COURT FILE NUMBER: **Q.B. No. 1401 of 2019**

COURT OF QUEEN'S BENCH FOR SASKATCHEWAN

JUDICIAL CENTRE **SASKATOON**

APPLICANT **PILLAR CAPITAL CORP.**

RESPONDENT **HARMON INTERNATIONAL INDUSTRIES INC.**

IN THE MATTER OF THE RECEIVERSHIP OF
HARMON INTERNATIONAL INDUSTRIES INC.

BRIEF OF LAW ON BEHALF OF HARMON INTERNATIONAL INDUSTRIES INC.

APPLICATION SET FOR OCTOBER 8, 2019

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I. INTRODUCTION AND FACTS

1. The basic issue before the Court is whether or not it is appropriate to appoint a receiver where the only material property in issue is real property which significantly exceeds the value of the secured creditors' loan and which is currently listed for sale. From our perspective, the answer to this question should be no.

2. Although we appreciate why the Applicant, Pillar Capital Corp. ("Pillar"), initially believed this matter was urgent (no utilities being connected), this concern has since been addressed.[1] There is therefore no longer any reason to treat this matter as an "emergency" court proceeding.

3. Given the ongoing efforts of Harmon to sell its real property, appointing a receiver serves no useful purpose. It will erode the value of Harmon's assets and, potentially, result in significant conversion issues with respect to personal property owned by two directors of Harmon (neither of whom have been named in this application or personally served) as Pillar is also asking that the receiver be given control over these director's personal assets. As Harmon's debts will be fully paid once its real property is sold, there is simply no reason to pay a receiver to perform a significant amount of personal property inventory work.

4. Although we certainly acknowledge that Pillar has a clause, in its security agreement, contemplating the appointment of a receiver, so did the applicant in *Lemare Lake Logging Ltd. v. 3L Cattle Co.*[2], and that did not prevent Justice Rothery from dismissing a similar application in somewhat similar circumstances.

5. For all of these reasons, we are requesting that this receivership application be dismissed with costs.

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[1] See Reply Affidavit of Calvin Moneo at para.2.

[2] 2013 SKQB 278 ("*Lemare*") **[Tab A]**.

II. ISSUES

6. We will address two issues in this Brief of Law:

   (a) Harmon is not insolvent; and

   (b) It is not just nor convenient to appoint a receiver.

III. LAW AND ANALYSIS

A. Harmon is not insolvent

7. Pillar has alleged that Harmon meets the definition of insolvency found at both sections 2(a) and 2(b) of the *Bankruptcy and Insolvency Act*. These sections provide as follows:

> **insolvent person** means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> **(a)** who is for any reason unable to meet his obligations as they generally become due,
>
> **(b)** who has ceased paying his current obligations in the ordinary course of business as they generally become due

8. In terms of subsection (a), the basic issue is whether or not it is reasonable to consider Harmon insolvent where the entirety of the secured creditor's claim could be satisfied through the sale of real property that is already subject to that secured creditor's security interest. Significantly, Pillar has not provided any type of evidence (ex. appraisal reports) opining on the value of the Harmon Property. The values for the Harmon Property given in Harmon's materials, both of which significantly exceed the amount of Harmon's debt, are the only independent values that exist on record.[3]

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[3] See Reply Affidavit of C. Moneo at paras. 5-7, see also Exhibits "D", "E" and "F".

9. Although it is true that Harmon may, to some degree, lack liquidity, Pillar is its only significant creditor[4] and will be fully paid once its primary security, namely the 47 Street Building and the Miller Avenue Building, as those terms are used throughout these proceedings, (collectively the "Harmon Property"), is sold.

10. In terms of subsection (b), the only evidence offered here is that Harmon is in arrears with respect to its utility account with SaskPower as well as has not paid property taxes assessed by the City of Saskatoon. Since this application was filed, however, the SaskPower arrears have been paid and Harmon's director has deposed that he intends to pay Harmon's City of Saskatoon taxes by the end of the year as that is often when Harmon has paid City of Saskatoon taxes in the past (ex. to align with the business' year end).[5]

11. Evidence of insolvency should be clear and convincing.[6] The court should not presume insolvency but should instead assess the evidentiary record to evaluate if a debtor is truly insolvent. Given the value of the Harmon Property, this evidence simply does not exist on this application.

12. Accordingly, this does not appear to be a case with the "creditors circling". Rather, Pillar is the only material creditor and is fully secured through its collateral mortgage, for the amount of its outstanding loan.

B. It is not just nor convenient to appoint a Receiver

13. Pillar has essentially raised four reasons as to why it is just and convenient to appoint a receiver:

    (a) The fact that the Harmon Property is not connected to utilities;

    (b) The fact that Pillar previously attempted to resolve the parties dispute collaboratively and failed due to a lack of cooperation from Harmon;

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[4] See Reply Affidavit of C. Moneo at para. 2(d).

[5] See Reply Affidavit of C. Moneo at paras 2(a), 2(b), and 2(c).

[6] See e.g. *Keith G. Collins Ltd. v. Canadian Imperial Bank of Commerce*, 2011 MBCA 41 at para 20 **[Tab B]**.

(c) The fact that the Harmon Property cannot be sold without significant "pre-sale" effort; and

(d) The fact that Harmon is no longer operating as a business.

14. In terms of the first issue raised, the lack of utilities is no longer, as a matter of fact, based on the evidence that has been filed, an issue. The arrears have been addressed, SaskEnergy's utility is now connected and SaskPower's utility will be connected within 48 hours (if it is not already).[7]

15. In terms of the previous attempt to auction the Property, there is significant conflict, not to mention hearsay evidence, on this point. However, Harmon's evidence is that it remains ready, willing and able to proceed with the auction process, and was prevented from proceeding due to Pillar's insistence on providing no assurance or security to the auction company as to what would occur in the event Pillar attempted to force Harmon into receivership, before the auction process could be concluded.[8]

16. In terms of the state of the Property, Harmon's evidence is that the effort needed to ready the Property for sale is being significantly overstated, based on a previous effort by Harmon to clean-up a comparable yard site for sale, and could be addressed by a third-party auction company in any event.[9]

17. Harmon's evidence is also that there have been expressions of interest with respect to the Harmon Property and the Harmon Property is currently listed for sale.[10] Given this, it is not clear what additional value a receiver could contribute to the sale process, particularly if, as alleged by Pillar, Harmon is no longer engaged in substantive business activity.

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[7] See Reply Affidavit of C. Moneo at para. 2.

[8] See Reply Affidavit of C. Moneo at paras. 9-13; see also Exhibit "I".

[9] See Reply Affidavit of C. Moneo at paras. 14(a), 14(b).

[10] See Reply Affidavit of C. Moneo at paras. 14(c), 14(d).

18. In other words, if Harmon is no longer producing or manufacturing product, there is no business required to be managed. Rather, all that needs to be managed is the sale of Harmon's primary asset, its land and there is simply no reason why Harmon should be forced to pay for the receiver to perform tasks such as, providing an inventory of personal property, as this property does not need to be sold to retire Pillar's debt.

