ltd., I filed on behalf of Nantong S.A. a Proof of Claim. I attached thereto the Judgment which Nantong S.A. had obtained on a summary judgment motion before Justice Paisley and the Statement of Claim. The purpose of filing the Statement of Claim was to set out that our claim is based on Promissory Notes and the purpose of filing the Judgment was to quantify our claim which is succinctly done in the Judgment.

It may be puzzling why this seemingly roundabout method of dealing with the proof of claim was chosen, but I give that the benefit of the doubt. Ms Conway goes on to indicate at paragraph 4 of her affidavit that she attended the first meeting of creditors in the proposal on September 24, 1997 at which time she asked if there were any problems with Nantong's proof of claim on entering "an adjoining room where the Official Receiver, Mr. Doyle on behalf of the Trustee and Mr. Golick and Mr. Shea as solicitors for respectively the Interim Receiver and the Trustee were going over the Proofs of Claim. I asked if there was any problem with Nantong S.A.'s Proof of Claim. I advised that I had in my possession and indeed in my hands

the Promissory Notes which formed the basis of the claim. Mr. Shea indicated that there was no problem with the claim. I asked about the quantification of the claim, since Canadian Triton International Ltd. in its Proposal had indicated that Nantong S.A.'s claim was $6.5 million, which is (roughly) the amount owing under only one of the Promissory Notes. I was advised that there was no problem with the amount Nantong S.A. was claiming." No one has disputed this portion, although Doyle, the trustee under the proposal in its report of October 14, 1997 states:

> 12. At a meeting of creditors held on September 24, 1997 Crown requested that it be permitted to review and copy all of the proofs of claim submitted to the Trustee [Doyle]. The Trustee complied with this request. No other creditors asked to review the proofs of claim. *The Interim Receiver did not ask to review the proofs of claim.* (emphasis added)

Ms Conway went on at paragraph 7 to state:

> 7. It did not occur to me to file the Court of Appeal's Order because I was not relying on the Judgment except to quantify the claim. The fact that the Court of Appeal ordered the matter to be tried, was, I believe, well known to all the parties to the Bankruptcy proceeding. I frankly did not advert to the fact that Mr. Shea, being newly appointed, would not know the history.

Nor of course would the Official Receiver who was chair of the meeting. I am however satisfied that there was no intent to deceive but only inadvertence.

[8] Nantong was represented by proxy at the September 24, 1997 meeting by Pascal Mahvi. He was not available for the October 8, 1997 meeting. Ms Conway indicates that she filed a proxy appointing her for that meeting. Doyle has now provided Mr. Golick with a proxy naming Ms Conway which proxy is dated October 6, 1997. Doyle does not indicate when it received this proxy (i.e. before, during or after the October 8 meeting). However even assuming that it was received in time (and that should be verified by Doyle and Ms Conway) we still have to deal with the question of whether Nantong was entitled to vote at the meeting.

[9] Sections 121(2) and s. 109(1) of the BIA come into play with respect to the voting contingent claims or the claims for unliquidated damages. As set out in H & M at p. 333:

> ...By section 109(1) a person is only entitled to vote at a meeting of creditors if he or she has a provable claim. By s. 121(2), a contingent claim or a claim for unliquidated damages is only a provable claim for the amount at which it has been valued by the court.
>
> A creditor with a claim for unliquidated damages has no right to vote until his or her claim has been valued pursuant to s. 121(2): *Re Andrew Motherwell of Canada Ltd.*

(1923), 4 C.B.R. 483, [1924] 4 D.L.R. 1308, 54 O.L.R. 614 (Ont. C.A.); *Re Arthur Fuel Co.* (1926), 8 C.B.R. 46, [1927] 1 D.L.R. 646, [1927] 1 W.W.R. 158 (Man. K.B.).

Given the uncertain nature of the Nantong claim at this stage and the Court of Appeal's concerns about whether or not there has been misrepresentation, it would not seem to me that Nantong can substantiate that on the basis of the material it has presented, it has other than a claim for unliquidated damages which must be valued - either by compromise by the trustee or by the summary valuation procedure by a judge so valuing the claim pursuant to section 121(2). In a sense as well it has a contingent claim - i.e. its claim has been disputed by Triton and this must be ruled on. I would note as well the views of Noble J. in *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56 (Sask. Q.B.) at p. 65. As Fisher J. in *Motherwell supra* stated at p. 267:

> In dealing with Taylor and Bornique's claim of $21,417.28 for damages (objected to at the meeting) arising by a failure of the debtor company to take delivery of a large quantity of goods which they had agreed to purchase, the trustee admits in his affidavit that it is a claim for unliquidated damages - that it has not been contested by him nor has it been valued by the Court. Section 44, subsection (3) of the Bankruptcy Act [1 C.B.R. 51] provides that the court shall value at the time and in the summary manner prescribed by the general rules all contingent claims and all claims for unliquidated damages, and *after* but not *before* such valuation every such claim shall for all the purposes of this Act be deemed a proved debt to the amount of its valuation. It is not a proved debt until valued by the Court. Rule 119 [1 C.B.R. 212] sets out the procedure to be followed in such cases. Section 20 - a trustee has power to make a compromise [1 C.B.R. 29] and the trustee did nothing under this section. Sub-section (9) of section 42 reads as follows:-
>
> > A person shall not be entitled to vote as a creditor at the first or any other meeting of creditors unless he has duly proved a debt provable in bankruptcy or under an authorized assignment to be due to him from the debtor, and the proof of claim has been duly lodged
> >
> > with the trustee before the time appointed for the meeting. [1 C.B.R. 48.]
>
> I must therefore hold that, as this claim has not been valued pursuant to the statute, it is not a proved claim until it is valued; it is only upon a proved claim that a vote can be taken; and that the 24 votes be disallowed.

H & M at pp. 346-7 state:

> When a contingent or unliquidated claim is filed with the trustee he shall, unless he compromises the claim, apply to the court to determine whether the claim is a provable claim, and, if so, to value the claim: R. 94(1). The court will then determine whether the claim is provable or not, and if the claim is provable will value it. Thereupon the claim is deemed a proved claim to the amount if its valuation: s. 121(2).
>
> The trustee must, prior to the hearing of the application under R. 94(1), file in a court a copy of the claim and an affidavit sworn by himself, the bankrupt or some other person

having knowledge of the claim setting out in detail the available information relating thereto: R. 94(2). In determining the matter the court may receive evidence upon affidavit: R. 94(3).

A trustee is not entitled to disallow a claim under s. 135 because it is a contingent or unliquidated claim. The trustee must apply to the court under s. 121(2) to have it determined whether the claim is a provable one following the procedure set out in R. 94: *Re Light's Travel Service ltd.* (1985), 56 C.B.R. (N.S.) 175 (B.C.S.C.).

Both claims for unliquidated damages arising by reason of contract and claims for unliquidated damages sounding in tort are claims provable in bankruptcy under s. 121. Such claims should be filed in the usual way under s. 124 whereupon the trustee should proceed in the manner provided in s. 121: *Re Letovsky and Mutual Motor Freight Ltd.* (1958), 37 C.B.R. 83 (Man. S.C.). See *Re Angelstad* (1991), 4 C.B.R. (3d) 235 (Sask. Q.B.).

The contingent liability of a guarantor who has not been called upon to pay or who has not in fact paid, is a debt provable in bankruptcy of the debtor: *Re Film House Ltd.* (1971), 15 C.B.R. (N.S.) 232 (Ont. S.C.).

To be a provable claim under s. 121(2), a claim must not be too remote and speculative. To establish that a contingent claim or unliquidated claim is a provable claim, a creditor must prove more than he has been sued, and that he has an indemnity agreement from the bankrupt: there has to be an element of probability of liability arising from the court proceedings. If there are too many "ifs" about the action and the applicability of the indemnity agreement before a provable claim comes into being, the claim is not a provable claim under s. 121(2): *Claude Resources Inc. (Trustee of) v. Dutton* (1993), 22 C.B.R. (3d) 56, (*sub nom. Claude Resources Inc. (Bankruptcy), Re)* 115 Sask. R. 35 (Q.B.).

Nantong not having proved its claim, it should not be allowed to vote until it does and such votes and entitlement to distribution are as to prospective matters and not retroactive to October 8, 1997.

[10] What of the aspect of not having marked the attachments as "Schedule A" (i.e. the attachments to the proof of claim). There are various judicial

views on this but nothing recent. See *London Bridge Works Ltd., Re* (1926), 8 C.B.R. 73 (Ont. S.C.) where Fisher J. at pp. 78-9 stated:

(3) Cowan Hardware Company is not entitled to a vote for the reason that the declaration of proof is defective. The declaration states that the insolvent company is indebted to the creditor "in the sum of $68.70 as shown by the account hereto annexed and marked A." I find there is no account annexed and marked A to this declaration, but only an invoice pinned to it, and the only particulars given are "account rendered $68.70." The account is not signed by the commissioner, and it should have been. It is necessary that particulars of an account should appear either in the declaration or in the account attached, so that a chairman may be in a position to exercise some scrutiny on

a claim filed. See *In Re McCoubrey; In Re Stratton and Greenshields Ltd.* (1924), 5 C.B.R. 248, [1924] 3 W.W.R. 587.

The rule that a creditor must file a claim within a certain time is only directory, but when a creditor prepares a declaration of proof The Bankruptcy Act is mandatory and must be strictly complied with, and if the Act is not complied with the proof of claim cannot be admitted by the chairman. A chairman is entitled to exercise his own discretion as to what proofs of claim he should admit or reject for the purpose of voting, and it is only when he entertains an honest doubt whether the proof of a creditor should be admitted or rejected that he is called upon to mark the proof objected to and allow the creditor to vote. It is only in cases where the Act has not been strictly complied with that the Court will interfere on an appeal from the chairman's decision.

See also *D.W. McIntosh Ltd., Re* (1939), 20 C.B.R. 267 (Ont. Bktcy.) at pp. 272-3 and pp. 280-1 where Urquhart J. observed:

Lastly the account must be marked "A". This requirement caused a considerable amount of argument in this case and I was referred to the case of *In Re London Bridge Works Ltd.* (1926), 8 C.B.R. 73, at p. 78, 3 Can. Abr. 652 or Abr. Bkcy. Cas. 504, where Fisher J. says:

> Cowan Hardware Company is not entitled to a vote for the reason that the declaration of proof is defective. The declaration states that the insolvent company is indebted to the creditor 'in the sum of $68.70 as shown by the account hereto annexed and marked A'. I find there is no account annexed and marked A to this declaration, but only an invoice pinned to it, and the only particulars given are 'account rendered $68.70'. The account is not signed by the commissioner, and it should have been.

It was argued before me that I am bound to find, following this decision, that unless the account marked "A" is signed or initialled by the commissioner the creditor cannot vote. I cannot agree with that argument. The form provides that the account must be marked "A"; that is all, and I think that the words of Fisher J. at page 78, "The account is not signed by the commissioner and it should have been" are mere obiter. He found in that case that there was no account marked "A" but only an invoice pinned to the declaration and with insufficient particulars. That is the gist of his decision and his subsequent words above last quoted

must be regarded as mere obiter. I have taken the matter up with him and he agrees that this is so.

If the account is a proper one and is annexed to the declaration in the sense I have above described and with particulars itemized, as I have detailed, and is marked "A", that is a full compliance, in my opinion, with the requirements of the section and rule. I have always considered it to be the best practice to have the commissioner either sign or initial the account for identification but I do not think the wording of the statute requires same.

Fisher J. in the above case goes on to say:

> It is necessary that particulars of an account should appear either in the declaration or in the account attached, so that a chairman may be in a position to exercise some scrutiny on a claim filed.

The provisions of sec. 105(4) [14 C.B.R. 14] in regard to proof are not merely directory but are mandatory. It is enacted that the proof "shall contain or refer to a statement of account": *In Re McCoubrey,* supra, at p. 255. There must be reasonable compliance with this section otherwise the proofs must be disregarded for voting purposes. I think however in determining what is a reasonable compliance with the section and form, what are obviously clerical errors must be ignored.

(pp. 272-3)

(15) The last claim is that of the solicitor for the company, Mr. Rosenberg himself. It carries two votes and was admitted by the chairman. The only objection taken to the proof was that the statutory declaration did not disclose the name of the creditor.

In regard to the objection taken, the declaration is made by Anne Schwarts who declares that she is the bookkeeper of the undermentioned creditor and has knowledge of the circumstances. There is no creditor undermentioned in the declaration itself. The declaration then goes on in the security clause to say the said creditor has no security. However, the account marked "A" is headed as follows: "D.W. McIntosh, Limited, in account with Henry S. Rosenberg". As the account marked "A" is by the form and the section made part of clause two, I think it can be read as if the account marked "A" follows in the space left for particulars after clause 2 and before the security clause 3, and therefore reading the two documents together in this manner the undermentioned creditor is Henry S. Rosenberg.

No objection was taken at the meeting as to the form of the account marked "A" annexed to Mr. Rosenberg's declaration. I am of opinion that if it is necessary to have recourse to the account for the purpose of making good the declaration, any defects in the account should be open to the inspection of the Court although objection to such defects was not made at the meeting. In other words a defective declaration should not be allowed to be made good by a defective account.

This account was itemized to a certain extent but there are no dates given for the various services set out, but there is a general date, December 2, 1938, at the head of the account. This is approximately the date of the commencement of the bankruptcy proceedings above referred to. No one can tell over what period the

services in question were rendered and the account and therefore the whole proof of claim is defective.

I would expect a greater degree of precision from members of the legal profession than I would from an ordinary commercial creditor. (pp. 280-1)

But for a more relaxed or lenient view see the observation of Tweedie J. *McCoubrey, Re,* [1924] 4 D.L.R. 1227 (Alta. S.C.) at pp. 1234-5:

The fourth objection is that the statement submitted along with the declaration is not sufficiently identified to comply with the provisions of Form 47 so as to constitute a proper reference within the meaning of sec. 45(4) of the Act. This objection applies to proofs of fourteen creditors.

The declarations all referred to accounts as being "annexed and marked 'A.'" Statements were in fact annexed to all the declarations, some of which had marked on them the letter "A" without any words to indicate that the letter referred to the declaration while the remainder were not marked at all.