19. To each of these points we would add:

    (a) There is no evidence of irreparable harm if a receiver is not appointed. Rather, the only harm raised (lack of utilities) has been addressed;

    (b) There is no evidence (nor has there been any type of suggestion) that Harmon has been dissipating assets (indeed Harmon has no motivation to dissipate its assets given its intention to sell the Harmon Property to pay Pillar);

    (c) There is no evidence, nor has Pillar provided any type of analysis, as to how we can ensure that the receiver does not inadvertently convert the personal property of either Calvin Moneo or Victor Moneo, despite the fact that the draft Receivership Order purports to give the receiver the ability to deal with this property as part of the receivership; and

    (d) A significant portion of Pillar's debt would be retired once Victor Moneo proceeds with the sale of farmland, which is subject to a Pillar security interest.[11]

20. Simply put, there is no compelling evidence or reason to justify the appointment of a receiver, particularly given the significant costs that receivership appointments commonly entail. The Harmon Property is already listed for sale[12] and, given the existence of a collateral mortgage, there is no reason why Pillar could not instead pursue some type of foreclosure process (if the auction does not proceed).

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[11] See Reply Affidavit of C. Moneo at para. 8.

[12] See Reply Affidavit of C. Moneo at para. 14(c).

21. The fact the parties' security agreement may provide for the appointment of a receiver is not an end to the inquiry. Indeed, Justice Rothery in *Lemare*, *supra*, in considering a virtually identical clause to the receivership appointment clause in issue here, dismissed a similar type of application, and, in doing so, noted that the foreclosure process, given the equity that existed, was a more appropriate avenue for the secured creditor to pursue.[13]

22. For all of these reasons, we suggest that the application to appoint a receiver should be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

DATED at the City of Saskatoon in the Province of Saskatchewan, this 8th day of October, 2019.

ROBERTSON STROMBERG LLP

Per: _____
Jared D. Epp
Solicitor for the Respondent,
Harmon International Industries Inc.

[13] See especially para. 39.

This *Brief of Law* delivered by:

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TAB A

Most Negative Treatment: Leave to appeal allowed
Most Recent Leave to appeal allowed: Lemare Lake Logging Ltd. v. 3L Cattle Co. | 2013 SKCA 90, 2013 CarswellSask 573, 232 A.C.W.S. (3d) 12, 423 Sask. R. 54, 588 W.A.C. 54 | (Sask. C.A., Aug 29, 2013)

2013 SKQB 278
Saskatchewan Court of Queen's Bench

Lemare Lake Logging Ltd. v. 3L Cattle Co.

2013 CarswellSask 531, 2013 SKQB 278, [2013] 12 W.W.R. 176, 231 A.C.W.S. (3d) 112

Lemare Lake Logging Ltd., Applicant and 3 L Cattle Company Ltd., Respondent

A.R. Rothery J.

Judgment: July 19, 2013
Docket: Saskatoon Q.B. 674/13

Counsel: J.M. Lee, Q.C., M.J. Russell, for Applicant
J.A. Hesje, Q.C., R.J. Wood, for Respondent
D.K. Lee, for Concentra Financial Services Association
G.A. Meschishnick, Q.C., for Farm Credit Canada
K.M. Roy, for Attorney General, for Saskatchewan
C.N. Ohashi, for Minister of the Environment, for Saskatchewan

Subject: Insolvency; Constitutional; Corporate and Commercial; Property; Public

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Secured creditor brought application for court appointment of receiver and manager of assets, excluding livestock, of debtor, pursuant to s. 243(1) of Bankruptcy and Insolvency Act (BIA) — Debtor was farmer as defined by Saskatchewan Farm Security Act (SFSA) and took position that secured creditor had to comply with provisions of Part II of SFSA before it could apply to court for appointment of receiver under s. 243(1) of BIA — Secured creditor served notice questioning constitutional operability of ss. 9 and 11 of SFSA to extent those provisions may be interpreted to require person to obtain leave of court prior to making application for appointment of receiver pursuant to s. 243(1) of BIA — Secured creditor took position that doctrine of federal paramountcy rendered ss. 9 and 11 of SFSA inoperable to extent of conflict between them — Application seeking declaration that Part II of SFSA was constitutionally inoperative under doctrine of paramountcy dismissed, and application for court appointed receiver dismissed — Dual compliance was possible, and there was no operational conflict between SFSA and BIA — Secured creditor failed to prove that purpose of s. 243(1) of BIA had been frustrated by secured creditor's compliance with Part II of SFSA — Secured creditor had to comply with provisions of Part II of SFSA prior to making application pursuant to s. 243(1) of BIA — At any rate, this was not application where court would find it just or convenient to appoint receiver under s. 243(1) of BIA.

Table of Authorities

Cases considered by *A.R. Rothery J.*:

Bank of Montreal v. Hall (1990), 1990 CarswellSask 405, 1990 CarswellSask 25, 9 P.P.S.A.C. 177, 46 B.L.R. 161, [1990] 1 S.C.R. 121, 65 D.L.R. (4th) 361, 104 N.R. 110, [1990] 2 W.W.R. 193, 82 Sask. R. 120 (S.C.C.) — considered

Clarkson Co. v. Credit foncier franco canadien (1984), 37 Sask. R. 295, 55 C.B.R. (N.S.) 206, 1984 CarswellSask 42 (Sask. Q.B.) — considered

Clarkson Co. v. Credit foncier franco canadien (1985), 57 C.B.R. (N.S.) 283, 44 Sask. R. 151, 1985 CarswellSask 61 (Sask. C.A.) — referred to

Laferrière c. Québec (Juge de la Cour du Québec) (2010), (sub nom. *Laferrière v. Québec (Procureur Général))* 324 D.L.R. (4th) 692, 2010 CarswellQue 10212, 2010 CarswellQue 10213, 2010 SCC 39, (sub nom. *Quebec (Attorney General) v. Canadian Owners and Pilots Association)* 407 N.R. 102, (sub nom. *Québec (Procureur général) c. C.O.P.A.)* [2010] 2 S.C.R. 536, 75 M.P.L.R. (4th) 113 (S.C.C.) — followed

Railside Developments Ltd., Re (2010), 95 C.L.R. (3d) 54, 62 C.B.R. (5th) 193, 2010 CarswellNS 8, 2010 NSSC 13, (sub nom. *Railside Developments Ltd. (Receivership), Re)* 286 N.S.R. (2d) 285, (sub nom. *Railside Developments Ltd. (Receivership), Re)* 909 A.P.R. 285 (N.S. S.C.) — referred to

Royal Bank of Canada v. Klassen Park Farms Inc., Ronald Klassen and Darlene Klassen (December 21, 2012), Doc. 1304/2012 (Sask. Q.B.) — considered

Statutes considered:

Bank Act, S.C. 1991, c. 46

Generally — referred to

s. 427 — considered

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

Generally — referred to

s. 2 "insolvent person" — considered

s. 243 — considered

s. 243(1) — considered

s. 243(1.1) [en. 2007, c. 36, s. 58(1)] — considered

s. 243(5) — considered

s. 244 — considered

s. 244(1) — considered

s. 244(2) — considered

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

Generally — referred to

Forest Act, R.S.B.C. 1996, c. 157

Pt. 11.1 [en. 2006, c. 13, s. 17] — referred to

Land Titles Act, R.S.S. 1978, c. L-5

s. 87 — considered

Land Titles Act, 2000, S.S. 2000, c. L-5.1

s. 109(3) — considered

Limitation of Civil Rights Act, R.S.S. 1978, c. L-16

Generally — referred to

Queen's Bench Act, 1998, S.S. 1998, c. Q-1.01

s. 12 — considered

s. 65 — referred to

Saskatchewan Farm Security Act, S.S. 1988-89, c. S-17.1

Generally — referred to

Pt. II — considered

s. 3(a) "action" — considered

s. 3(a) "action" (i) — considered

s. 3(a) "action" (ii) — considered

s. 3(a) "action" (iii) — considered

s. 3(a) "action" (iv) — considered

s. 3(a) "action" (v) — considered

s. 3(c) "farmer" — referred to

s. 4 — considered

s. 9 — considered

s. 9(1)(d) — considered

s. 11 — considered

s. 12 — referred to

s. 12(1) — considered

s. 13 — referred to

s. 18 — referred to

s. 19 — referred to

APPLICATION by secured creditor for court appointment of receiver and manager of assets, excluding livestock, of debtor, pursuant to s. 243(1) of *Bankruptcy and Insolvency Act*; APPLICATION by secured creditor concerning constitutional operability of provisions of Part II of *Saskatchewan Farm Security Act*.