> As already pointed out Form 47 indicates the method by which reference may be made, which must be deemed to be the manner in which the identification of statements is authorized by the Rules, and the statement of account is *prima facie* properly referred to in a declaration only when it is "annexed and marked 'A.'" Neither Form 47 nor the words in the form, however, are exclusive. Some of them or others may be used subject to certain penalties, as to costs, for their use (R. 3). What is meant by "refer" as used in s. 45(4)? The purpose of this section is to compel a claimant to furnish a statement as part of the evidence by which the person authorized to make a decision must be guided in arriving at his decision, and the reference to it is sufficient if it is referred to with such particularity that it may be identified and become incorporated with and form part of the proof. If the statement is a proper one and it is annexed to the declaration though not marked and from an examination of the statement in conjunction with the declaration to which it is attached or from other circumstances, the person who has to decide in regard to the admissibility of the proof may reasonably conclude that the statement is the one referred to, he is justified, in the exercise of his discretion, in receiving it and his decision should not be interfered with. I am satisfied from an examination of the documents that the statements in question were annexed and were the ones referred to and the objection cannot be sustained.

H & M at p. 329 observed:

> **(2) Formalities**
>
> If there is not a reasonable compliance with the statutory requirements of the Act for proofs of claim, a creditor will not be permitted to vote. In determining what is reasonable compliance, clerical errors should be ignored and reasonable allowance ought to be made for the fact that the Bankruptcy and Insolvency Act is a businessman's statute and contemplates that businessmen will file their own proofs of claim: *Re D.W. McIntosh Ltd.* (1939), 20 C.B.R. 267 (Ont. S.C.).
>
> When the proof of claim is from a workman or a layman, the chair should be more lenient in determining if the proof of claim complies with the Act, but if the claim emanates from a trader, the proof of claim should be held to a more
>
> rigid compliance with the requirements of the Act: *Re Corduory's Unlimited Inc.; Grobstein and Lawrence v. Canadian Corduroys Ltd.* (1962), 4 C.B.R. (N.S.) 250 (Que. S.C.); but see *Re G. Totton Publishers Ltd.* (1975), 20 C.B.R. (N.S.) 140 (Ont. Reg.).

I would be of the view that under these circumstances (given the annexure, the limited number of claims with the result that the trustee would not be over burdened with "defective" proofs) it is reasonable to conclude that the failure to mark the attachment as Schedule A is not fatal to a proof of claim if otherwise valid. It would seem to me that this formalism is designed to assist a trustee who may otherwise be inundated with either a vast number of proofs from various claimants and/or a jumble of attachments. I do not see that the trustee in these circumstances could not have readily reached the conclusion that the attachments here were what were otherwise intended to be Schedule A, there was nothing to conflict with that conclusion and it does not appear that the trustee has complained that it could not complete

its task notwithstanding the absence of the marking as Schedule A on the attachments. I am however of the view that Tweedie J. at pp. 1235-6 of *McCoubrey, Re, supra,* has some helpful observations as to what should go into the statement of account:

> There is nothing in any of these five statements to indicate who is the debtor or who is the creditor or as to why the payments were made. A person examining them without the assistance of extrinsic evidence could only conclude that the payments were being made by the claimants on account of their indebtedness to the authorized assignor while in fact the reverse was the case. The claimants were each buying suits of clothes on the instalment plan and when an amount agreed upon was paid in, the person making such payments would be entitled to a suit. The statement of account should clearly indicate who is debtor and who is creditor and give such particulars, with dates, as are necessary to disclose the origin or nature of the liability, such as, "goods sold and delivered," "money lent," "services rendered," or, if there be particular circumstances which do not come within what are generally known as the common counts, the particular circumstances giving rise to the claim as well as all payments in cash or otherwise for which the debtor is entitled to credit. It is not necessary that the statement should contain in detail an itemized account of the goods sold and delivered, but it is sufficient if it shows goods sold on a certain date as is the practice in statements of commercial houses in connection with their monthly statements. If the claim is for money lent, the particulars of the loan should be given; if for services rendered, the extent thereof and the period within which they were rendered; if on a bill of exchange, sufficient particulars to identify the instrument, or in special cases sufficient particulars to acquaint the person whose duty it is to pass upon the proof with the nature of the particular transaction.

With respect to GAC, Tradean and Tyson, Doyle has confirmed that Mr. Mastin provided a proof of proxy minutes before the meeting to the Doyle offices and this was relayed to the meeting immediately thereafter. It would

appear that these proxies were in regular form. With respect to Tradean and Tyson it was indicated that the documentation may have been split in the sense that PWL received separately from Doyle a proof of claim and proxy and then apart from that a schedule. However it appears from Tyson's transmittal cover sheet of September 18, 1997 that he sent Doyle the material together. The Tradean proxy in favour of Mr. Mastin is subsequently dated (October 7, 1997) from that it gave in favour of Mr. Fogarty (September 22, 1997) and I would be of the view that the subsequent proxy is the operative one. Thus it would appear that Tradean, GAC and Tyson could vote on October 8, 1997.

[11] Let us now turn to the question of Crown's ability to vote. Crown's proof of claim was objected to by Doyle, as trustee under the proposal. Crown's claim is based upon a contract between it and Triton which provides that Crown is to be paid a fee equal to 10% of the total contract value of Triton's participation in certain Iranian projects. This matter is the subject of

arbitration in Switzerland which is apparently somewhat in practical suspension as it does not appear that either side has been pushing to have it finally determined. Doyle's objection to Crown's position would appear to me to be somewhat round about - e.g. asking for documentation that Crown is a valid and subsisting corporation under the laws of Liberia which is authorized to do business in Iran. However, for the same reasons as I reviewed in rejecting Nantong's right to vote because its claim had not been valued, it would seem to me that Crown's claim is similarly affected. That is, it cannot vote until its claim has been established as a valued claim pursuant to s. 109(1) and s. 121(2). Triton in the arbitration proceedings has stated (paragraph 8): "[Crown] did not fulfill its obligations towards [Triton] and performed no services either directly or indirectly which resulted in the award of the NIOC [National Iranian Oil Company] contract to [Triton]." Given the requirements of the BIA concerning establishment and valuation of a provable claim before a claimant is allowed to vote as a creditor, I do not see that the handing up of a November 26, 1993 letter from the Head of Drilling Operations of the National Iranian Oil Company (NIOC) is helpful for the purposes of the October 8, 1997 vote even though it does indicate that it "is to acknowledge successful completion of the NIOC - CTI [Triton] 53 wells turnkey drilling contract... completing the project with about 20M USD [$20 million US] less than project budget (258M USD) which was financed by Canadian Triton International."

[12] It also seemed somewhat curious that Doyle (now appreciating that Nantong did not have a final judgment since Paisley's judgment was set aside by the Court of Appeal) did not directly address whether Nantong fell into the same difficulty as did Crown although I do note that Doyle in paragraph 23 of its October 14, 1997 report did ask for "the advice and direction of the Court respecting the hearing of Crown's appeal from the disallowance of its claim and the timing for the adjudication of any other disputed claims."

[13] It would seem to me that these claimants with contingent or unliquidated claims should proceed according to the provisions of section 121(2) to establish and value their claims if they wish to participate in any future voting or distribution.

[14] Based on the foregoing it would appear to me that the motion to adjourn was defeated, that the amended proposal was appropriately voted on and defeated and that there resulted therefore a bankruptcy of Triton. As well there was the substitution of PWL as trustee in bankruptcy vote and vote electing inspectors which should be counted in accordance with my

observations above. The Schlumberger claim together with the other undisputed claims against the adjournment are sufficient to defeat that motion even allowing for the positive vote of Tradean etc. This follows through the other votes.

[15] I would also note that it appears that the Official Receiver allowed a vote by Duferco in favour of the adjournment - but based on a misunderstanding that Duferco was properly represented at the meeting. Since in my view it was not so properly represented, its vote on the adjournment is not valid. As Chair, the Official Receiver was quite correct in agreeing with Gordon Marantz, counsel for the Interim Receiver at pp. 50-1 of the transcript of the October 8, 1997 meeting when it was noted that Duferco had no vote on the proposal question that this would change the adjournment vote as well.

> The Chairperson: Ladies and gentlemen, the vote hasn't changed, except for the abstaining vote.
>
> Right, could you do some calculations for me, please.
>
> Mr. Olfati: Is there a proxy for Duferco?
>
> Mr. Doyle: We are trying to locate it right now.
>
> Mr. Graff: I am the representative, but I understood that Robert Stein was the proxy.
>
> Mr. Marantz: Well, that changes the vote on the motion to adjourn as well.
>
> The Chairperson: Yes, it will, yes, it will.
>
> Mr. Marantz: It doesn't change the result, but it changes the numbers.
>
> Mr. Carfagnini: The percentage goes a lot higher.
>
> Mr. Williams: I apologize—
>
> Mr. Carfagnini: So, general proxy in favour of the Trustee?
>
> Mr. Brent Williams: No, still with Mr. Stein, who was present last week.
>
> The Chairperson: What was the total, Brian?
>
> Mr. Doyle: Seven million for Duferco.
>
> Mr. Marantz: Nothing appears to turn on it.
>
> Mr. Turk: No, but could we have the revised percentage anyway?
>
> The Chairperson: This is the percentage, taking out Duferco and also with Nantong abstaining, okay—there you go.
>
> Mr. Brent Williams: The "no" votes, 74.51% and the "yes" votes, 25.45%.
>
> The Chairperson: Has everybody got those numbers?
>
> The resolution fails.
>
> We now have a deemed bankruptcy of the company.

It is clear that the Official Receiver was relying on what she appropriately thought was correct information being given to her which information was in fact incorrect. She was quite right in noting that there should therefore be a revision to the vote calculations on the adjournment, based upon the correct information. To say that such an error when caught (and no one having acted to their detriment) cannot be corrected is abhorrent to the principles and philosophy of the bankruptcy and insolvency legislation.



[16] Voting at meetings of creditors must be in accordance with the provisions of BIA. I think it salutary to remember the concluding words of Gomery J in *Toia v. Cie de Cautionnement Alta* (1989), 77 C.B.R. (N.S.) 264 (Que. S.C.) at p. 270:

> Distinguishing between the rules governing procedure at meetings of creditors which must be strictly enforced and those which are merely directory is not always easy. In *Re McCoubrey; Re Stratton,* 5 C.B.R. 248, [1924] 3 W.W.R. 587, [1924] 4 D.L.R. 1227 (Alta.), it was decided that in the latter case, if the chairman of the meeting has exercised his discretion reasonably, his decision should not be interfered with. However, mandatory rules must be complied with.
>
> In the court's opinion, the rule breached by the Official Receiver in this case was mandatory. *The only way in which a creditor is able to participate in the administration of the estate of a bankrupt is by voting at meetings of creditors. If the votes of other creditors are improperly allowed or calculated, the will of the majority may not prevail.*
>
> (emphasis added)

It should be obvious that creditors who wish to vote should ensure that they successfully pass over the hurdles imposed by BIA - specifically here that they have any contingent or unliquidated claims established and valued as per section 121(2) or that they are properly represented at any vote. Minor imperfections which do not go to the heart of the claim or authority to vote when viewed objectively should not go to preventing the true will of the (validated) majority from prevailing.

[17] The Fogarty Clients also moved for an order giving the relief of "(iv) Pursuant to section 116(5) of the *Bankruptcy and Insolvency Act,* removing Ata Olfati and Bernard Frankel as inspectors and substituting two inspectors in their place pending resolutions of all claims." In the grounds for such removal it was stated that "(v) Two of the three inspectors appointed have a conflict of interest in so far as their claims are being challenged. No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceeding by or against the estate of the bankrupt."

[18] Bernard Frankel is a representative of Crown. While he personally is not a party to Crown's contested proceeding, I note that *Maheu v. Rodrigue* (1984), 51 C.B.R. (N.S.) 132 (Que. S.C.) indicated that the prohibition in s. 116(2) applies to a representative of the corporation as much as to an individual. It would therefore appear to me at this stage that Mr. Frankel's position is questionable. The Fogarty Clients, through Mr. Mastin's affidavit also suggest that Dr. Olfati was involved with Crown (and by implication continues to be so involved) as a result of his having signed a document on behalf of Crown some years previously. It would appear to me that this question should be explored further to determine if there is any presently existing conflict. I would generally note that if a matter came up before the inspectors and one of them was directly affected by being a creditor or the representative of a creditor whose claim was being contested or affected in some way different from the general body of creditors, then it would be appropriate for that inspector to remove himself from debate and vote on that item. I note as well that BIA does not lay down any particular qualifications for inspectors and does not require that an inspector be a representative of a creditor: see *F & W Stereo Pacific Ltd., Re* (1975), 22 C.B.R. (N.S.) 84 (B.C. S.C.). I note that Mr. Frankel does not appear to have been served with the motion to have him removed. Thus, it would be inappropriate at this time to make any binding decisions concerning Mr. Frankel or Dr. Olfati. Rather it would be appropriate to have this heard on a regular basis.

[19] While on that topic, it would be helpful to the Court, the system of justice and the administration of and principles of BIA, if all interested parties adhered to the maximum extent possible in the circumstances to the established procedures for serving motions preparing motion material and attempting to have matters dealt with in Court. The Court will always try to deal in a timely fashion with true emergencies, however these emergencies should not be self created ones or situations where the parties have refrained from taking timely action at an earlier time. One is struck by the frequency and amount of last minute or after the fact filings and irregular material.