***A.R. Rothery J.*:**

The Issues

1 The applicant, Lemare Lake Logging Ltd. (the "Secured Creditor") applies for the court appointment of Alvarez & Marsal Canada Inc. as receiver and manager of the assets (excluding livestock) of 3L Cattle Company Ltd. (the "Debtor"), pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "*BIA*"). The Secured Creditor holds a mortgage over approximately 19,100 acres of land in Saskatchewan owned by the Debtor, and a security agreement over all goods and equipment (excluding inventory), to secure the repayment of $10 million. The Debtor is a farmer as defined by *The Saskatchewan Farm Security Act*, S.S. 1988-89, c.S-17.1(the "*SFSA*"), and takes the position that the Secured Creditor must comply with the provisions of Part II of the *SFSA* before it may apply to the court for an appointment of a receiver under s. 243(1) of the *BIA*.

2 The Secured Creditor served a notice questioning the constitutional operability of s.9 and s. 11 of the *SFSA* to the extent those provisions may be interpreted to require a person to obtain leave of the court prior to making an application for the appointment of a receiver pursuant to s. 243(1) of the *BIA*. The Secured Creditor argues that the doctrine of federal paramountcy renders s. 9 and s. 11 of the *SFSA* inoperable to the extent of the conflict between them. The Secured Creditor submits that this is a situation where the court may immediately appoint a receiver over the Debtor's assets and permit the receiver to sell the land and provide the purchaser with clear title by way of a vesting order. Both counsel for the Debtor and for the Attorney General for Saskatchewan submit that there is no operational conflict between the *SFSA* and the *BIA*.

The Factual Background

3 This is not the usual factual situation where a debtor defaults on payments to his financial institution, requiring the financial institution to invoke its remedies and realize on its security. Although both parties are corporations, the principals behind them are family members. The father, David Dutcyvich, established Lemare Lake Logging Ltd. in 1984. He brought his two sons, Eric and Chris, into this British Columbia business. David also established 3L Cattle Company Ltd., which is a ranching operation near Naicam, Saskatchewan. While the affidavit evidence is contradictory as to the underlying reasons, David and his two sons were unable to continue doing business together. By January, 2011, they had restructured their business affairs such that David now is the shareholder and director of the Debtor and Eric and Chris are the two trustees of the shareholder of the Secured Creditor, being the Dutcyvich Family Trust. Eric and Chris are the sole directors of the Secured Creditor.

4 There are two events that led the Secured Creditor to make this application. They stem from the restructuring of the business between the father and sons, wherein the Secured Creditor remains contingently liable for David's loan of $10 million with Concentra Financial Services Association ("Concentra") taken in 2003 to establish a Retirement Compensation Allowance Trust ("RCA Trust"). Concentra demanded repayment of that loan on January 29, 2013. Neither David nor the Debtor repaid the $10 million. Concentra now demands repayment from the Secured Creditor. In turn, the Secured Creditor proposes to realize on its security over the Debtor's assets taken to secure its contingent liability on the $10 million Concentra loan. That is, the Secured Creditor seeks its remedies under the $15 million mortgage registered against the lands of the Debtor granted January 21, 2011 and the security agreement of January 19, 2011 over goods and equipment.

5 The second event that has precipitated the Secured Creditor's application for the appointment of a receiver to realize on its security is the Secured Creditor's own financial problems. Beginning in February, 2009, the Secured Creditor found itself in an ongoing dispute with the Government of British Columbia (the "Crown") over unpaid stumpage fees in its timber business. The Crown issued a proposal to assess stumpage fees in the Secured Creditor's timber business under Part 11.1 of *The Forest Act*, R.S.B.C. 1996, c. 157, for an amount in excess of $9.6 million. This indebtedness, along with other financial difficulties, led the Secured Creditor to file for protection from its own creditors under the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c.C-36 ("*CCAA*"). It obtained its *CCAA* Initial Order from the Supreme Court of British Columbia on June 21, 2012. The stay of proceedings has been extended, with the next extension to expire August 31, 2013. At the date of the *CCAA* Initial Order, the Secured Creditor owed about $34.8 million to its creditors, of which $10 million was owed to Concentra for the RCA Trust Loan.

6 The Secured Creditor has successfully negotiated a settlement with the Crown. It has negotiated a plan of repayment with its other creditors. However, Concentra expects its $10 million from the Secured Creditor, and the Secured Creditor cannot exit *CCAA* protection until the Concentra loan is dealt with. That means incurring ongoing costs of the *CCAA* proceedings. There is no certainty that the Supreme Court of British Columbia will extend the stay of proceedings beyond August 31, 2013. To ensure its own survival as a business entity, and to not be placed in receivership itself, the Secured Creditor seeks a prompt resolution to the $10 million debt that the Debtor owes it. It proposes to do this by way of a court-appointed receivership under s. 243(1) of the *BIA*.

7 Concentra could retire half of the $10 million owed to it by way of collapsing David's life insurance policy and applying the proceeds of approximately $5.276 million to the loan. Concentra could access a refundable tax account held by Canada Revenue Agency ("CRA"). While it is valued at over $5.9 million, Concentra states that this recovery is an unclear and complex process as it is subject to review by CRA. Furthermore, CRA requires Concentra to take steps to collect on its loan prior to accessing the refundable tax account. Concentra is prevented from suing the Secured Creditor because it is in *CCAA* protection. Therefore, Concentra supports the Secured Creditor in its application for a court-appointed receiver.

The Constitutional Question

8 The preliminary issue is whether the provisions of Part II of the *SFSA* that require a court order before any action may be commenced with respect to a mortgage on farm land in Saskatchewan is in conflict with s. 243(1) of the *BIA* that provides for the court appointed receiver.

9 The relevant provisions of Part II of the *SFSA* are:

> 3 (a) "action" means an action in court with respect to farm land by a mortgagee for:
>
> (i) foreclosure of the equity of redemption;
>
> (ii) sale or possession of the mortgaged farm land;
>
> (iii) recovery of any money payable under a mortgage;
>
> (iv) specific performance or cancellation of an agreement forsale;
>
> (v) sale or possession of the farm land sold under the agreement for sale; or
>
> . . .
>
> **9**(1) Notwithstanding any other Act or law or any agreement entered into before, on or after the coming into force of this Act:
>
> . . .
>
> (d) subject to sections 11 to 21, no person shall commence an action with respect to farm land;
>
> **11**(1) Where a mortgagee makes an application with respect to a mortgage on farm land, the court may, on any terms and conditions that it considers just and equitable:
>
> (a) order that clause 9(1)(d) or section 10 does not apply; or
>
> (b) make an order for the purposes of clause 9(1)(f).
>
> (2) Where an order is made pursuant to subsection (1), the mortgagee may commence or continue an action with respect to that mortgage.
>
> (3) Any action that is commenced without an order pursuant to this section is a nullity, and any order made with respect to an action ora proposed action without an order pursuant to this section is void.
>
> **12**(1) Subject to subsection (14), a mortgagee may apply to the court for an order pursuant to section 11 but only after the expiry of 150 days from the date of service of a notice of intention on:
>
> (a) the board; and
>
> (b) the farmer.

10 As articulated by counsel for the Secured Creditor, the net effect of sections 9 and 11 of the *SFSA* is that no person shall commence an action with respect to mortgaged farm land without first obtaining leave of the court. Prior to making an application for such leave, a mortgagee must serve a statutory notice of intention and await the expiry of the 150 day notice period, during which notice period the parties must participate in a mandatory mediation process (section 12). To succeed on the application that the *SFSA* does not apply to the farm land in question, the mortgagee must overcome certain statutory presumptions (section 13) and must satisfy the statutory burdens of proof (sections 18 and 19).

11 The relevant provisions of Part XI -Secured Creditors and Receivers of the *BIA* are:

> **243.** (1) Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

(a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;

(b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or

(c) take any other action that the court considers advisable.

(1.1) In the case of an insolvent person in respect of whose property a notice is to be sent under subsection 244(1), the court may not appoint a receiver under subsection (1) before the expiry of 10 days after the day on which the secured creditor sends the notice unless

(a) the insolvent person consents to an earlier enforcement under subsection 244(2); or

(b) the court considers it appropriate to appoint a receiver before then.

. . .

244. (1) A secured creditor who intends to enforce a security on all or substantially all of

(a) the inventory,

(b) the accounts receivable, or

(c) the other property

of an insolvent person that was acquired for, or is used in relation to, a business carried on by the insolvent person shall send to that insolvent person, in the prescribed form and manner, a notice of that intention.

(2) Where a notice is required to be sent under subsection (1), the secured creditor shall not enforce the security in respect of which the notice is required until the expiry of ten days after sending that notice, unless the insolvent person consents to an earlier enforcement of the security.

12 The only time restriction on the appointment of the receiver under the *BIA* is the ten-day notice requirement. Counsel for the Secured Creditor submits that it is this conflict between the time restraints and statutory presumptions under the *SFSA* that create the conflict between the federal and provincial laws. To the extent that there is a conflict, counsel argues that the doctrine of federal paramountcy renders s. 9 and s. 11 of the *SFSA* inoperative.

13 The legal principles to be utilized in determining federal paramountcy of conflicting legislation are succinctly outlined in the recent decision of the Supreme Court of Canada, *Laferrière c. Québec (Juge de la Cour du Québec)*, 2010 SCC 39, [2010] 2 S.C.R. 536 (S.C.C.). McLachlin C.J.C. summarizes the legal principles at para. 62 - 64:

62 Unlike interjurisdictional immunity, which is concerned with the scope of the federal power, paramountcy deals with the way in which that power is exercised. Paramountcy is relevant where there is conflicting federal and provincial legislation. As Major J. explained in *Rothmans*, at para. 11, "[t]he doctrine of federal legislative paramountcy dictates that where there is an inconsistency between validly enacted but overlapping provincial and federal legislation, the provincial legislation is inoperative to the extent of the inconsistency."

63 The effect of the doctrine of interjurisdictional immunity is to negate the potential inconsistency between federal and provincial legislation by rendering the provincial legislation inapplicable to the extent it impairs the core of a federal power. Because I have concluded that interjurisdictional immunity resolves the dispute in this case, it is unnecessary to consider federal paramountcy. However, in light of the submissions of the parties, it may be useful to explore the applicability of this doctrine.

> 64 Claims in paramountcy may arise from two different forms of conflict. The first is operational conflict between federal and provincial laws, where one enactment says "yes" and the other says "no", such that "compliance with one is defiance of the other": *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191, per Dickson J. In *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121, at p. 155, La Forest J. identified a second branch of paramountcy, in which dual compliance is possible, but the provincial law is incompatible with the purpose of federal legislation: see also *Law Society of British Columbia v. Mangat*, 2001 SCC 67, [2001] 3 S.C.R. 113, at para. 72; *Lafarge Canada*, at para. 84. Federal paramountcy may thus arise from either the impossibility of dual compliance or the frustration of a federal purpose: *Rothmans*, at para. 14.

14 In this application, it is conceded that the *SFSA* is valid provincial legislation. The only issue is whether Part II of the *SFSA* conflicts with s. 243(1) of the *BIA* such that "compliance with one is defiance of the other", or whether the *SFSA* frustrates the purpose of s. 243(1) of the *BIA*.

15 Section 4 of the *SFSA* states:

> The purpose of this Part is to afford protection to farmers against loss of their farm land.

16 The provincial legislation is clear that unless a person obtains an order under s.11 of the *SFSA* that s. 9(1)(d) of the *SFSA* does not apply to the mortgage on farm land, the action by a mortgagee is a nullity. The Secured Creditor's application for the court appointment of a receiver pursuant to its mortgage registered on the Debtor's farm land is an "action" as defined by s. 3 of the *SFSA*. Thus, the Secured Creditor is required to comply with the statutory notice provisions and to obtain the court order under s. 11 of the *SFSA* prior to realizing on its security.

17 Counsel for the Secured Creditor submits that, on proving that the Debtor is insolvent (as defined in the *BIA*), it is entitled to apply for a national receiver of the Debtor's property. The Secured Creditor is only required to serve the ten-day notice pursuant to s. 244 of the *BIA* prior to applying for a receiver. It is this inconsistency that prevents the Secured Creditor from complying with both the *BIA* and *SFSA*. The Secured Creditor is "told to do inconsistent things".

18 I must conclude that the Secured Creditor is not in the position of having to comply with the *BIA* and having, at the same time, to defy the *SFSA*. In the first branch of the test articulated in *Québec (Juge de la Cour du Québec)*, *supra*, the Secured Creditor is not required to make an application under s. 243(1) of the *BIA*. The *BIA* is characterized as permissive legislation. However, if the Secured Creditor does so, the court may appoint a receiver. This discretionary remedy available to the Secured Creditor does not place it in a position of operational conflict. It is possible for the Secured Creditor to comply with the prohibitive legislation of the *SFSA*, and once it has obtained the requisite court order, to apply for the appointment of a receiver under s. 243(1) of the *BIA*. In other words, compliance with the *SFSA* is not in defiance of the *BIA*.

19 The second branch of the test for paramountcy must now be considered. Because dual compliance is possible, and there is no operational conflict between the *SFSA* and the *BIA*, the next question is whether Part II of the *SFSA* is incompatible with the purpose of s. 243(1) of the *BIA*. Counsel for the Secured Creditor submits that this case is analogous to issues before the Supreme Court of Canada in *Bank of Montreal v. Hall*, [1990] 1 S.C.R. 121 (S.C.C.). The Bank of Montreal held *Bank Act*, S.C. 1991, c-46 security on the implements of a Saskatchewan farmer. When Mr. Hall defaulted on his loans, the Bank seized the farmer's swather without first serving a Notice of Intention to seize as required by *The Limitation of Civil Rights Act*, R.S.S. 1978, c.L-16 ("*LCRA*"). The parties applied for a determination whether a chartered bank was required to comply with the *LCRA* in enforcing its s. 427 (formerly s. 178) security under the *Bank Act.*

20 The Supreme Court of Canada concluded in *Hall*, *supra*, that the notice requirement under the *LCRA* was not compatible with the federal legislative purpose of the scheme for realization of *Bank Act* security. At p. 152 - 155, Laforest J. defined the problem with *LCRA* in this way:

> The most salient feature of the procedure set out in ss. 21 to 35 of the Act, as I understand it, is that it is designed to ensure that a judge determine the terms and conditions under which a creditor may repossess and seize articles. Section

33 makes this clear. It is a judge who is to decide if, when, and under what circumstances the pledged article is to be returned to the secured party.