[20] Further along those lines, Triton (or its principal Vladimir Katic) continues to submit material concerning what appears to be additional information concerning a desired reorganization of Triton. The latest in this is an affidavit of Samuel Marr, a partner in the legal firm retained by Triton who attaches a letter dated October 13, 1997 from PT Tertimas Comexindo to "Doyle Salewski Lemiuex Inc. [in trust] 5617 Yonge Street, Toronto, Ontario, Canada M2M 3S9" (it may be that Doyle which is located in Ottawa has this as a Toronto

address). Mr. Marr describes PT Tertimas Comexindo as "an Indonesian investor" without further explanation. The letter indicates that:

> Further to a meeting of 13 October 1997, between Mr. Vladimir Katic and a responsible party representing the Republic of Kalmykia Oil Company, this is to inform you that a Letter of Credit, in the amount of USD $3,000,000 (three million United States dollars) for the mobilization of six (6) drilling rigs, currently based in the Islamic Republic of Iran, shall be opened by 1 November 1997.
>
> The drawdown conditions on the Letter of Credit are as follows:
>
> 1. Approval of the proposal by the creditors and by Judge Farley.
>
> 2. Execution of the formal drilling contract between above Oil Company and the contractor, being Canadian Triton International Ltd. (C.T.I.).
>
> ...

Attached was a draft of a letter of credit with an issue date of October 13, 1997 with the following indications:

> ...
>
> issuing bank:
>
> [to be determined]
>
> ...
>
> Dated at Jakarta this 1st day of November 1997.

I would merely note that section 50(1) of BIA provides:

> 50(1) Subject to subsection 1.1, a proposal may be made by
>
> (a) an insolvent person;
>
> (b) a receiver, within the meaning of subsection 243(2), but only in relation to an insolvent person;
>
> (c) a liquidator of an insolvent person's property;
>
> (d) a bankrupt; and
>
> (e) a trustee of the estate of a bankrupt.

It seems to me that the "and" in this section should be read disjunctively. Thus, if Triton as a bankrupt wishes to submit a proposal in the future it should do so in the regular way. I would assume that any such proposal would have included in it sufficient information to allow the creditors to make a reasoned decision.

[21] Finally, I would note that *National Bowling Centres Ltd. v. Brunswick of Canada Ltd. (No. 2)* (1967), 11 C.B.R. (N.S.) 219 (Que. Q.B.) is based upon the question of there being an

appeal brought by a claimant to determine whether it is a creditor authorized to vote at the meeting called to consider the proposal. As Rinfret J. stated for the Court at p. 223:

> En effet, il s'agit sur le présent appel de déterminer si Brunswick of Canada Ltd. est un créancier autorisé à voter sur la proposition et, dans l'affirmative, pour quel montant.
>
> Tant qu'on n'aura pas définitivement répondu à ces deux questions, la proposition ne saurait être considérée comme rejetée. Dans l'intervalle, l'appel a l'effet de suspendre la marche des procédures postérieures prévues par l'article 32B.

I would therefore suggest that all interested persons carefully note the provisions of BIA which may affect them and others as to whom they are in opposition. Then they may decide to take what they consider to be appropriate action in the circumstances. I would think it helpful for all concerned if they were to meet in the near future to discuss their various legal and business alternatives; in that regard I think it would be appropriate for PWL as trustee in bankruptcy to call such a meeting to be held by November 8, 1997. This meeting may assist by eliminating unnecessary turmoil and allow matters to be appropriately focused.

*Order accordingly.*

# TAB 4

1970 CarswellOnt 84, 14 C.B.R. (N.S.) 288

**C**

1970 CarswellOnt 84, 14 C.B.R. (N.S.) 288

Wimco Steel Sales Co., Re

Re Wimco Steel Sales Company Limited

Ontario Supreme Court, In Bankruptcy

Houlden J.

Judgment: May 19, 1970



Counsel: *J. R. N. Sintzel*, for trustee.

*S. G. M. Grange, Q.C.*, for J. B. Barber.

Subject: Corporate and Commercial; Insolvency; Estates and Trusts

Bankruptcy --- Administration of estate — Inspectors — Who may be appointed inspector.

Inspectors — Party to contested action or proceedings — Proceedings by trustee against corporation whose vice-president is inspector — Power of Court to revoke appointment of inspector — The Bankruptcy Act, R.S.C. 1952, c. 14, s. 82(2)(5).

This was an application by the trustee for directions with respect to B., an inspector of the bankrupt estate. B. was a vice-president of a substantial creditor of the bankrupt company. The trustee, on behalf of the bankrupt estate, had issued a writ for damages against the said creditor, claiming approximately $1,000,000. In the circumstances the trustee felt that it was improper for B. to continue as an inspector of the estate.

*Held*, there should be an order removing B. as an inspector of the bankrupt estate.

Although B. was not personally a party to a contested action or proceeding but the party was a corporation of which he was a vice-president, the Court had power under s. 82(5) of the Bankruptcy Act to revoke the appointment of an inspector. An inspector is as much a trustee of the estate as the trustee, and it is inconceivable that a person could act as trustee of the bankrupt estate and, at the same time be sued by the bankrupt estate for damages. Furthermore, it appeared that a proposal might be submitted to the trustee. In such case B., representing his corporation, might be anxious that the lawsuit against the corporation might be disposed of, and this could possibly colour his approach to any proposal that might be submitted.

**Annotation**

1970 CarswellOnt 84, 14 C.B.R. (N.S.) 288

Although an inspector acts personally, and not on behalf of a corporation by whom he is employed, it is often difficult for an inspector to completely divorce himself from his allegiance to his employer. Although B. was not personally a party to a contested action or proceeding, he occupied an important position with the corporation which was a party to the action or proceedings brought by the trustee. Although B. might have had the best intentions, he might have found himself in a considerable conflict of interest. As the learned Bankruptcy Judge pointed out, "it is unfortunate that s. 82(2) does not provide that no person is eligible to be appointed or to act as an inspector who is a party *directly or indirectly* to any contested action or proceeding by or against the estate". (The italics are mine.)

In the instant case the fact that a proposal might be submitted to the trustee caused some additional concern. If a proposal would be approved by the inspector (s. 27(3) of the Bankruptcy Act), it was quite likely that it would also be accepted by the creditors and approved by the Court. In such case there is a possibility that the proceedings against the creditor in question might be prosecuted more vigorously by the company than in bankruptcy by the trustee.

The problem of an employee of the corporation acting as an inspector in the bankrupt estate has often arisen where the employer corporation was interested in purchasing a property of the bankrupt estate. In such case it has been the good practice in the Province of Ontario to ask the Court for approval (see s. 82(11) of the Bankruptcy Act.)

***Houlden J.* (orally):**

1 This is an application for directions with respect to J. B. Barber, an inspector of the bankrupt estate. Mr. Barber is a vice-president of the Algoma Steel Corporation Limited, a substantial creditor of the bankrupt company. I am informed that the claim of the Algoma Steel Corporation is three times that of the next largest creditor and represents over one-half of the total claims against the estate. There are four other inspectors in the estate, representing creditors with large claims. I am quite sure that to date Mr. Barber has acted quite properly in his capacity as inspector and there does not appear to be any criticism on the part of the trustee of his conduct.

2 What has caused the difficulty, is that the bankrupt estate has a large claim against the Algoma Steel Corporation Limited for damages arising out of the supply of steel which it is alleged was defective. The damages claimed are in the neighbourhood of $1,000,000.

3 A writ has been issued by the trustee against Algoma and in the circumstances the trustee feels that it is improper for Mr. Barber to continue as an inspector of the estate.

4 Counsel for the inspector has pointed out that s. 82(2) of the Bankruptcy Act, R.S.C. 1952, c. 14, provides that no person is eligible to act as an inspector who is a party to any contested action or proceeding by or against the estate. He submits that Mr. Barber is not a party to a contested action or proceeding but that the party is the Algoma Steel Corporation. This is undoubtedly so. It is unfortunate that s. 82(2) does not provide that no person is eligible to be appointed or to act as an inspector who is a party directly or indirectly to any contested action or proceeding by or against the estate.

5 However, the Court has power under s. 82(5) to revoke the appointment of an inspector. In my opinion, an inspector is as much a trustee of the estate as the trustee and it is inconceiv able that a person could act as trustee of a bankrupt estate and, at the same time, be sued by the bankrupt estate for damages.

6 From the material before me, it appears that there may be a proposal submitted to the trustee. It will be obvious that Mr. Barber, representing the Algoma Steel Corporation, will be most anxious that the lawsuit against his company should be disposed of, and I believe this might very well colour his approach to any proposal that is submitted. In my opinion, it is imperative that an order should be made removing Mr. Barber as an inspector of the estate ...

7 There will therefore be an order removing J. B. Barber as an inspector of the bankrupt estate with costs of both parties out of the estate.

END OF DOCUMENT

# TAB 5

1999 CarswellBC 97, 60 B.C.L.R. (3d) 348, 9 C.B.R. (4th) 136

1999 CarswellBC 97, 60 B.C.L.R. (3d) 348, 9 C.B.R. (4th) 136

# Taylor Ventures Ltd., Re

In the Matter of the Bankruptcies of Taylor Ventures Ltd., 402847 B.C. Ltd., 387325 B.C. Ltd., 512046 B.C. Ltd. and 512048 B.C. Ltd.

British Columbia Supreme Court

Burnyeat J.

Heard: November 12, 1998
Judgment: January 8, 1999
Docket: Vancouver 185695/VA98, 185403/VA98



Counsel: *J. Webster*, for Oliver, Drabik, Carruthers & Chalcraft.

*M.J. Peerson*, for the Trustee in Bankruptcy, Pricewaterhouse Coopers Inc.

*H.M.B. Ferris*, for 4 of the 5 Inspectors of Bankruptcy.

Subject: Insolvency; Evidence; Civil Practice and Procedure

Bankruptcy --- Administration of estate — Inspectors — Fiduciary relation to creditors — General

Representative of unsecured creditor named inspector of bankrupt's estate — Unsecured creditor indicated intention to bring action against bankrupt's former solicitors for breach of fiduciary duty — Trustee in bankruptcy ordered former solicitors to produce solicitor-client communications of bankrupt for purposes of disclosure to inspectors — Former solicitors objected to production for disclosure to inspectors for collateral purpose of improper civil discovery in pending actions between unsecured creditor and former solicitors — Trustee applied for directions as to propriety of disclosure to inspectors — Inspectors and trustee have fiduciary duty to creditors of bankrupt — Efforts of trustee and inspectors must be spent for benefit of creditors only, as interest of creditors relates to property, dealings and affairs of bankrupt — Trustee and inspectors must not use access to records of bankrupt for collateral or improper purpose or in interest of third-party actions — Inspectors not entitled to use records of bankrupt or demand production of confidential communications for purpose of unsecured creditor's pending action against former solicitors.

Bankruptcy --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — General

Representative of unsecured creditor named inspector of bankrupt's estate — Unsecured creditor indicated intention to bring action against bankrupt's former solicitors for breach of fiduciary duty — Trustee in bankruptcy ordered former solicitors to produce solicitor-client communications of bankrupt for purposes of disclosure to inspectors — Bankrupt's former solicitors asserted solicitor-client privilege over confidential communications, trustee purported to waive privilege and brought application for direction as to trustee's power to waive privilege on behalf of bankrupt — Solicitor-client privilege belongs to client — Trustee standing in shoes of client has implicit power to waive solicitor-client privilege over all information regarding property and affairs of bankrupt, including assets and trust flow — Communications made for purpose of provision of legal advice privileged and not liable to disclosure to trustee, unless communications or advice rendered in furtherance of criminal purpose — Former solicitors ordered to disclose all records and communications not made for purpose of providing legal advice, and to attend any necessary oral examinations as to non-privileged material or communications over which trustee may properly assert privilege.

Evidence --- Documentary evidence — Privilege as to documents — Solicitor and client privilege — Waiver

Representative of unsecured creditor named inspector of bankrupt's estate — Unsecured creditor indicated intention to bring action against bankrupt's former solicitors for breach of fiduciary duty — Trustee in bankruptcy ordered former solicitors to produce solicitor-client communications of bankrupt for purposes of disclosure to inspectors — Bankrupt's former solicitors asserted solicitor-client privilege over confidential communications, trustee purported to waive privilege and brought application for direction as to trustee's power to waive privilege on behalf of bankrupt — Solicitor-client privilege belongs to client — Trustee standing in shoes of client has implicit power to waive solicitor-client privilege over all information regarding property and affairs of bankrupt, including assets and trust flow — Communications made for purpose of provision of legal advice privileged and not liable to disclosure to trustee, unless communications or advice rendered in furtherance of criminal purpose — Former solicitors ordered to disclose all records and communications not made for purpose of providing legal advice, and to attend any necessary oral examinations as to non-privileged material or communications over which trustee may properly assert privilege.