The contrast with the comprehensive regime provided for in ss. 178 and 179 of the Bank Act could not be more striking. The essence of that regime, it hardly needs repeating, is to assign to the bank, on the taking out of the security, right and title to the goods in question, and to confer, on default of the debtor, an immediate right to seize and sell those goods, subject only to the conditions and requirements set out in the Bank Act.

On a comparison of the two enactments, can it be said that there is an "actual conflict in operation" between them, giving that phrase the meaning above described? I am led inescapably to the conclusion that there is. The Bank Act provides that a lender may, on the default of his borrower, seize his security, whereas *The Limitation of Civil Rights Act* forbids a creditor from immediately repossessing the secured article on pain of determination of the security interest. There could be no clearer instance of a case where compliance with the federal statute necessarily entails defiance of its provincial counterpart.

. . .

I can only conclude that it was Parliament's manifest legislative purpose that the sole realization scheme applicable to the s. 178 security interest be that contained in the *Bank Act* itself. Again, as I pointed out earlier, I am firmly of the view that the security interest and realization procedure must, in essence, be viewed as a single whole in that both components of the legislation are fully integral to Parliament's legislative purpose in creating this form of financing. In other words, a s. 178 security interest would no longer be cognizable as such the moment provincial legislation might operate to superadd conditions governing realization over and above those found within the confines of the *Bank Act*. To allow this would be to set at naught the very purpose behind the creation of the s. 178 security interest.

Accordingly, the determination that there is no repugnancy cannot be made to rest on the sole consideration that, at the end of the day, the bank might very well be able to realize on its security if it defers to the provisions of the provincial legislation. A showing that conflict can be avoided if a provincial Act is followed to the exclusion of a federal Act can hardly be determinative of the question whether the provincial and federal acts are in conflict, and, hence, repugnant. That conclusion, in my view, would simply beg the question. The focus of the inquiry, rather, must be on the broader question whether operation of the provincial Act is compatible with the federal legislative purpose. Absent this compatibility, dual compliance is impossible. Such is the case here. The two statutes differ to such a degree in the approach taken to the problem of realization that the provincial cannot substitute for the federal.

I have dealt with this case on the basis of paramountcy to meet the arguments put forward by counsel. But the issue can, I think, be answered more directly. At the end of the day, I agree with counsel for the Attorney General of Canada that this is simply a case where Parliament, under its power to regulate banking, has enacted a complete code that at once defines and provides for the realization of a security interest. There is no room left for the operation of the provincial legislation and that legislation should, accordingly, be construed as inapplicable to the extent that it trenches on valid federal banking legislation.

[emphasis added]

21 Counsel for the Secured Creditor characterizes s. 243(1) of the *BIA* as providing an unqualified right to a secured creditor to apply to the court for the appointment of a receiver, just as the *Bank Act* provides a chartered bank the unqualified right to seize assets without being required to comply with the *LCRA* notice. Counsel argues that the *SFSA* must yield to the provisions of s. 243(1) of the *BIA* because it frustrates the purpose of s. 243(1) of the *BIA*.

22 McLachlin C.J.C. stated at para. 66 of *Québec (Juge de la Cour du Québec)*, *supra:*

...The party seeking to invoke the doctrine of federal paramountcy bears the burden of proof: Lafarge Canada, at para. 77. That party must prove that the impugned legislation frustrates the purpose of a federal enactment. To do so, it must

> first establish the purpose of the relevant federal statute, and then prove that the provincial legislation is incompatible with this purpose. The standard for invalidating provincial legislation on the basis of frustration of federal purpose is high; permissive federal legislation, without more, will not establish that a federal purpose is frustrated when provincial legislation restricts the scope of the federal permission: see *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40, [2001] 2 S.C.R. 241.

23 In the commentary to s. 243(1) of the *BIA* of *The 2012 -2013 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2012), the authors, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, explain that the effect of s. 243 of the *BIA* is to authorize the court to appoint a national receiver, if required. At p. 985, the authors comment as follows:

> Section 243 grants authority to the court, defined in s. 2 to include a judge exercising jurisdiction under the *BIA*, to appoint a receiver with the power to act nationally, thereby eliminating the need to apply to the courts in multiple jurisdictions for the appointment of a receiver (2007, c.36 in force September 18, 2009). The national receiver under the *BIA* is entitled to act across the country, increasing efficiency by removing the need to have a receiver appointed in each jurisdiction in which the debtor's assets are located. Creditors are still entitled to have a provincially appointed receiver act on their behalf under the *Act*. The subsection was further amended by providing specific powers that may be exercised by the court appointed receiver.

And see: *Railside Developments Ltd., Re*, 2010 NSSC 13, 286 N.S.R. (2d) 285 (N.S. S.C.) at para. 58 - 65.

24 If it is necessary for the secured creditor to realize on the insolvent debtor's assets that are in more than one jurisdiction, the purpose of s. 243 of the *BIA* is to permit a secured creditor to apply for a court appointed receiver that is recognized nationally. It allows the secured creditor to obtain its receivership order in one jurisdiction, with the comfort of knowing that other courts in other jurisdictions will recognize the authority of that receivership order. At the application for receiver stage, a secured creditor need only be subjected to the legislative scheme of the province in which it makes the application. That is clear from the wording of s. 243(5) of the *BIA*. The secured creditor must apply in the court having jurisdiction in the locality of the debtor. Once the secured creditor has complied with the legislative requirements of that province, and that court has exercised its discretion to appoint a receiver, the purpose of s. 243(1) of the *BIA* has been met. That receiver may now act nationally. That is not to say that the receiver would also be subjected to the laws of another provincial jurisdiction in which the receivership order may need to be recognized. But, the purpose of s. 243 of the *BIA* is not restricted, that being, the appointment of a national receiver.

25 There is no analogy between this case and the legislation sought to be impugned in *Hall*, *supra*. *Hall* dealt with the paramountcy of the realization provisions of the s.427 of the *Bank Act* security which the Supreme Court of Canada described as a "complete code that at once defines and provides for the realization of a security interest." Oppositely, the appointment of a receiver is a discretionary remedy available to the court to assist creditors in the realization of their security if it is just or convenient to do so. The appointment of a receiver pursuant to s. 243 of the *BIA* is simply a mechanism to have that receiver appointed so that it may be recognized nationally. It does not create a "complete code" for the realization of security as set out in the *Bank Act.*

26 In short, counsel for the Secured Creditor has failed to prove that the purpose of s. 243(1) of the *BIA* has been frustrated by the Secured Creditor's compliance with Part II of the *SFSA*. The application seeking a declaration that Part II of the *SFSA* is constitutionally inoperative under the doctrine of paramountcy is dismissed. The Secured Creditor must comply with the provisions of Part II of the *SFSA* prior to making an application pursuant to s. 243(1) of the *BIA*.

The Merits of the Application

27 Had I concluded that the Secured Creditor need not comply with the provisions of Part II of the *SFSA* prior to the application pursuant to s. 243 of the *BIA*, the Secured Creditor's application for a court appointed receiver must be dismissed at any rate. The Secured Creditor has failed to prove the Debtor is insolvent. Furthermore, the mortgage only permits a receiver to be appointed over the rents and profits. Even if a receiver could be appointed to sell the farm land, the court would not grant a vesting order in these circumstances. I elaborate.

28 The Secured Creditor alleges that the Debtor is insolvent as defined by s. 2 of *BIA* which states:

> *"insolvent person"* means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due;

29 Counsel for the Secured Creditor refers to the Debtor's financial statements for the last three years. They show steady and increasing losses. In summary, as shown in the financial statements, the Debtor has $14 million in assets and $17 million in liabilities.

30 Counsel for the Debtor submits the test for insolvency under s. 2 of the *BIA* does not include a test of profitability. I must agree. The court must determine if the Debtor meets any of the definitions of insolvency in the three following tests, considering the facts before it:

> 1. The Debtor is unable to meet its obligation as they generally become due:
>
> The evidence is that the Debtor has defaulted on the $10 million loan to Concentra and $1.69 million owed to the Secured Creditor. However, the Debtor is meeting its other obligations as they generally become due. The $1.69 million owed to the Secured Creditor is part of the restructuring between the corporations for the father and sons. The Secured Creditor was to pay the Debtor for certain obligations by way of set-off, but those payments have ceased to be made since March, 2013. The $1.6 million obligation cannot be considered an example of the Debtor not meeting its obligations.
>
> 2. The Debtor has ceased paying its current obligations in the ordinary course of business as they generally become due:
>
> The debts to the Secured Creditor and to Concentra are not obligations in the Debtor's ordinary course of business. Oppositely, the obligation to Farm Credit Canada is current. No other creditors have alleged that the Debtor has ceased paying its current obligations.
>
> 3. The Debtor's property is not sufficient to pay all its obligations:
>
> The Debtor states the farm land is worth about $30 million, and the equipment is worth about $2 million. Farm Credit Canada is the first mortgagee and it is owed about $7 million. The Secured Creditor is owed $10 million. The Secured Creditor has provided no evidence of the value of the farm land. There is no evidence that the Debtor does not have sufficient assets to meet other obligations, such as inventory financing.

31 In conclusion, the Secured Creditor has failed to prove that the Debtor's property is not sufficient to pay all its obligations. The test of insolvency has not been met. The Secured Creditor has not satisfied the pre-condition required to apply for an order appointing a receiver under s. 243(1) of the *BIA*.

32 If the test for insolvency had been met, it is neither just nor convenient to appoint a receiver. The Secured Creditor applies for the receivership order under s. 243(1) of the *BIA* on the basis of its security interest derived from both a mortgage dated January 21, 2011, on the Debtor's 120 parcels of farm land and a security agreement dated January 19, 2011, on the Debtor's goods and equipment. The terms of the mortgage include the Secured Creditor's right to appoint a receiver-manger of the lands upon default and to apply to the court for the appointment of a receiver. Clause 13 of the mortgage states in part:

> 13. APPOINTMENT OF RECEIVER OR RECEIVER-MANAGER

> (a) At any time when there is default under paragraph 9 of this mortgage the Mortgagee may, with or without entering into possession of the Lands, appoint in writing a receiver or receiver-manger (the **"Receiver")** of the Lands and of the rents and revenues therefrom with or without security. The Mortgagee may from time to time by similar writing remove any Receiver and appoint another in its place. In making any such appointment or removal the Mortgagee will be deemed to be acting as agent or attorney for the Mortgagor. The statutory declaration of an officer of the Mortgagee as to the existence of such default will be conclusive evidence of such default. Every Receiver will be the irrevocable assignee or attorney of the Mortgagor for the collection of all rents falling due in respect of the Lands...
>
> (b) Notwithstanding the provisions of subparagraph 13(a) above and in addition to the right of private appointment contained therein, the Mortgagee will have the right to apply to a court of competent jurisdiction for the appointment of a receiver or a receiver-manager, whether such application is made prior to or after the appointment of a Receiver pursuant to subparagraph 13(a). The right to apply to a court for the appointment of a receiver or receiver-manager may be exercised at any time by the Mortgagee in its sole discretion.

33 Certainly, this mortgage allows for the Secured Creditor to apply to the courts for the appointment of a receiver or a receiver-manager. However, the power that the court may confer upon the receiver pertains to obtaining rents and revenues and managing the Debtor's business. As stated by Frank Bennett, *Bennett on Receiverships* (2nd ed.), (Toronto: Carswell, 1999) at p. 648:

> A court-appointed receiver is neither the agent of the mortgagee who initiated the appointment nor the agent of the mortgagor. The receiver is an officer of the court who only takes directions from the court and cannot be interfered with by any creditor without leave of the court. This would include even a prior mortgagee or debenture holder who was not made party to the proceedings. The receiver derives its powers and duties from the court and any statutory provision such as the duty to report under Part XI of the *Bankruptcy and Insolvency Act*, if it is applicable. Therefore, the order appointing the receiver should specify the powers that are needed in the particular case. In a mortgage receivership, the receiver requires powers to take possession of the property, to collect the rent, to enter into leases and to cause tenants to attorn to the receiver and generally to manage the business. If the debtor held guarantees to secure payment of rent in the event of default, then the receiver can only sue a defaulting tenant where the mortgagee holds an assignment of the guarantee.
>
> [emphasis added]

34 On the facts before the court in this application, there is no evidence that a receiver is required to collect the Debtor's rents. There is no basis for the court to exercise its discretion, either under s. 243(1) of the *BIA*, or under s. 65 of *The Queen's Bench Act, 1998*, S.S. 1998, c.Q-1.01.

35 Finally, the Secured Creditor applies under s. 243(1) of the *BIA* for a court-appointed receiver so that the receiver would be permitted to sell the Debtor's farmland and vest the title in the purchaser. In the circumstances of this case, the court would not find the requisite pre-conditions to grant a vesting order. Certainly, s. 12 of *The Queen's Bench Act, 1998* confers authority on the court to vest real or personal property in any person. Section 109(3) of *The Land Titles Act, 2000*, S.S. 2000, c.L-5.1 (the "*LTA*") confers authority on the court to vest title to the land in any person if the court considers it appropriate.

36 Case authority establishes that the court will only grant a vesting order in exceptional circumstances. This was outlined in *Clarkson Co. v. Credit foncier franco canadien* (1984), 37 Sask. R. 295, 55 C.B.R. (N.S.) 206 (Sask. Q.B.) and upheld at (1985), 44 Sask. R. 151, 57 C.B.R. (N.S.) 283 (Sask. C.A.) Matheson J. considered the provisions of s. 87 of *The Land Titles Act*, R.S.S. 1978, c.L-5, which are the same as the provisions of s. 109(3) of the *LTA*. Although the court was dealing with an application by the secured creditor as a debenture holder, the principles articulated are equally applicable to a mortgagee. After summarizing appellate authority, Matheson J. stated at para. 15:

> No real issue can be taken with the foregoing remarks of Tallis J.A. and Hall J.A. When a creditor has commenced an action to realize upon its security, and in that action a receiver-manager has been appointed and granted authority to realize upon

> the security, it would not be reasonably convenient to insist that formal foreclosure proceedings be commenced merely to complete a sale, arranged by the receiver-manager to which the debtors do not object.

37 Matheson J. also articulated the reasons that the court requires a mortgagee to proceed by way of foreclosure, unless exceptional circumstances exist. At para. 21 -22 the court stated:

> 21 One of the purposes of the foreclosure procedure prescribed by the Queen's Bench Rules is to permit a defaulting mortgagor to redeem the real property. A real property mortgage apparently cannot be irredeemable: *Falconbridge on Mortgages*, 4th ed. (1977), pp. 43-49. Although a body corporate may very well waive a right of redemption, as suggested in *Roynat Ltd. v. Denis* and *Roynat Ltd. v. Canawa*, which may permit the granting of a vesting order if there are no other interested parties who also have a right to redeem, neither Properties nor Pharmacy is before this court.
>
> 22 No serious argument was advanced that exceptional circumstances existed which would cause an injustice if the bank had complied with the regular and recognized procedure to enforce its security, whether that procedure be the prescribed foreclosure procedure or the procedure which was utilized in *Roynat Ltd. v. Canada*. Consequently, all three applications must be dismissed.