**Cases considered by *Burnyeat J.*:**

*Abacus Cities Ltd., Re* (1981), 16 Alta. L.R. (2d) 279, 40 C.B.R. (N.S.) 172, 128 D.L.R. (3d) 566 (Alta. Q.B.) — considered

*Amonson, Re*, 39 Alta. L.R. (2d) 307, [1985] 6 W.W.R. 377, 57 C.B.R. (N.S.) 314, 65 A.R. 396 (Alta. Q.B.) — considered

*Bryant Isard & Co., Re* (1923), 4 C.B.R. 41, 24 O.W.N. 597 (Ont. S.C.) — referred to

*Catalena Productions Inc., Re* (1982), 37 B.C.L.R. 391, 43 C.B.R. (N.S.) 94 (B.C. S.C.) — considered

*Cirone, Re* (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.) — considered

*Clarkson Co. v. Chilcott* (1983), (sub nom. *Dilawri, Re)* 47 C.B.R. (N.S.) 93, 37 C.P.C. 218 (Ont. Bktcy.) — considered

*Clarkson Co. v. Chilcott* (1984), 48 O.R. (2d) 545, 53 C.B.R. (N.S.) 251, 6 O.A.C. 291, 13 D.L.R. (4th) 481, 13 C.R.R. 41 (Ont. C.A.) — applied

*Descôteaux c. Mierzwinski*, [1982] 1 S.C.R. 860, 28 C.R. (3d) 289, 1 C.R.R. 318, 44 N.R. 462, 141 D.L.R. (3d) 590, 70 C.C.C. (2d) 385 (S.C.C.) — considered

*Fentiman, Re* (1926), 7 C.B.R. 355, 30 O.W.N. 30 (Ont. S.C.) — referred to

*Lauzier, Re* (1996), 2 C.P.C. (4th) 197, 43 C.B.R. (3d) 207, (sub nom. *Lauzier (Bankrupt), Re)* 16 O.T.C. 15 (Ont. Bktcy.) — referred to

*Long, Re* (1978), 29 C.B.R. (N.S.) 225 (Ont. H.C.) — referred to

*Maheu v. Rodrigue*, (sub nom. *Promedia Inc., Re; Maheu, Noiseux v. Rodrigue & Boisvert)* 51 C.B.R. (N.S.) 132, [1984] C.S. 472 (Que. S.C.) — referred to

*Nadon Paving Ltd., Re* (1967), 10 C.B.R. (N.S.) 57, 59 W.W.R. 124, 61 D.L.R. (2d) 510 (Alta. C.A.) — considered

*Ontario (Securities Commission) v. Greymac Credit Corp.* (1983), 41 O.R. (2d) 328, 21 B.L.R. 37, 33 C.P.C. 270, 146 D.L.R. (3d) 73 (Ont. Div. Ct.) — considered

*Shannon & Co., Re* (1931), 13 C.B.R. 291, [1932] 1 W.W.R. 12 (Alta. T.D.) — referred to

*Shepherd (Trustee of) v. Shepherd* (1997), 50 C.B.R. (3d) 115 (Ont. Gen. Div. [Commercial List]) — referred to

*Sun Squeeze Juices Inc., Re* (1994), 27 C.B.R. (3d) 98 (Ont. Bktcy.) — referred to

*Tomkinson, Re* (1971), 14 C.B.R. (N.S.) 245 (Ont. S.C.) — considered

*Wolch's Guaranteed Foods Ltd. (Trustee of) v. Wolch*, 18 Alta. L.R. (3d) 156, 24 C.B.R. (3d) 268, (sub nom. *Wolch's Guaranteed Foods Ltd. (Bankrupt), Re)* 152 A.R. 30, [1994] 6 W.W.R. 173 (Alta. Q.B.) — considered

**Statutes considered:**

*Bankruptcy and Insolvency Act*, R.S.C. 1970, c. B-3

s. 133 — referred to

s. 134 — referred to

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

s. 16(3) — considered

s. 16(5) — considered

s. 30 — considered

s. 34(1) — pursuant to

s. 120(1) — referred to

s. 116(2) — considered

s. 163(1) — considered

s. 164(1) — referred to

s. 165(1) — referred to

*Loan and Trust Corporations Act*, R.S.O. 1980, c. 249

Generally — referred to

**Rules considered:**

*Bankruptcy and Insolvency Rules*, C.R.C. 1978, c. 368

R. 65(5) — referred to

*Rules of Court, 1990*, B.C. Reg. 221/90

Generally — referred to

APPLICATION by trustee for directions as to effect of solicitor-client privilege on proper use of business records and solicitor-client communications of bankrupt prior to bankruptcy.

***Burnyeat J.*:**

1 Oral reasons on this matter were given on November 12, 1998. These written reasons supplement the decision provided on that date. The Trustee in Bankruptcy applies pursuant to s. 34(1) of the *Bankruptcy and Insolvency Act* which allows the Trustee to apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt. In particular, the Trustee seeks directions as to whether it is at liberty to provide to all of the Inspectors of the Bankrupt "complete and unrestricted access to all Taylor Ventures Ltd. and related files which the Trustee has received from... the former solicitors for the Bankrupt." The counsel for the former solicitors submits that, in the unique circumstances of this bankruptcy, complete and unrestricted access to the records should not be available to the Inspectors.

**Background**

2 Taylor Ventures Ltd. was incorporated in 1979 and had raised approximately $36 million from in excess of 400 investors. Taylor then used that money to purchase and develop various real estate projects in British Columbia. Pursuant to its own petition, an order was made on January 22, 1998 that Coopers & Lybrand Ltd. be appointed as the Receiver-Manager of all of the undertaking of Taylor. By order made February 18, 1998, five individuals were appointed as a Steering Committee to represent the interests of all investor creditors. After extensive negotiations, a May 8, 1998 order relieved Coopers of much of its duties and responsibilities as Receiver-Manager. Its responsibilities were assumed by the Steering Committee so that the Committee could undertake many of the tasks which would ordinarily be the responsibility of the Receiver-Manager and so that the cost of the Receiver-Manager undertaking mailings to the investor creditors and of undertaking a forensic audit of the

affairs of Taylor could be avoided.

3 The Receiver-Manager was provided with the authority to assign Taylor into bankruptcy. That was done and a receiving order was made on September 2, 1998 with Pricewaterhouse Coopers Inc. appointed as the Trustee. At a meeting of creditors held on October 22, 1998, five Inspectors were appointed: Gary Bateman, Peter Elms, David Mosher, Laurie Giles and Michael Sturby. Mr. Mosher represents a judgment creditor of Taylor and the other Inspectors were investor creditors who advanced monies to Taylor. Four of the five Inspectors had served as a members of the Steering Committee. Michael Sturby is a member of the Steering Committee and is an Inspector. Mr. Sturby had been retained by Coopers to conduct research and analysis in relation to Taylor and its related numbered companies and had undertaken much of the forensic auditing tasks which would ordinarily have been undertaken by the Receiver-Manager.

4 In the Statement of Affairs of Taylor, unsecured creditors are listed as $33,285,810.99, secured creditors are listed at $13,556,802.00 and total assets are listed at $18,155,385.00.

**Concerns Raised on Behalf of the Former Law Firm of Taylor**

5 The concerns raised by the solicitor for the former lawyers can best be summarized in his October 16, 1998 letter to the solicitors for the Trustee:

> ...one of the investors who is anticipated to be starting a lawsuit by using Heather Ferris and David Roberts at Campney & Murphy is also an inspector in the bankruptcy and that you anticipate that he may wish to examine the files in question under the context of the bankruptcy. Firstly, I think it is plain that the trustee's possession of the files and access to those files must only be exercised for legitimate and proper purposes of the bankruptcy. It would be completely inappropriate and wrong, in my view, for an investor who is also an inspector to go through all of our client's files so as to get information and documentation for the purposes of a personal lawsuit which is anticipated to be commenced. First of all, it subverts the concept of implied confidentiality of documents from one litigation matter to another. Secondly, it subverts the disclosure of documents issues of relevance and privilege which flow within each individual lawsuit.
>
> In strikes me that the trustee is under an obligation to respect the confidentiality of documents produced within the bankruptcy in the same manner as a litigant is under a duty to respect the confidentiality of all documents produced by the discovery process.
>
> It strikes me that if indeed there are inspectors who are also actual or prospective litigants against our client or others arising out of matters touched upon in the Taylor Ventures Ltd. bankruptcy that those inspectors are in conflict of interest and should either resign or steps should be taken by the trustee to deal with the issue in some other manner so as to prevent the use of documents used in the bankruptcy from being used for other personal purposes or for other litigation.

The concerns are therefore twofold: (a) the Inspectors will use the knowledge they obtain from the files to either promote their own personal lawsuit against the former solicitors or to provide information to one of the Investors who has threatened a lawsuit against the former solicitors arising out of the alleged representation of both Taylor and that Investor by the former law firm; (b) information which will be confidential to the Investors and their solicitor, Ms. Ferris, will be made known to Mr. Roberts, the partner of Ms. Ferris, in his capacity as the solicitor likely to be commencing an action on behalf of one of the Investors against the former law firm of Taylor arising out of the alleged fiduciary duty owed by the former law firm to the Investors and/or out of the alleged

representation of both an Investor and Taylor on a particular transaction or transactions.

**Position Taken by the Solicitors for the Inspectors**

6 The position of the Inspectors is best outlined in the November 4, 1998 letter to the solicitor for the former law firm:

> The Trustee in Bankruptcy of Taylor Ventures Ltd. stands in the shoes of the bankrupt. The files of Taylor Ventures Ltd. which are in the possession of Mr. Oliver, belong to Taylor Ventures Ltd., the bankrupt. Communications between Taylor Ventures Ltd. and Mr. Oliver are privileged and the files may not be disclosed to others by Mr. Oliver without the permission of Taylor Ventures Ltd. However, the client, now the Trustee in Bankruptcy, may waive that privilege if he chooses. The confidentiality is the Trustee's and the Trustee may disclose what he chooses because the files belong to the Trustee, as does the privilege.

**Applicable Provisions: *Bankruptcy and Insolvency Act* and Rules**

**S.16(5)**

No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents relating to the accounts or to any trade dealings of the bankrupt or to set up any lien thereon.

**S.116(2)**

No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate of the bankrupt.

**S.120(1)**

No inspector is, directly or indirectly, capable of purchasing or acquiring for himself or for another any of the property of the estate for which he is an inspector, except with the prior approval of the court.

**S.163(1)**

The trustee ... may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt ... respecting the bankrupt, his dealings or property and may order the person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

**S.164(1)**

Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

**R.65(5)**

Documents that are subject to the lien of a solicitor shall be returned to the solicitor upon completion of the estate to which the documents relate.

***What is Privileged***

7 It is clear that there is a distinction between the "facts" which may be in a solicitor's file and "confidential communications." It is clear that, as to matters of fact, no privilege attaches to documents and that they are not confidential. Similarly, a solicitor must answer questions regarding the movement of funds in and out of a trust account: see, for instance, *Lauzier, Re* (1996), 43 C.B.R. (3d) 207 (Ont. Bktcy.). In *Descôteaux c. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.), where Lamer J. delivered the judgment of the court, there is this description of the scope of privilege:

> The following statement by Wigmore (8 Wigmore, *Evidence* para. 2292, p.554 (McNaughton Rev. 1961) of the rule of evidence is a good summary, in my view of the substantive conditions precedent to the existence of the right of the lawyer's client to confidentiality:
>
> > Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except the protection be waived, (at p.603)

***Can a Trustee in Bankruptcy Waive the Privilege***

8 The 1965 decision of McDermott J. in *Cirone, Re* (1965), 8 C.B.R. (N.S.) 237 (Ont. S.C.), stood for the proposition that the Trustee stepped into the shoes of the client and was in a position to waive the privilege in order to require the former solicitor for a bankrupt to be examined. In dealing with the power to examine the former solicitor, McDermott J. stated:

> Counsel for the trustee cited numerous cases in support of his contention that the privilege of the solicitor is actually that of the client, and that the client can release the solicitor from refusing to answer on a question of privilege, or from divulging information that came to him from his client, and further submits that when the client has become bankrupt the trustee steps into the shoes of the client and has the right to relieve from or waive the solicitor's privilege (or actually the client's privilege) of not answering questions leading to information obtained by the solicitor for the bankrupt before the bankrupt assumed that status. See 2 Halsbury, 3rd ed., p.408, para. 820: "The solicitor of a person who afterwards becomes bankruptcy cannot set up as against the trustee in the bankruptcy any privilege which is the client's"; and the reference there to Cordery on Solicitors, 4th ed., p.298. (at p.239)

9 The motion before the court had been made in an action commenced by the Trustee against the former solicitor. The question was whether the former solicitor should re-attend at his examination for discovery to answer the questions that he previously refused to answer. In deciding that the former solicitor should attend to answer the questions, McDermott J. concluded:

> The trustee in bankruptcy under the Bankruptcy Act should be permitted much wider scope in the course of his examinations in cases where he is obliged to take an action in court on behalf of the creditors to try to recover funds, and where it is his duty to make all possible investigation in his work as a trustee to carry out

fully the administration of the estate for the benefit of the creditors. (at p.243)

10 In *Abacus Cities Ltd., Re* (1981), 40 C.B.R. (N.S.) 172 (Alta. Q.B.), MacDonald J. dealt with the question of whether or not a Trustee was in a position to waive privilege in connection with communications between the previous solicitors for the bankrupt and the bankrupt in order that the communications might be introduced in evidence at preliminary hearings in Ontario relating to fraud charges against the principal of the Abacus. MacDonald J. commented:

> Were Abacus Cities Ltd. not in bankruptcy, decisions of and for the company would be made by the Board of Directors. Being in bankruptcy, the Trustee replaces the Board of Directors, at least in all matters concerning the property of the bankrupt, (at p.173)

11 After citing the decision in *Cirone, Re, supra*, MacDonald J. concluded:

> It would be improper to claim the privilege of the company for the purpose of protecting an employee who enjoys no solicitor-client privilege in a prosecution for a breach of a statute.
>
> If the trustee with the advice of the inspectors in bankruptcy knows of any reason why, in the interests of the bankrupt, privilege should be claimed and certainly he can do so. The trustee as an officer appointed by the court is under an obligation to balance the public interests in any decision he makes.
>
> I do not consider that an order should go directing the trustee to waive privilege as there may be circumstances of which this court has no knowledge, but an order will go authorizing the trustee to waive privilege and suggesting he do so if he has no reason to believe that such a waiver would be to the prejudice of the interests that he represents. (at pp. 176-7)

12 In *Clarkson Co. v. Chilcott* (1983), 47 C.B.R. (N.S.) 93 (Ont. Bktcy.), Ewaschuk J. dealt with the question of whether the former solicitor of the bankrupt should re-attend and answer questions relating to property presently or formerly forming part of the estate of the bankrupt. Ewaschuk J. concluded as follows:

> My initial impression was that the trustee in bankruptcy, though vested with the bankrupt's property and charged with a duty to act in the best interests of the bankrupt's creditors, possess no right to waive solicitor-client privilege with respect to the bankrupt's property. That was so on the basis that the solicitor-client privilege was such a fundamental right in our legal system that this right should not be lightly derogated from. And it was also based on the assumption that the creditors' rights to the bankrupt's property could be adequately protected by inquiry into the acquisition, location and disposition of property, which attract no privilege, being objective acts and transactions and not confidential communications: see *Ont. Securities Comm. v. Greymac Credit Corp.* (Ont. Div. Ct., 30th March 1983, not yet reported). In other words, by compelling the bankrupt and solicitor to disclose the flow of the bankrupt's property, the rights of the creditors would be adequately protected without requiring disclosure of the client's instructions, and thus disclosure of the purpose for which the property was acquired or disposed of.
>
> However, I find that my impressions are not valid in law. It appears clear that a trustee in bankruptcy does indeed possess the legal right to waive the bankrupt's solicitor-client privilege with respect to the bankrupt's former property: *Re Cirone; Reisman v. Laker* (1965), 8 C.B.R. (N.S.) 237 (Ont. H.C.) and implicity reaffirmed in *Ont. Securities Comm. v. Greymac Credit Corp., supra.* Thus, the law's interest in protecting confidential legal communications must yield to the seemingly greater interest in protecting the creditors' rights

in the easily disposed of bankrupt's property.