38 Certainly, this court has granted a receiver an order vesting title in a purchaser, even where the title pertains to farm land. However, that has only been granted in exceptional circumstances. By way of example, a receiver was granted authorization to sell the home quarter of farmers with the resulting vesting order being made in my unreported decision in *Royal Bank of Canada v. Klassen Park Farms Inc., Ronald Klassen and Darlene Klassen* (December 21, 2012), Doc. 1304/2012 (Sask. Q.B.) (unreported). The reasons stated in the fiat are as follows:

> The Receiver applies for an order authorizing him to sell the home quarter of Ronald and Darlene Klassen. This application was served on the debtors personally and upon their counsel of record. The RBC has served all preliminary notices under the FDRA and SFSA prior to applying for the Receivership Order. The Receivership Order was granted Sept. 10/12 with the consent of the debtors. The order allowed for the Receiver to sell the property, including the home quarter.
>
> The RBC has a Home Quarter Exclusion Order regarding the property, so the Receiver does not have to deal with a right of 1 st refusal issue.
>
> I find that the debtors have voluntarily surrendered the home quarter to the Receiver, and they do not claim the protection of the SFSA or FDRA. This is analogous to the situation in *Gardiner v. Chrysler Credit Canada Ltd.* (1989) 77 Sask.R. 182 (Q.B.).
>
> Therefore, the order will issue in the draft filed, authorizing the Receiver to list the home quarter for sale.

39 None of the exceptional circumstances are present in this application to grant a vesting order to a receiver. The foreclosure procedure is the appropriate legal remedy available to the Secured Creditor. That way, the Debtor is able to redeem the mortgage, and the lands may be sold by judicial sale under supervision of the court. It is neither just nor convenient to appoint a receiver, and I decline to do so.

Conclusion

40 This is a sad story about one family's financial and personal difficulties for a father and his two sons. However, none of that affects the court's analysis of the relevant legal principles.

41 The Secured Creditor's application to find Part II of the *SFSA* inoperative under the doctrine of paramountcy is dismissed. This is not an application where the court would find it just or convenient to appoint a receiver under s. 243(1) of the *BIA*, at any rate. The application for a court appointed receiver is dismissed in its entirety.

Order accordingly.

End of Document

TAB B

Most Negative Treatment: Distinguished
Most Recent Distinguished: Keith G. Collins Ltd. v. Bhullar | 2011 MBQB 143, 2011 CarswellMan 328, 266 Man. R. (2d) 105, 80 C.B.R. (5th) 145, [2011] W.D.F.L. 4601, [2011] W.D.F.L. 4603, 204 A.C.W.S. (3d) 469 | (Man. Q.B., Jun 20, 2011)

2011 MBCA 41
Manitoba Court of Appeal

Keith G. Collins Ltd. v. Canadian Imperial Bank of Commerce

2011 CarswellMan 196, 2011 MBCA 41, [2011] 7 W.W.R. 458, 203 A.C.W.S. (3d) 695, 268 Man. R. (2d) 30, 268 Man. R. (2d) 44, 333 D.L.R. (4th) 740, 520 W.A.C. 30, 77 C.B.R. (5th) 180

Keith G. Collins Ltd. (Applicant / Appellant) and Canadian Imperial Bank of Commerce (Respondent / Respondent)

Barbara M. Hamilton, Martin H. Freedman, Holly C. Beard JJ.A.

Heard: November 2, 2010
Judgment: May 9, 2011
Docket: AI 10-30-07303

Proceedings: reversing *Keith G. Collins Ltd. v. Canadian Imperial Bank of Commerce* (2010), 63 C.B.R. (5th) 32, [2010] 5 W.W.R. 56, 2010 MBQB 2, 2010 CarswellMan 15, *(*sub nom. *Forbes (Bankrupt), Re)* 248 Man. R. (2d) 206 (Man. Q.B.)

Counsel: R.W. Schwartz for Appellant
I.D. Perlov for Respondent

Subject: Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.c Insolvency of debtor at time of transaction
Bankruptcy and insolvency
XI Avoidance of transactions prior to bankruptcy
XI.2 Fraudulent preferences
XI.2.e View to prefer
XI.2.e.iii Intention other than to prefer
XI.2.e.iii.E Miscellaneous
Headnote
Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — Insolvency of debtor at time of transaction
On September 29, bankrupt settled his credit card account with respondent bank out of proceeds of new mortgage on his house — On October 27, bankrupt made assignment in bankruptcy citing indebtedness on three other credit cards (other cards) — Trustee in bankruptcy demanded repayment from bank — Bank refused to repay amount it received from bankrupt — Trustee brought unsuccessful application to have payment received by bank declared invalid as fraudulent preference under s. 95 of Bankruptcy and Insolvency Act — Application judge concluded there was insufficient evidence to prove bankrupt was insolvent at time of payment to bank or that bankrupt's intention was to prefer bank over other creditors — Trustee appealed — Appeal allowed — Payment to bank was void as fraudulent preference — Application judge erred when he failed to consider evidence of indebtedness and concluded evidence was insufficient to establish bankrupt was insolvent on date of payment to bank —

This was palpable and overriding error — Review of evidence properly included bankrupt's declarations as to his assets and liabilities — Facts spoke to bankrupt's inability to pay his credit card indebtedness as it became due — Evidence established, at least on prima facie basis, that other three credit card debts existed on September 29 — None of bank's evidence rebutted this prima facie evidence — Only reasonable inference to be drawn from all evidence, when considered in totality, was that bankrupt's accounts for other credit cards existed on September 29 and were unpaid — Given that bankrupt lacked sufficient assets to pay those debts on September 29, trustee did establish on balance of probabilities that on that date, bankrupt was unable to meet his obligations as they became due.

Bankruptcy and insolvency --- Avoidance of transactions prior to bankruptcy — Fraudulent preferences — View to prefer — Intention other than to prefer — Miscellaneous

On September 29, bankrupt settled his credit card account with respondent bank out of proceeds of new mortgage on his house — On October 27, bankrupt made assignment in bankruptcy citing indebtedness on three other credit cards (other cards) — Trustee in bankruptcy demanded repayment from bank — Bank refused to repay amount it received from bankrupt — Trustee brought unsuccessful application to have payment received by bank declared invalid as fraudulent preference under s. 95 of Bankruptcy and Insolvency Act — Application judge concluded there was insufficient evidence to prove bankrupt was insolvent at time of payment to bank or that bankrupt's intention was to prefer bank over other creditors — Trustee appealed — Appeal allowed — Payment to bank was void as fraudulent preference — Application judge erred in concluding that evidence did not establish bankrupt had intention to prefer bank to other creditors — Judge made palpable and overriding errors — Judge wrongly focussed on absence of evidence — Judge placed too much emphasis on bankrupt's subjective intention — Payment to bank had effect of preferring bank over other three creditors — There was preference in fact — In such circumstances, s. 95(2) of Act comes into play — Presumed intent to prefer arising from preference in fact in favour of bank was not rebutted — Plan by insolvent person to reorganize his or her financial affairs must be objectively reasonable to rebut presumption — Bankrupt's conduct, viewed objectively, was that he preferred bank to other three creditors that existed on September 29 — Bankrupt's plan was not objectively reasonable.

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Cases considered by *Barbara M. Hamilton J.A.*:

Black & White Hat Shop Ltd., Re (1925), [1925] 1 W.W.R. 1121, 35 Man. R. 9, [1925] 3 D.L.R. 670, 5 C.B.R. 690, 1925 CarswellMan 1 (Man. C.A.) — referred to

Canada (Director of Investigation & Research) v. Southam Inc. (1997), 50 Admin. L.R. (2d) 199, 144 D.L.R. (4th) 1, 71 C.P.R. (3d) 417, [1997] 1 S.C.R. 748, 209 N.R. 20, 1997 CarswellNat 368, 1997 CarswellNat 369 (S.C.C.) — referred to

Coast Wire Rope & Supply Ltd. (Trustee of) v. Trans Pacific Hardware Inc. (1999), 1999 CarswellBC 638, (sub nom. *Coast Wire Rope & Supply Ltd. (Bankrupt) v. Trans Pacific Hardware Inc.)* 122 B.C.A.C. 257, (sub nom. *Coast Wire Rope & Supply Ltd. (Bankrupt) v. Trans Pacific Hardware Inc.)* 200 W.A.C. 257, 1999 BCCA 217, 9 C.B.R. (4th) 255 (B.C. C.A.) — considered

Dubois-Vandale (Trustee of) v. MBNA Canada Bank (2006), (sub nom. *Dubois-Vandale (Bankrupt) v. MBNA Canada Bank)* 209 Man. R. (2d) 268, 26 C.B.R. (5th) 261, 2006 CarswellMan 377, 2006 MBQB 258 (Man. Q.B.) — considered

Holt Motors Ltd., Re (1966), 56 W.W.R. 182, 57 D.L.R. (2d) 180, 1966 CarswellMan 3, 9 C.B.R. (N.S.) 92 (Man. Q.B.) — considered

Housen v. Nikolaisen (2002), 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, 286 N.R. 1, [2002] 7 W.W.R. 1, 2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 30 M.P.L.R. (3d) 1, 219 Sask. R. 1, 272 W.A.C. 1, [2002] 2 S.C.R. 235 (S.C.C.) — referred to

Knock v. Dumontier (2006), 2006 MBCA 99, 2006 CarswellMan 311, 208 Man. R. (2d) 121, 383 W.A.C. 121, 56 C.L.R. (3d) 1, [2006] 11 W.W.R. 148 (Man. C.A.) — referred to

Krawchenko (Trustee of) v. Minister of National Revenue (2005), (sub nom. *Krawchenko (Bankrupt), Re)* 198 Man. R. (2d) 120, 2005 CarswellMan 172, 2005 MBQB 97, 11 C.B.R. (5th) 238, [2006] 6 W.W.R. 575 (Man. Q.B.) — referred to

L. (H.) v. Canada (Attorney General) (2005), 2005 SCC 25, 2005 CarswellSask 268, 2005 CarswellSask 273, 333 N.R. 1, 8 C.P.C. (6th) 199, 24 Admin. L.R. (4th) 1, 262 Sask. R. 1, 347 W.A.C. 1, [2005] 8 W.W.R. 1, 29 C.C.L.T. (3d) 1, 251 D.L.R. (4th) 604, [2005] 1 S.C.R. 401 (S.C.C.) — referred to

Lotito Estate v. Scantlebury-MacDougall (1996), (sub nom. *Lotito v. Scantlebury)* 146 Nfld. & P.E.I.R. 337, 456 A.P.R. 337, 1996 CarswellPEI 107, 43 C.B.R. (3d) 23 (P.E.I. C.A.) — considered

19 Section 95 applies to a payment that was made by a bankrupt (described as "the debtor" in the rest of this section on "The Law") prior to bankruptcy, provided that: 1) it was made within the prescribed period of time prior to the date of bankruptcy; 2) the debtor was insolvent on the date of the impugned payment; and 3) the debtor had the intention to prefer one creditor over another. On this appeal, there is no issue that the bankrupt's payment to CIBC fell within the applicable three-month period prescribed by s. 95.

20 The trustee has the initial burden to prove the debtor was insolvent by establishing that at least one of the three tests set out in the definition of insolvent person existed on the date of the impugned payment. The court is not to presume insolvency. See *Black & White Hat Shop Ltd., Re* (1925), 35 Man. R. 9 (Man. C.A.), and *Van der Liek, Re* (1970), 14 C.B.R. (N.S.) 229 (Ont. S.C.). Some cases describe the need for the evidence of insolvency to be "clear and convincing." For example, see *Krawchenko (Trustee of) v. Minister of National Revenue*, 2005 MBQB 97 (Man. Q.B.) at para. 11, (2005), 198 Man. R. (2d) 120 (Man. Q.B.).

21 While I have no quarrel with that description, it must be understood in its proper context of a shifting evidentiary onus. Once the trustee establishes a *prima facie* case of insolvency, the onus shifts to the defendant creditor to adduce evidence to rebut that *prima facie* case. See *Robinson v. Countrywide Factors Ltd.* (1977), [1978] 1 S.C.R. 753 (S.C.C.). McQuaid J.A. explained the onus in *Lotito Estate v. Scantlebury-MacDougall* (1996), 43 C.B.R. (3d) 23 (P.E.I. C.A.)) (at para. 14):

> .... The appellant had the burden of establishing a *prima facie* case that one of these three alternative situations [under s. 95] existed. If, on a balance of probabilities, the appellant established such a *prima facie* case, the evidentiary onus shifted to [the creditor] to rebut the *prima facie* evidence. See: *Robinson v. Countrywide Factors Ltd*. (1977), 23 C.B.R. (N.S.) 97 (S.C.C.) at pp. 135-136 ....

22 Once the trustee has established that the debtor was insolvent on the date of the impugned payment, the next question is whether the debtor had the intention to prefer one creditor over another by that payment.

23 It is not enough that a payment creates a preference in fact. The trustee must establish that the debtor had the intent to prefer one creditor over another. The cases refer to this intent as "the dominant intent." The intent of the creditor who received the payment is irrelevant. As stated by Belzil J.A. in *Norris, Re* (1996), 44 C.B.R. (3d) 218 (Alta. C.A.) (at para. 16):

> .... The state of mind of the debtor at the time of making the payment is ultimately the paramount consideration to be addressed by the court. The intent or state of mind of the preferred creditor is irrelevant, *Hudson v. Benallack* (1975), 21 C.B.R. (N.S.) 111 (S.C.C.).

24 The dominant intent is based on an objective assessment of the circumstances. In other words, the intention will be what the debtor's conduct objectively demonstrates when reasonably construed and not what the debtor (or others) may claim was his or her intention long after the payment was made. The point is made in the oft-cited decision in *Holt Motors Ltd., Re* (1966), 9 C.B.R. (N.S.) 92 (Man. Q.B.) (at p. 95):

> .... The test which I consider should be applied is an objective and not a subjective one; that is to say, the intention which should be attributed to the parties will always be that which their conduct bears when reasonably construed and not that which, long after the event, they claim they believe was present in their minds.

25 In *Coast Wire Rope & Supply Ltd. (Trustee of) v. Trans Pacific Hardware Inc.*, 1999 BCCA 217, 9 C.B.R. (4th) 255 (B.C. C.A.), Finch J.A. also emphasized the objective nature of the test (at para. 8):

> .... [T]his Court has held in *Ferrostaal Metals Canada Ltd. v. Olympic Steel Ltd. (Trustee of)*, [[1985] B.C.J. No. 2276 (QL)], at p. 6, that the intention of the debtor is to be determined objectively and not subjectively. Mr. Justice Carrothers for the Court said at para. 17:
>
> > The relevant intention governing determination of whether the prima facie presumption of a preference has been rebutted is that intention which the conduct of the parties bears when reasonably construed. It is an objective rather than a subjective test.