I would hope that the trustee in bankruptcy would not lightly waive a solicitor-client privilege unless the bankrupt's property cannot be determined and reached in any other way. Now that the act/transaction as opposed to communication distinction has been developed and recently clarified, I would hope it would be the rare case where the trustees would waive the privilege, (at pp. 95-6)

13 In the *Ontario (Securities Commission) v. Greymac Credit Corp.* decision referred to (reported at (1983), 146 D.L.R. (3d) 73 (Ont. Div. Ct.)), the court dealt with the ability of a Receiver appointed under the *Loan and Trust Corporation Act* to waive solicitor and client privilege on behalf of a company. The court concluded that the Receiver had the power to waive solicitor-client privilege but that the power had to be used only for the purposes for which the Receiver was ordered to take control of the company:

Section 159 of the *Loan and Trust Corporations Act* expressly provides that the registrar has his powers "for such purposes". The result of the Orders in Council is that the registrar has all the powers of the boards of directors of Greymac Trust and Crown Trust, which would include the power to waive a solicitor-and-client privilege of either of those corporations, but those powers are expressly conferred for the purposes for which the registrar was ordered to take control. It is no part of those purposes, in my judgment, to render assistance to the Morrison Commission in its inquiry into the affairs of Greymac Trust and Crown Trust and other corporations. That being so, the registrar, in my judgment, has no right to waive the solicitor-and-client privilege of Greymac Trust or Crown Trust so that their solicitors or former solicitors may be free to disclose confidential information to the commission. (at p.81)

14 The decision in *Cirone, Re, supra*, was described by the court in *Greymac Credit Corp.* as not being "determinative of the issue" because of the differences between the purposes for which a Trustee in Bankruptcy is appointed and the purposes for which a statutory Receiver was ordered to take possession and control. The court said that the Trustee was appointed to liquidate the assets of the bankrupt and distribute the proceeds amongst the creditors whereas the statutory Receiver was appointed to take possession and control of the two trust companies and conduct their businesses and to take "... such steps as in his opinion should be taken towards their rehabilitation or continued operation." (at p.81)

15 The court in *Greymac Credit Corp.* also dealt with the question of what would and would not be priv- ileged:

Evidence as to whether a solicitor holds or has paid or received moneys on behalf of a client is evidence of an act or transaction, whereas the privilege applies only to communications. Oral evidence regarding such matters, and the solicitor's books of accounts and other records pertaining thereto (with advice and communications from the client relating to advice expunged) are not privileged, and the solicitor may be compelled to answer the questions and produce the material.

It may be helpful to ask in such a case whether the client himself if he were the witness, could refuse on the ground of the solicitor-and-client privilege to disclose particulars of a transaction directed by him through his solicitor's trust account. The fact that a client has paid to, received from, or left with his solicitor a sum of money involved in a transaction is not a matter as to which the client himself could claim the privilege, because it is not a communication at all. It is an act. The solicitor-and-client privilege does not enable a client to retain anonymity in transactions in which the identity of the participants has become relevant in properly constituted proceedings. (at p.83)

16 The trial decision of Ewaschuk J. and the decision in *Greymac Credit Corp.* were reviewed by the Ontario Court of Appeal in *Clarkson Co. v. Chilcott* (1984), 53 C.B.R. (N.S.) 251 (Ont. C.A.). The judgment of the court was delivered by Lacourciere J.A. The court dismissed the appeal but also ruled that: "... the appellant may refuse to answer any and all questions in respect of instructions which he has received or professional advice which he gave to the debtor in respect of the bankrupt's property." (at p.256)

17 The court had the following comments about the judgment of Ewaschuk J.:

> We respectfully disagree, however, with the proposition accepted by the learned motions court judge that a trustee in bankruptcy possesses the legal right to waive the privilege with respect to legal advice given to the bankrupt respecting his former property. He relied on *Re Cirone; Reisman v. Laker* (1965), 8 C.B.R. (N.S.) 237 (Ont.S.C.); in our respectful view, the case is based on a broad proposition stated in 2 Hals. (3d) 408, para. 820, which does not appear to be consistent with the rationale for the privilege. *Cirone* involved the proposed examination of a solicitor against whom there were allegations of fraudulent preference with respect to his fees for services to the bankrupt. (at p.254)
>
> Mr. Justice Houlden in his article "Discovery in Criminal Prosecutions in Bankruptcy Matters" (1972), Can.Bar Rev. 486 at 488, states that it is a difficult question whether or not the *Cirone* case should be extended beyond its particular facts. We think that it should be limited to its own facts, and that the proposition in Halsbury is too broad having regard to the authority upon which it is based. (at p.254)
>
> In our view, the appellant can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the appellant for the purpose of giving legal advice. These communications with respect to property are not privileged. All questions contained in Sched.A to the order of Ewaschuk J. can be read as falling in this category of non-privileged information and to that extent they should be answered by the appellant. In that respect, there is no privilege to be waived by the client or by the trustee. (at p.255)
>
> The privilege attaches, however, to all information requested by the client for the purpose of obtaining professional advice and assistance and given for that purpose. (at p.255)
>
> It is also unnecessary to say definitely whether there may be circumstances in which the trustee may properly waive the bankrupt's privilege. We do not think, however, that the protection of creditor's rights, standing alone, is sufficient to overcome the solicitor/client privilege. (at p. 255)

18 Subsequent decisions have not been consistent in dealing with the Ontario Court of Appeal decision in *Clarkson Co. v. Chilcott*. In *Amonson, Re* (1985), 57 C.B.R. (N.S.) 314 (Alta. Q.B.), Chrumka J. dealt with whether the bankrupt's former solicitor should present himself for examination by the Trustee pursuant to ss. 133 and 134 of the *Act*. Chrumka J. stated:

> There are matters which deal with the preparation of documents and dispensing of funds, with respect to which there is no solicitor-client privilege. There are other areas of communications between solicitor and client where there clearly is a privilege in the client. (at p.316)

19 Chrumka J. then cited the trial decision but not the appeal decision in *Clarkson Co. v. Chilcott* before

> ...a trustee in bankruptcy may waive the solicitor-client privilege, but that it should not be waived unless the bankrupt's property cannot be determined in any other way...
>
> However, questions should not be asked which are concerned with the giving of legal advice by Mr. Milne [the lawyer] and which attempt to elicit the nature of the legal advice given. No privilege, of course, attaches where a communication is made in furtherance of a criminal purpose.
>
> In an examination of this type, it seems to me that it is generally unnecessary to breach the confidentiality respecting the legal advice sought or given. There is nothing improper or irregular in asking Mr. Milne questions which deal with the assets, disposition of the assets, tracing of them, the flow of funds and similar matters. But care should be taken with respect to the solicitor-client privilege concerning the giving of the legal advice unless this advice was in furtherance of a criminal purpose. (at pp.316-17)

While Chrumka J. does not refer to the Ontario Court of Appeal decision, he concludes as they did that much which is in the possession of the former solicitor is not privileged.

20 Registrar Quinn in *Wolch's Guaranteed Foods Ltd. (Trustee of) v. Wolch* (1994), 24 C.B.R. (3d) 268 (Alta. Q.B.) dealt with an application by a Trustee for a declaration that certain correspondence, memoranda and documents in the possession of a former solicitor were producible and not subject to any solicitor-client privilege. The documentation requested related to legal and accounting advice received prior to a "rather elaborate series of transactions "including a resolution declaring a dividend." Registrar Quinn concluded:

> Counsel for the Trustee submits that any privilege there may have been has in any event been waived by the Trustee, and that the Trustee is entitled to receive all of the documentation, even if it includes communications between the Bankrupt and its lawyer for the purpose of obtaining professional legal advice. Having regard to what was said in the ***Chilcott*** **[*Dilawri*]** case, I conclude there is no authority for holding a Trustee can waive the Bankrupt's privilege. (at p. 273).
>
> Turning to the present case, I do not purport to decide whether or not a waiver by a Trustee of a Bankrupt's privilege is possible. It is not necessary for me to do so, because I am of the opinion that even if such a waiver is possible, circumstances that would warrant it have not been shown by the Trustee. (at p. 275).

Registrar Quinn concluded that the lawyer and accountant should produce at their examinations under s.163(1) of the *Act*, any books, documents, correspondence or papers in their possession or power respecting the bankrupt, its dealings or its property, except those which were privileged.

21 In *Shepherd (Trustee of) v. Shepherd* (1997), 50 C.B.R. (3d) 115 (Ont. Gen. Div. [Commercial List]), Greer J. cited with approval the Court of Appeal decision in *Clarkson Co. v. Chilcott* although he found that the documents requested did not fall within the category of privileged documents.

22 Since the decision of the Ontario Court of Appeal in *Clarkson Co. v. Chilcott*, it is possible to summarize the position of the Trustee regarding privileged information as follows:

> (a) Solicitors or former solicitors can be compelled to disclose to the Trustee all information regarding the property and affairs and transactions of the bankrupt which do not require the disclosure of communications made for the purpose of giving legal advice. Specifically, questions which deal with assets, the disposition of assets, the tracing of assets or sale proceeds or the flow of funds in and out of trust or otherwise are mat-

ters which are not subject to solicitor-client privilege.

(b) Communications made for the purposes of giving legal advice are not privileged where the purpose of the communication was made to further a criminal purpose. All other communications for the purpose of giving legal advice are privileged and must not be disclosed to the Trustee or others and this privilege cannot be waived by the Trustee on behalf of the bankrupt.

(c) The Trustee can, pursuant to ss.16(5), 163(1) and 165(1) of the *Act*, require the examination of a former solicitor and the delivery of documents in the possession of the former solicitor providing those documents and that examination does not relate to matters which are privileged.

23 In this case, all documents and information in the possession of the former solicitors must be delivered up to the Trustee except that the former solicitors are not obligated to disclose communications between Taylor and themselves which were made for the purpose of providing legal advice to Taylor. It is then necessary to review the question of whether the documents and information that come into the possession of a Trustee and the Inspectors may then be provided by the Trustee and the Inspectors to third parties or may be used by the Inspectors or provided to others by the Inspectors for purposes other than for purposes of the bankruptcy.

**Can Documents which are not Privileged be Provided to Third Parties**

24 In *Nadon Paving Ltd., Re* (1967), 10 C.B.R. (N.S.) 57 (Alta. C.A.), the court dealt with the question of whether documentation in the hands of a consultant should be produced or not. The consultant had been retained by the bankrupt to review the workmanship of the bankrupt company but a copy of the report prepared by the consultant was not available to the Trustee. The Trustee sought a copy of the report from the consultant so that the Trustee could proceed with an action against the owner who refused to pay for work done by the bankrupt company. The court concluded that the documents should be made available. As to the argument of whether or not what is now s.163(1) of the *Act* should be used as a "dress rehearsal" for ongoing litigation, the court concluded:

*Re Franks; Ex parte Gittins*, [1892] Q.B. 646, was referred to and it was argued that because of that decision an examination that had for its purpose the improving of the trustee's position in civil litigation should not be made. In that case Vaughan Williams J., acting under the equivalent English section, postponed an examination of a party against whom the trustee intended to assert a claim because, he said at p.647, that he wished "to avoid permitting the trustee to have anything like a dress rehearsal of the cross-examination in the action." The rule that he was applying was stated by Cave J. in *Re Easton; Ex parte Davies* (1891), 8 Morr. 168 at 171:

> I admit that when the person seeking to interrogate is the official receiver or the trustee it is no answer to say that an action is pending by the official receiver or trustee against the witness he proposes to examine. But it is the duty of the registrar to see that the questions are put *bona fide* for the benefit of the creditors, and not for any indirect purpose.

The contemplated litigation in this case is not against the appellant but against John Laing & Sons Ltd. There is therefore no question of any preliminary examination for discovery as far as that action is concerned. (at p. 60)

25 Houlden J. in *Tomkinson, Re* (1971), 14 C.B.R. (N.S.) 245 (Ont. S.C.) dealt with a situation where ac-

tions had previously been commenced by the Bank of Nova Scotia against the sister of the bankrupt claiming a fraudulent conveyance and where the same counsel was acting for the Bank of Nova Scotia and for the Trustee on a proposed examination under s.163(1) of the *Act*. Houlden J. commented:

> I suggested to counsel for the Trustee that, if the Trustee was *bona fide* in bringing this application, the Trustee should have no objection to the Court ordering that the examinations not be used in the proceedings brought by the Bank of Nova Scotia. Counsel has consented to my imposing this restriction on the examinations. I do not know what the Bank of Nova Scotia intends to do with its pending actions, but where the trustee appears to have a *prima facie* right to attack the two transactions in question for the benefit of the bankrupt's estate, I believe the Trustee should be permitted to conduct a s.121 [now s. 163] examination. If the Trustee had no interest in the transactions, and merely wished to assist the Bank of Nova Scotia, the decisions of *Re Desportes* (1893), 10 Morr. 40, 68 L.T. 233 and *Re Easton; Ex parte Davies* (1891), 8 Morr. 168, 64 L.T. 798 would be relevant and I would stay the holding of the examination. But in this case, there is good reason for the Trustee to examine into the transactions and, in my view, the Trustee should be permitted to conduct it. (at p.248)

26 In dealing with this general question, Cory J. (as he then was) in *Long, Re* (1978), 29 C.B.R. (N.S.) 225 (Ont. H.C.) allowed an examination and concluded:

> There may be many instances where it is essential for the benefit of the creditors of the bankrupt that the trustee obtain as much information as possible before he determines whether or not to proceed with an action or undertake an action on behalf of the bankrupt's estate. The principle thus given is of great important and ought not, in my opinion, to be unduly fettered or restricted. It would seem that in many situations the trustee can proceed with an examination which is, in effect, a discovery, without there being payment of security costs for the protection of the other parties. That right is prone to abuse, and no doubt in some instances, if it were exercised without restraint by a trustee, it would become so abusive that the court would take steps to restrict the practice. (at p.227)

27 In *Catalena Productions Inc., Re* (1982), 43 C.B.R. (N.S.) 94 (B.C. S.C.), Skipp L.J.S.C. (as he then was) dealt with the question of whether a person could be represented by counsel at a s.163(1) examination even though that counsel also represented a creditor of the estate. After concluding that the person could be represented by counsel, Skipp L.J.S.C. stated:

> I conclude that the nature of the examination under s.133(1) [now s.163(1)] is a bar to the admission of the creditors to the proceedings. The examination under s. 133 is not the proper forum for the creditors to inform themselves with respect to the assets of the bankrupt or the dealings of the estate, there being alternatives open to them.
>
> Since counsel here represents not only Mr. Evans, the person being examined, but a creditor as well, a restriction should be placed on counsel that as a condition of his being allowed to attend he should give an undertaking not to divulge information obtained at the examination to the creditor. (at p. 169)

28 While *Greymac Credit Corp., supra*, deals with the question of the powers available to a statutory Receiver, it is clear from the judgment of the court that the court was of the view that the powers available should only be exercised for the purposes for which they were provided.

29 In dealing with questions arising under ss. 163(1) and 164(1) of the *Act*, the court has limited the scope

of the examination or the delivery of documents to matters relating to the bankrupt, his dealings or property. For instance, in *Sun Squeeze Juices Inc., Re* (1994), 27 C.B.R. (3d) 98 (Ont. Bktcy.) Farley, J. dealt with the right of inspection of documents in the possession of an accounting firm. Regarding s.164, Farley J. noted that it was:

> ...wide enough to include a right of inspection of documents even though they are the property of another person. Naturally the production of such must be of documents "relating in whole or in part to the Bankrupt, his dealings or property". (at p.99)

30 It is clear that the Trustee is appointed for the purposes set out under the *Act* and Regulations. Under s.16(3) of the *Act*, the Trustee is required to take possession of the deeds, books, records and documents and all property of the bankrupt and may enter onto premises for the purpose of making an inventory of that property. Under s.30 of the *Act*, the Trustee may do a number of things with the permission of the Inspectors: (a) sell the property of the bankrupt including the goodwill of any business and any book debts owing; (b) lease any real properties; (c) carry on the business of the bankrupt; (d) "bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt"; (e) incur obligations, borrow money and give security on any property of the bankrupt; (f) comprise and settle any debts owing to the bankrupt; (g) comprise any claim made by or against the estate of the bankrupt; etc. The activities of the Trustee must be limited to the legitimate interests of the creditors and of the affairs of the bankrupt.

31 The powers available to the Trustee do not include the ability to review the books and records of the bankrupt to obtain, not information which is pertinent to the affairs of the bankrupt, but information which would be of use to third parties. The efforts of the Trustee and the Inspectors must be spent for the benefit of the creditors only as the interest of those creditors relate to the property, dealings and affairs of the bankrupt. It is clear that the Inspectors and the Trustee stand in a fiduciary relation to the general body of creditors. As a result, the Inspectors and the Trustee must not use their access to the books and records of the bankrupt for their own purposes, the purposes of creditors who may have separate actions against third parties who had dealings with the bankrupt or in a way which would conflict with the Trustee's obligation to pursue all legitimate claims against third parties that may be available to the Trustee and the bankrupt.

32 The duties owed by the Inspectors have been variously described:

> (a) *Bryant Isard & Co., Re* (1923), 4 C.B.R. 41 (Ont. S.C.) - Inspectors stand in a fiduciary relation to the general body of creditors and should perform their duties impartially and in the interests of the creditors who appoint them. (at p.48);
>
> (b) *Fentiman, Re* (1926), 7 C.B.R. 355 (Ont. S.C.) - Inspectors must not allow their duty as Inspectors to conflict with some other interest.;
>
> (c) *Shannon & Co., Re* (1931), 13 C.B.R. 291 (Alta. T.D.) - An Inspector must not act for his or her own personal advantage and must make a full and complete disclosure to the Trustee of the matters much might reasonably create suggestion of conflict.;
>
> (d) *Maheu v. Rodrigue* (1984), 51 C.B.R. (N.S.) 132 (Que. S.C.) - An Inspector will be removed if there is a conflict of interest and the fact that the Inspector could be of assistance in administering the estate is not sufficient reason to justify his continuance as an Inspector.

33 The Inspectors were not appointed in order that they might review the materials available to them to see

whether they or others might have causes of action available against parties who had dealings with the Bankrupt. Plaintiffs having causes of action against parties such as the former solicitors will have all of the rights of discovery allowed by the Supreme Court Rules. It is inappropriate to allow the Inspectors to use their present access to materials to allow them or others to have early access to materials which will be available on discovery or to have access to materials which would not be available on discovery.

34 In the circumstances of this case, the access which both the Trustee and the Inspectors and their solicitors will have to the documents and records obtained from the former solicitors will be limited to using those documents in relation only to the "affairs of the Bankrupt", its "account", its "trade dealings", or its "dealings or property" and not in relation to any other purposes. Accordingly, it is appropriate to impose upon the Trustee and the Inspectors and their respective solicitors that, while the Trustee and the Inspectors will have complete and unrestricted access to all Taylor and related files which the Trustee has received from the former solicitors of the Bankrupt, they may use those files and the information contained only in relation to the affairs of the Bankrupt. At the same time, the solicitor for the Inspectors will provide an undertaking that she and those in her office who are assisting her in her representation of the Inspectors will not provide any of the information or documents they obtain in that capacity to any other members of their firm.

*Order accordingly.*

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# TAB 6

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Kedzep Ltd. v. Bertrand

Re KEDZEP LIMITED and BERTRAND

Quebec Superior Court, In Bankruptcy

Meyer J.

Judgment: April 24, 1981
Docket: Montreal No. 500-11-002801-779



Counsel: *D. Lachance*, for trustee.

No one contra.

Subject: Corporate and Commercial; Insolvency

Bankruptcy --- Proposal — General.

Proposals — Procedure under Bankruptcy Act — Directions — Inspections — Conflicts of interests — No automatic disqualification — Bankruptcy Act, ss. 16, 94(2).

The debtor's proposal provided for the appointment of a committee of inspectors and granted to them and to the trustee powers barely distinguishable from those possessed by the trustee and inspectors in the case of a bankruptcy. The administration of the estate was extremely complex. Four of the five inspectors were solicitors representing their clients, who were creditors, and a fifth was a professional trustee representing another creditor. As the administration of the estate progressed, it appeared gradually more obvious that certain claims of those creditors whose representatives were inspectors would be either contested or rejected. The practice followed had been that whenever a claim, relating to a party one of whose representatives was an inspector, was treated by the inspectors, the "interested" inspector would withdraw. The trustee was concerned that this procedure might constitute a violation of s. 94(2) of the Bankruptcy Act and accordingly presented an application for directions, seeking permission to continue to follow the previously established practice.

**Held:**

Application granted.

None of the inspectors concerned were parties to any contested proceedings. While it is generally true that an in-

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spector ought not to hold office where a conflict of interests has arisen or may arise, the peculiar circumstances of this case justify the continuation in office of the duly appointed inspectors.

**Cases considered:**

*F & W Stereo Pac. Ltd., Re; J. Mercer Indust. Ltd. v. Bottom* (1975), 22 C.B.R. (N.S.) 84 (B.C.) — *considered*

*Fentiman, Re* (1926), 30 O.W.N. 30, 7 C.B.R. 355 — *distinguished*

*Kleckner, Huck & Co. Ltd., Re; Bank of Toronto v. Can. Permanent Trust Co*, 22 C.B.R. 69, (sub nom. *Re Bank of Toronto))* [1940] 3 W.W.R. 326, reversed 22 C.B.R. 136, [1941] 1 W.W.R. 1, [1941] 1 D.L.R. 464 (Sask. C.A.) — *distinguished*

*Lions D'Or Ltée, Re; Hamel v. de Coster* (1965), 8 C.B.R. (N.S.) 171 (Que.) — *considered*

*Lincoln Floral Co. Ltd., Re* (1940), 21 C.B.R. 325 (Ont.) — *distinguished*

*Morrison v. T.D. Bank*, 35 C.B.R. (N.S.) 218, [1980] 6 W.W.R. 540 (Alta. Q.B.) — *considered*

*Overholt, Re*, [1964] 2 O.R. 334, 7 C.B.R. (N.S.) 17, 45 D.L.R. (2d) 490 — *distinguished*

*Roy (Paul-Emile) Inc., Re; Vallée v. Vachon* (1968), 13 C.B.R. (N.S.) 244 (Que.) — *considered*

*Wimco Steel Sales Co. Ltd., Re* (1970), 14 C.B.R. (N.S.) 288 (Ont.) — *distinguished*

**Statutes considered:**

Bankruptcy Act, R.S.C. 1970, c. B-3, ss. 16, 94.

Application for directions under s. 16(1) of Bankruptcy Act.

***Meyer J.* (orally):**

1 This is a motion for directions under s. 16(1) of the Bankruptcy Act, R.S.C. 1970, c. B-3. The file involves an extremely complicated estate in which a proposal was made and ratified, which proposal provided for the appointment of a committee of inspectors and granted to them and to the trustee powers which are distinguishable only with difficulty from those possessed by the trustee and inspectors in the case of a receiving order or voluntary assignment.

2 The five inspectors all represent important creditors, and four of the inspectors are members of the bar of the province of Quebec and are acting as solicitors for these clients, while the fifth inspector is a trustee by profession, and was especially asked by one of the major creditors to act as such on its behalf. All of the inspectors were duly elected at a meeting of the creditors.

3 Since their election the inspectors have attended a great number of meetings and have participated in many serious and important discussions and decisions concerning this estate. They appear to have acted conscientiously, to the best of their ability, and have acquired valuable knowledge and insight concerning the estate in

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the course of discharging their duties, which has benefitted the creditors generally. It is clear that it would cause substantial difficulties should it become necessary to replace anyone by someone not having knowledge of the past history of this matter, who would have to be briefed and educated from scratch, and that the administration of the estate would suffer as a result.

4 The problem which has arisen is that certain claims filed by unsecured creditors, represented by one or another of the inspectors, have been or may be contested or rejected in whole or in part by the trustee on the advice of his attorneys. In each case which has arisen so far, the inspector in question, whenever anything remotely concerning the creditor represented by him has appeared on the agenda at an inspectors' meeting, has left the meeting, and has not participated in any way, directly or indirectly, in the discussion relating to his client's claim nor in any vote connected therewith. It also appears that the basis of the contestation differs in each case, and that the inspectors have acted objectively and conscientiously in relation to any of the contested claims with respect to which they have not excluded themselves, without in any way being influenced by the fact that the claim may be that of a creditor represented by a co-inspector.

5 Nevertheless, because of s. 94(2) of the Act, the trustee felt that the procedure followed so far might possibly constitute a violation of the said section, and he has therefore made the present motion for greater certainty and in order to be permitted, if possible, to continue the present practice. Section 94(2) reads as follows:

> (2) No person is eligible to be appointed or to act as an inspector who is a party to any contested action or proceedings by or against the estate.

6 In the present case none of the inspectors concerned are themselves personally parties to any contested action or proceedings, but some of them do represent creditors who are or may be parties to contested proceedings, namely, disputed claims filed by them in the record. Counsel for the trustee has cited a number of cases which, according to him, cover the jurisprudence in this area, to the best of his knowledge.

7 *Re Fentiman* (1926), 30 O.W.N. 30, 7 C.B.R. 355, contains an obiter dictum to the effect that where the attorney for the landlord was an inspector and was placed in a position of conflict of interest, he was disqualified from acting as referee of his client's claim; consequently any decision he gave in the circumstances should be considered null and void. This situation is clearly distinguishable from the kind of authorization which the trustee wishes to obtain in the present case, as under the procedure suggested by the trustee any inspector *would* automatically disqualify himself from participating in any decision relating directly or indirectly to his client.

8 *Re Lincoln Floral Co. Ltd.* (1940), 21 C.B.R. 325 (Ont.), again involved an inspector who was also solicitor, or agent for the solicitor, of the purchaser of a piece of property belonging to the bankrupt, and this inspector participated in the decision to sell the property. The court found that he had exercised independent and considered judgment, but that he was really too close to the picture, and that it would have been preferable had he not been in spector, or, if an inspector, that he not have acted or voted in the matter in which the company for which he was acting as solicitor was involved as a purchaser of property. This case again is clearly distinguishable from the facts in the present case.

9 *Re Kleckner, Huck & Co. Ltd.; Bank of Toronto v. Can. Permanent Trust Co.*, 22 C.B.R. 69, (sub nom. *Re Bank of Toronto)* [1940] 3 W.W.R. 326, reversed 22 C.B.R. 136, [1941] 1 W.W.R. 1, [1941] 1 D.L.R. 464 (Sask. C.A.), deals with the fiduciary position of an inspector and states that where an inspector is an employee of a secured creditor, he is disabled from making any arrangement for its special benefit without full disclosure

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to, and acquiescence of, the creditors generally. Again, this is clearly distinguishable from the proposed procedure in the present case which would *not* involve the participation of any inspector in any arrangement for the benefit of the creditor represented by him.

10 *Re Overholt*, [1964] 2 O.R. 334, 7 C.B.R. (N.S.) 17, 45 D.L.R. (2d) 490, involved the fees of the solicitor for the estate, one of whose partners was an inspector. The court found that he was entitled to be paid his fees, but that he would not have been so entitled had there been evidence that the firm or the inspector would have received any benefit therefrom, or that the charge had been made on behalf of the firm of which both lawyers were members. This again seems to involve facts which are not that relevant in the present circumstances.

11 *Re Lions D'Or Ltée; Hamel v. de Coster* (1965), 8 C.B.R. (N.S.) 171 (Que.), involved a creditor's lawyer acting as an inspector, and it was found that where this same inspector presented a petition on behalf of his client to transfer the case to another judicial district, this was not illegal, but that the practice should not be approved. Again, this involves direct participation by the inspector in a matter where there is a conflict of interest, and even there, the court found that the practice, while not desirable, was not illegal.

12 *Re Paul-Emile Roy Inc.; Vallée v. Vachon* (1968), 13 C.B.R. (N.S.) 244 (Que.), deals generally with the fiduciary capacity of inspectors and their obligation to cooperate with the trustee and to act as prudent administrators. The undersigned is of the opinion that the procedure suggested by the trustee in the present case would in no way violate these principles as to the duties and obligations of inspectors.

13 *Re Wimco Steel Sales Co. Ltd.* (1970), 14 C.B.R. (N.S.) 288 (Ont.), involved an application for directions, where an inspector was vice-president of a substantial creditor being sued by the trustee in damages for a substantial sum. In the circumstances of that particular case, the court removed the inspector under then s. 82(5) [now s. 94(5)] of the Bankruptcy Act, R.S.C. 1952, c. 14. However, this involved a particular determination based on the evidence of the existence of a conflict of interest so great that it would not have been appropriate for the particular inspector to continue in office, and the decision to remove the inspector was made on the basis of the court's discretionary power, and in no way concerned the present s. 94(2) (then s. 82(2)). The court is of the view that in the present circumstances there is no evidence before the court which requires such action at the present time, but that it would be in order to reserve the right of any interested party to request the removal of any inspector under s. 94(5), should the circumstances warrant such action.

14 *Re F & W Stereo Pac. Ltd; J. Mercer Indust. Ltd. v. Bottom* (1975), 22 C.B.R. (N.S.) 84 (B.C.), involved a tender for the purchase of assets, and held inter alia that an objection to the appointment of the inspectors representing creditors against whom the estate might itself have a claim was unfounded. The court found that the Bankruptcy Act does not require either that an inspector be a representative of a creditor or that an inspector not be a representative of a creditor, and only expressly prohibits an inspector from holding office under s. 94(2) if he himself is personally a party to any contested action or proceeding by or against the estate, which is clearly not the case in the present estate.

15 The case of *Morrison v. T.D. Bank*, 35 C.B.R. (N.S.) 218, [1980] 6 W.W.R. 540 (Alta. Q.B.), involved a motion for directions, and it was held that a secured creditor had not abandoned its security by having its representative act as an inspector. After discussing whether a secured creditor is eligible to act as an inspector, the court goes on to discuss s. 94(2). Again, nothing in this decision would appear to prohibit the present inspectors from continuing in office in virtue of any provision of the Bankruptcy Act.

16 For all of the foregoing reasons, the court declares that no inspector in the present estate is automatically

disqualified as such under s. 94(2) merely because he represents or is the solicitor for a creditor of the estate whose claim has been or may be contested by the trustee; orders that any inspector shall withdraw from the meeting and not be present during any discussion relating, directly or indirectly, to any claim which the creditor he represents may have against the estate or relating to any matter, directly or indirectly, in which the creditor he represents has an interest, and shall not participate in any decision or vote relating to any such matters; and reserves the rights of all interested parties to apply to the court for the revocation of the appointment of any inspector at any time, should circumstances warrant such removal under s. 94(5) of the Bankruptcy Act.

17 The whole with costs against the mass.

*Application granted.*

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# TAB 7

Corrigendum released January 3, 2007. Original judgment has been corrected with the text of corrigendum appended.

# QUEEN'S BENCH FOR SASKATCHEWAN



Citation: **2006 SKQB 541**

Date: **2006 12 19**
Docket: Court #9778; Estate No. 029090/091 & Q.B.G. 149/2004
Judicial Centre: Moose Jaw

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IN THE MATTER OF THE BANKRUPTCY
OF TRENDS HOLDINGS LTD.

- and -

BETWEEN:

SULLIVAN AND ASSOCIATES INC.
in its capacity as Trustee in Bankruptcy
of Trends Holdings Ltd.

PLAINTIFFS

- and -

JUDITH TILSON, also known as JUDY TILSON,
RICHARD TILSON, also known as RICK TILSON,
LORNE TILSON, LORNE TILSON LTD.,
618304 SASKATCHEWAN LTD. and
101036275 SASKATCHEWAN LTD.

DEFENDANTS

**Counsel:**

| | |
|---|---|
| Rick Van Beselaire | for Sullivan and Associates Ltd., Nicole Hortman, Inspector & Kanuka Thuringer |
| Kevin A. Clarke | for Judith Tilson, Judy Tilson, Richard Tilson, Lorne Tilson and Lorne Tilson Ltd. |

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JUDGMENT — ZARZECZNY J.

## THE FACTS



[1] Trends Holdings Ltd. ("Trends" or "the Bankrupt") is a Saskatchewan business corporation that owned and operated retail gas service stations in Moose Jaw, Weyburn and Ceylon, Saskatchewan, a convenience store in Moose Jaw and a bulk fuel division. It also owned and operated other properties in association with these businesses including oil storage facilities, lease of a restaurant, automotive service facilities and a coin-operated carwash. Trends operated as an independent fuel distributor under various brands. Until August of 2000 it purchased its fuel exclusively from an independent distributor, Northridge Energy Marketing Ltd. ("Northridge"). Trends was a relatively large volume gasoline retailer with average annual sales in excess of $7.5 million.

[2] The Tilsons, both as individuals and through their various corporations, became the owners, shareholders and directors of Trends and/or properties and equipment upon and with which Trends operated its business. Judy Tilson, her husband, Lorne and her son Richard Tilson, are each and all the shareholders, officers and directors of Trends each responsible for various aspects of it operations.

[3] In or about the year 2000 Northridge was purchased by Nexen Marketing, a partnership between a number of corporate manifestations of Nexen Holdings ("Nexen"). Nexen continued to supply Trends with its gasoline inventories supported by a registered security interest including an assignment of its accounts receivable.

[4] In 2000 a "gas price war" developed in the city of Moose Jaw with the result that Trends' margins were severely impacted. By 2001 Trends' business was operating at a loss. In 2002 Nexen produced a Retail Product Sales Agreement for Trends to sign which included a security agreement to support Trends indebtedness to Nexen. The sale and security agreement were signed and Nexen registered its interest under the security at the Personal Property Security Registry.

[5] Relations between Trends and Nexen deteriorated and Trends indebtedness to Nexen increased. In September of 2002, Trends entered into a Fuel Supply Agreement with Esso. The agreement with Esso was to supply one of Trends' locations only and Trends continued to purchase the rest of their wholesale fuel from Nexen.

[6] By November of 2002 Trends was indebted to Nexen in the sum of $1,514,596.75. Nexen engaged as its legal counsel the Kanuka Thuringer LLP law firm in Regina and on November 6, 2002, its solicitors demanded of Trends payment in full of its indebtedness to Nexen.

[7] When full payment was not made, Nexen acted upon its security interest in Trends' accounts receivable. It appointed Sullivan and Associates as its agent for the purpose of collecting them.

[8] In May of 2003 Nexen petitioned Trends into bankruptcy claiming an indebtedness of $1,258,218.25 and its interest as a secured creditor. Nexen

sought the appointment of Sullivan & Associates Inc. ("Sullivan" or "the Trustee") as trustee in bankruptcy. This Court's adjudication of bankruptcy and Receiving Order including its appointment of Sullivan as Trustee was issued June 23, 2003. The Kanuka Thuringer law firm represented Nexen upon the bankruptcy petition and became solicitors to the Trustee in this bankruptcy. In the bankruptcy proceedings a total of five creditors have filed claims of indebtedness as follows:

| | |
|---|---|
| Nexen | $1,236,366.25 |
| Judith Tilson (unpaid wages) | 9,600.00 |
| Lorne Tilson Ltd. | 29,000.00 |
| Government of Saskatchewan | 2,200.00 |
| Talbot Marketing | 332.00 |

As demonstrated, Nexen is by far the largest creditor of Trends in this bankruptcy proceeding claiming an indebtedness of $1,236,366.25. The total of all other creditors' claims is $41,132.00.

[9] The administration of the Trends bankruptcy has been problematic and acrimonious between the individuals and parties involved, particularly as between the Trustee and its solicitors in bankruptcy, Kanuka Thuringer and the Tilsons.

[10] Court applications have been made and court orders were successfully obtained restraining Lorne and Richard Tilson from taking possession of large above-ground gas tanks and fuel pumps from Trends' place of business in Ceylon (which the Tilsons claimed belonged to them and was not property of Trends). On June 28, 2004, the Trustee commenced legal action in

the Court of Queen's Bench, Judicial Centre of Moose Jaw, against Judith Tilson, Richard Tilson and the Tilson corporation alleging fraudulent conveyances, preferences and void transactions were engaged in by the Tilsons in respect of the assets and estate of Trends in bankruptcy. The action further alleges breach of fiduciary duties owed by Judith and Richard Tilson to the Bankrupt and an action in conspiracy by them to cause loss or damage to Trends for their own personal benefit (the "Moose Jaw action"). The Tilsons' responded by attempting to initiate a third party claim against Nexen and the Trustee including allegations that Nexen, by its actions, caused Trends substantial losses and that Sullivan acted negligently in its administration of the bankrupt estate or otherwise failed in its duties as Trustee. The third party claim was struck out upon application by the third parties.



[11] The Trustee now seeks to require the Tilsons to comply with the *Rules of Court* in respect of the next proceedings in the Moose Jaw action and the Tilsons have replied by initiating this application to have Sullivan removed as Trustee, Kanuka Thuringer removed as solicitors to the Trustee and Nicole Hortman removed as the sole inspector of the bankrupt estate. The Tilsons also apply for an order of the court staying the Moose Jaw action.

## THE APPLICATIONS

[12] The following applications have been presented by the following parties to this Court for its determination, namely:

**The Trustee's Applications:**

[13] The Trustee applies for the following court orders:

(a) Compelling the defendant, Judith Tilson, to file her statement as to documents in the Moose Jaw action;

(b) Requiring Judy, Richard and Lorne Tilson to attend for examinations for discovery in the Moose Jaw action;

(c) Designating Lorne Tilson as the proper officer to be examined on behalf of Lorne Tilson Ltd. and Richard Tilson on behalf of 618304 Saskatchewan Ltd. and 101036275 Saskatchewan Ltd.

**The Tilson Applications:**

[14] The Tilsons apply for the following court orders:

(a) A stay of the Moose Jaw action;

(b) Prohibiting the law firm of Kanuka Thuringer from representing the Trustee;

(c) Removing Nicole Hortman as inspector of the bankruptcy estate of Trends;

(d) Removing Sullivan and Associates as Trustee in Bankruptcy of the estate of Trends.



## ISSUES

[15] The issues to be determined by the court are whether or not the orders requested by each of the applying parties ought to issue.

## ANALYSIS

### The Moose Jaw Action:

[16] The Tilson's stay application is presented pursuant to s. 37 of *The Queen's Bench Act, 1998*, S.S. 1998, c. Q-1.01 and the inherent powers or jurisdiction of the court with respect to its own process.

[17] In summary, the applicants argue that it would be unjust and inappropriate for the court to allow the Trustee plaintiff to proceed with its action against the defendants while the defendants' applications to remove the Trustee, its solicitors and the estate inspector is outstanding. The affidavits of Judy Tilson filed in support of the Tilson applications outlines the causes of action which the Tilsons intended to pursue against the Trustee and Nexen by their now dismissed third party proceedings in the Moose Jaw action. If not permitted to approach their claims in this fashion, the Tilsons intend to commence an independent action against these parties. They apply for the stay of the Moose Jaw action

against them until their applications for the removal of the Trustee, its solicitors and the bankrupt Estate Inspector are dealt with and their intended re-initiation of third party proceedings or commencement of their new action is concluded.

**The Removal Applications:**

***(a) The Trustee:***

[18] The removal of the Trustee's application is taken pursuant to s. 14.04 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3, as am. by the *Bankruptcy and Insolvency Act*, S.C. 1992, c. 27, s. 2 (the "BIA"). That section of the BIA provides as follows:

> **14.04** The court, on the application of any interested person, may **for cause** remove a trustee and appoint another licensed trustee in the trustee's place. [Emphasis added]

"Cause" means misconduct, fraud, dishonesty, becoming bankrupt or otherwise incapable of acting as a trustee. Where it is difficult for a trustee to act impartially and impossible for it to sue itself, a substitute trustee will be appointed. The main principle upon which the jurisdiction of the court is exercised in ordering the removal of the trustee, is the welfare of the creditors and of the bankrupt estate. The trustee must not undertake a duty and put itself in a position that is in conflict with its duty as trustee, or act in a manner that is inconsistent with that duty. If the trustee has placed itself in a position of conflict, it cannot continue as trustee and must resign or be removed by the court (See: *Re Herman* (1930), 11 C.B.R. 239 at p. 246 (Ont. S.C. A.D.); *Re Phillip's Manufacturing Ltd.* (1992), 16 C.B.R. (3d)

127 (B.C.S.C.); and *Commonwealth Investors Syndicate Ltd.* (1986), 61 C.B.R. (N.S.) 147 (B.C.S.C.)).



[19] The Tilsons argue that Sullivan is in a conflict of interest because of its involvement with Nexen and Trends prior to being appointed Trustee in bankruptcy of Trends' estate. As a result it is not able to act impartially or to "sue itself" for those causes of action the Tilsons wish and intend to pursue against Sullivan in either the third party proceedings in the Moose Jaw or new action.

[20] Paragraphs 42(a) and (b) of the Judy Tilson affidavit filed in support of the Trustee removal application claims the Trustee was a receiver for Nexen prior to its appointment as Trustee. The application also alleges that as Trustee Sullivan took actions in respect of its administration of the bankrupt's assets and business (including failure to operate it) and/or disposed of the bankrupt's assets in a non-commercial, or unreasonable way resulting in less than fair value sales prices.

[21] The Trustee, in the affidavit of Clark Sullivan, replies to these assertions. In paragraph 4, together with the attached Exhibit "A" of his affidavit, he outlines the capacity in which he was retained by Nexen prior to the bankruptcy. Sullivan was appointed Nexen's agent on November 29, 2002, for the collection of Trends' accounts receivable pursuant to the registered security interest Nexen had in those receivables. Sullivan disputes Ms. Tilson's deposition that Sullivan further acted as a receiver for Nexen in respect to the seizure of Trends' fuel tanks. Paragraph 5 and attached Exhibit "B" to the Sullivan affidavit satisfies this Court that it was another company called Falcon Group of

Companies Inc. that Nexen appointed as its agent to enforce its security interest in Trends' gasoline inventories. The court accepts that the information and exhibits contained in the Sullivan affidavit establish that pre-bankruptcy Sullivan acted only as an agent and not receiver for Nexen in respect of Trends' receivables only and not with respect to any of Trends' other property.



[22] The Tilson application for removal of the Trustee suggests that the Trustee could not objectively or without conflict pursue causes of action that the Tilsons believe should be pursued by the Trustee against Nexen because the Trustee acted as a fee for service agent or, as they had mistakenly characterized it "receiver" for Nexen prior to the bankruptcy.

[23] Not only is the court satisfied that the factual foundations for the Tilson removal application are in error, the arguments presented in support of the removal application fail to recognize the statutory duties and responsibilities the Trustee has as an officer of the court and a professional and licensed trustee under the law.

[24] In his affidavit Mr. Sullivan deposes in paragraph 10:

> 10. In any situation where Sullivan and Associates was asked to pursue an action against Nexen Marketing, Nexen Marketing's counsel would not be asked for an opinion about the merits of such a proposed action . . . an independent legal opinion would be obtained.

In paragraph 13 Mr. Sullivan deposes:

> 13. As the trustee in this or any other bankruptcy, Sullivan and Associates does not act upon the instructions of Nexen or any other creditor. Sullivan and Associates acts in the interests of all the unsecured creditors. While the extent of Nexen's security is an issue, Nexen is an unsecured creditor of Trends as the value of its security is less than the amount it is owed.



[25] Within a month after the court's bankruptcy and receivership order, Sullivan requested a legal opinion from the Balfour Moss law firm respecting whether or not Nexen's security interest as claimed was valid, whether Nexen was a secured creditor and, if so, the nature and extent of its claim as a secured creditor in the bankruptcy. This is an illustration of the independence of this Trustee and its proper exercise of its statutory obligations in this bankruptcy.

[26] It is also noted, as a practical observation, that whether as a secured or unsecured creditor the claim of Nexen is by far the largest claim against Trends' bankruptcy estate. It represents approximately 96.7% of the total outstanding creditor claims in the Trends bankruptcy. Even if Nexen were to be successfully sued on behalf of the bankrupt estate it would in effect receive this percentage of any amount recovered for the estate. This observation was more explicitly stated by McIntyre J. in his judgment dismissing the third party claim which the Tilsons proposed to take against Nexen in the Moose Jaw action. There Justice McIntyre observed that the third party claim was in effect a claim advanced for and on behalf of Trends in bankruptcy, an action that must be taken by the Trustee not the defendants as former shareholders and directors of Trends and for their benefit. The only circumstance in which the Tilsons could benefit from an action taken by the Trends bankruptcy estate against Nexen is if the

amount recovered against Nexen exceeds the total claimed by Nexen and the other small creditors mostly the Tilsons.



[27] There is nothing in the materials filed which suggests otherwise than that Sullivan not only understands and recognizes its rights, duties and obligations as Trustee of the Trends bankruptcy estate but has acted throughout in accordance with the obligations of a trustee at law.

[28] Based upon its analysis the court has concluded there is no basis established by the applicants to support their application to remove the Trustee in this bankruptcy. The application to do so is dismissed.

***(b) The Kanuka Thuringer Removal Application:***

[29] The affidavit of Judy Tilson sets out, in paragraphs 44 to 51, the facts relied upon to support this removal application.

[30] Kanuka Thuringer had acted for Nexen prior to the bankruptcy and receivership order of the court. In particular this firm gave advice and took action in respect of Nexen's enforcement of its security and attempts to collect Trends' outstanding accounts receivable. Kanuka Thuringer now acts as solicitors to the Trustee in respect of the Moose Jaw action against the Tilsons.

[31] As previously pointed out, the Trustee has and will continue to recognize that if there is any legal opinion or action required with respect to the position of the Bankrupt that involves Nexen, independent legal advice and

representation will be required and sought. As was the case with the Trustee removal application, the facts and any grounds advanced with respect to the Kanuka Thuringer removal does not lead this Court to conclude that Kanuka Thuringer is in any present conflict of interest nor have the applicants demonstrated any conduct which would justify the removal of this firm of solicitors in the capacities in which they act in respect to the Bankrupt's estate and the Moose Jaw action. The Tilsons' notice of motion on this aspect of its application invokes s. 119(2) of the BIA. This section is referable to applications to remove or revoke the appointment of inspectors. It provides for judicial review of the decisions and actions of inspectors but does not provide authority for the relief claimed with respect to the removal of the solicitors for a bankrupt's estate.



[32] The right to counsel of choice in civil matters is properly protected in our law. It is only when some real and identifiable public interest intervenes that such a relationship must yield under an impropriety or "appearance of impropriety" concern (*Alberta Treasury Branches v. Leahy* (1998), 223 A.R. 113 (Alta. C.A.)). In the case of *CPR v. Aikens MacAulay* (1998) M.J. No. 77 (Man. C.A.) the court made the following comments with respect to solicitor removal applications:

> It is incumbent to ask if there is genuinely an issue of conflict, or is the issue simply being raised as a strategic tool where it might well advantage the party raising it simply to delay matters or for other positioning purpose?

[33] Similar sentiments were expressed by this Court with respect to a removal application in the case of *Rayner v. Enright* (1993), 20 C.P.C. (3d) 269 (Sask. Q.B.) where the following points were made by Kyle J. at para. 7:

> [7] Concerns have been expressed that motions such as these have been a standard tactic in litigation in recent years. The courts must be vigilant to confine the principle to those cases where a litigant's interests are threatened or at least reasonably appear to be threatened as any expansion of the principle beyond the present guidelines will make a delivery of legal services to the public by law firms of large or medium size extremely difficult. . .

A party's choice of counsel should not be interfered with by the courts unless there is a compelling reason to do so (See *Rayner, supra*).

[34] From the whole of the materials filed it is clear to this Court that there is nothing substantive to which the removal applicants can point to establish that the legal services of the Kanuka Thuringer law firm to the Trustee will be compromised because of that firm's association with Nexen as its legal counsel. Kanuka Thuringer's now aggressive pursuit of pre-trial proceedings in the Moose Jaw action explains and likely contributed to this application being made for their removal. Any legal action that the estate may take against Nexen, as the Trustee deposes, will result in the Trustee seeking outside legal advice and representation from other than the Kanuka Thuringer firm.

[35] In the whole of the circumstances, there being no present factual or legal foundation for the removal application of the Kanuka Thuringer law firm, that application is also dismissed.

***(c) Inspector Removal Application:***

[36] The appointed inspector of the Bankrupt's estate is Nicole Hortman, an employee of Nexen. The removal application is taken pursuant to s. 116(5) of the BIA. That provision does provide statutory authority for the removal of an inspector at the instance of creditors at a properly called meeting or by the court. There is no question that the particular inspector here has a vested interest, as an employee of Nexen, respecting the administration of this bankruptcy estate. As has already been observed, Nexen is by far the single largest creditor of the Bankrupt.

[37] Sections 116 to 120 of the BIA identify the role, duties and obligations of an inspector in the administration of a bankrupt's estate. The appointment of an inspector generally, and the appointment of this inspector specifically, is a decision to be made by the creditors of the bankrupt at a properly convened meeting. If the Trustee disagrees with the inspector appointed or on an application of a creditor, as is now presently before this Court, an application for removal of the inspector can be made. The court must consider whether or not the appointed inspector has acted improperly or alternatively will be unable to perform those duties assigned to inspectors under the provisions of the BIA to which this Court has referred. While it is the case that inspectors who represent a company against whom the bankrupt estate has a substantial claim should not be appointed (or continue to act as) an inspector (See *Re Wimco Steel Sales Co.* (1970), 14 C.B.R. (N.S.) 288 (Ont. S.C.), *Maheu v. Rodrigue* (1984), 41 C.B.R. (N.S.) 132 (Que. S.C.)) nevertheless as has already pointed out, that is not the

circumstance presently before the court. If, as and when any action is commenced on behalf of the bankrupt estate against Nexen then this issue may very well be topical and the principles analysed in and applied by the courts in the *Wimco* and *Maheu* cases (*supra*) may apply to support this inspector's removal.

[38] There being no basis in fact or in law for the removal of the inspector in the current circumstances, the application for the removal is dismissed.



**Sections 38 and 215 BIA:**

[39] Paragraph 50 of Judy Tilson's affidavit provides as follows:

> 50. As previously stated, it is my intention to pursue an action against Nexen and Sullivan & Associates. I may pursue the appeal that is filed. Alternatively, I will ask a new Trustee to review my complaints, or I will bring an application pursuant to Sections 38 and 215 of the *Bankruptcy and Insolvency Act*, requesting that the Court grant me leave to pursue these actions. If successful, I understand the proceeds would be payable to the Estate, but I believe that damages exceed the creditor's claims.

[40] In considering the removal applications, the court considers that there is much merit to the argument advanced by legal counsel for the Trustee, Kanuka Thuringer and the inspector that if the Tilsons maintain their conviction that the estate has a maintainable cause of action against Nexen and/or Sullivan & Associates (whether as Trustee or agent of Nexen) then an application is available to be taken pursuant to ss. 38 and 215 of the BIA to authorize the Tilsons to proceed where the Trustee has decided not to do so. As McIntyre J.

pointed out when addressing the application to dismiss the third party proceedings, this is a viable alternative to the Tilsons. Whether they choose to take this approach or pursue their claims by the other alternatives noted by Ms. Tilson in her affidavit remains to be seen. The consequences upon the status of the Trustee, the Bankrupt estate's solicitors and the inspector may remain to be considered at that time and in such a context, if it arises.



**The Moose Jaw Action (Cont.)**

[41] The determination of the removal applications, now dismissed, impact significantly upon the Tilson applications for the stay of proceedings of the Moose Jaw action and the Trustee's applications, made by its solicitors, for orders compelling the production of documents, appointment of appropriate officers for examination and orders for the conduct of the examinations for discovery.

[42] The application for the stay of the Moose Jaw action is dismissed. Proceedings on this action have now been substantially and long delayed. The plaintiff is entitled to proceed in an orderly and timely way with further pre-trial proceedings.

[43] There will be an order for the production of relevant documents as prescribed by the Rules of Court in this action by the defendant, Judy Tilson, the same to be complied with within 30 days of the date of service upon her of this order.

[44] In addition, Lorne Tilson is designated as the proper officer to be examined for discovery on behalf of Lorne Tilson Ltd., and Richard Tilson on behalf of 618304 Saskatchewan Ltd. and 101036276 Saskatchewan Ltd. An order may also issue requiring Judith Tilson, Richard Tilson and Lorne Tilson to attend at examinations for discovery on a date and time specified by the solicitors for the Trustee, in consultation with the solicitors for the Tilsons. An Appointment for that purpose may issue which counsel for the Trustee may serve upon the Tilsons' solicitors.

[45] The Trustee, the law firm of Kanuka Thuringer and the inspector are entitled to one set of costs with respect to the removal applications, the same to be assessed against the applicants pursuant to column 4 of this Court's tariff of costs. In addition, the Trustee is entitled to its costs respecting the Moose Jaw action applications to be paid by the Tilsons upon Column 4. If not agreed to, the costs ordered are directed to the local registrar for assessment. The costs as agreed or assessed shall be payable within 30 days thereafter.

J.
T.C. Zarzeczny

# QUEEN'S BENCH FOR SASKATCHEWAN



Citation: **2006 SKQB 541**

Date: **2007 01 03**
Docket: Court #9778; Estate No. 029090/091
& Q.B.G. 149/2004
Judicial Centre: Moose Jaw

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IN THE MATTER OF THE BANKRUPTCY
OF TRENDS HOLDINGS LTD.

- and -

BETWEEN:

SULLIVAN AND ASSOCIATES INC.
in its capacity as Trustee in Bankruptcy
of Trends Holdings Ltd.

PLAINTIFFS

- and -

JUDITH TILSON, also known as JUDY TILSON,
RICHARD TILSON, also known as RICK TILSON,
LORNE TILSON, LORNE TILSON LTD.,
618304 SASKATCHEWAN LTD. and
101036275 SASKATCHEWAN LTD.

DEFENDANTS

**Counsel:**

| | |
|---|---|
| Rick Van Beselaire | for Sullivan and Associates Ltd., Nicole Hortman, Inspector & Kanuka Thuringer |
| Kevin A. Clarke | for Judith Tilson, Judy Tilson, Richard Tilson, Lorne Tilson and Lorne Tilson Ltd. |

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CORRIGENDUM to ZARZECZNY J.

[46] Because of a typographical error paragraph [44] of the judgment issued in this matter dated December 19, 2006, is deleted and the following paragraph [44] issued in substitution:

> [44] In addition, Lorne Tilson is designated as the proper officer to be examined for discovery on behalf of Lorne Tilson Ltd., and Richard Tilson on behalf of 618304 Saskatchewan Ltd. and 101036276 Saskatchewan Ltd. An order may also issue requiring Judith Tilson, Richard Tilson and Lorne Tilson to attend at examinations for discovery on a date and time specified by the solicitors for the Trustee, in consultation with the solicitors for the Tilsons. An Appointment for that purpose may issue which counsel for the Trustee may serve upon the Tilsons' solicitors.

J.
T.C. Zarzeczny

**IN THE MATTER OF THE BANKRUPTCY OF SKYSERVICE AIRLINES INC. OF THE CITY OF TORONTO IN THE PROVINCE OF ONTARIO**

Court File No. 31-OR-207744-T

***ONTARIO***
**SUPERIOR COURT OF JUSTICE**
**COMMERCIAL LIST**
**(IN BANKRUPTCY AND INSOLVENCY)**

Proceeding Commenced at Toronto

**BRIEF OF AUTHORITIES OF TRUSTEE**
**(returnable August 3, 2012)**

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