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When Should Banks Opt for Bank Act Security?

by Simina Ionescu-Mocanu

Introduction

In the past year, we have been receiving more questions from lenders seeking to improve their priority position in respect of borrowers' assets. Many of these questions deal with the choice of a federal *Bank Act*¹ security interest versus a provincial security interest granted under the Alberta *Personal Property Security Act*² (the "PPSA"). Lenders want to know whether the Bank Act regime can provide enhanced priority and, if so, to what extent.

While the *Bank Act* gives lenders' a wider security reach than the *PPSA* in certain limited circumstances, the federal regime does not provide any more significant security than its provincial counterpart. However, lenders that wish to maximize their realization potential may choose in certain circumstances to effect their security interests under *both* regimes, depending on the debtor's business, the nature of the assets in question and the degree of administrative complexity created by doing so.

Bank Act History

The federal *Bank Act* security regime was originally enacted because banks at that time were prohibited from taking security interests in personal property to secure their loans. To promote and facilitate lending to certain vital sectors of the economy (i.e. farming, fishing and forestry) a special form of security—the *Bank Act* security was crafted³. The prohibition was removed in 1967 and, subsequently, modern provincial secured transactions legislation was enacted provincially across Canada. Nevertheless, *Bank Act* security remained popular with banks and continued to be used extensively.

Although it is clear that there are certain advantages available to banks through the *Bank Act*, there are also certain reasons why obtaining this type of security may actually be less beneficial than security under the *PPSA*.

Lenders' Rights Under the Bank Act

The *Bank Act* security registration regime applies exclusively to banks. Only certain categories of borrowers are eligible to grant the security and only in respect of certain categories of assets. To be valid, banks must comply with the following two registration requirements: (a) the debtor must deliver a security agreement to the bank; and (b) the bank must properly register its security in the Bank of Canada registry.

By registering a valid security interest under the *Bank Act*, the bank obtains priority over all rights subsequently acquired in the same assets, including the rights of an unpaid vendor. Cases have interpreted the legislation to mean that title to the subject property vests in the bank, subject to the borrower's right of redemption. However, the bank's rights are subject to any other pre-existing interest that a third party holds in the property.

Benefits of Bank Act Security

(a) A "proprietary" right

As noted above, the *de facto* vesting of title to the secured assets allows the bank to defeat certain claims that would otherwise have priority under the provincial legislation (e.g. a landlord's claim for unpaid rent or a right of distress, an unpaid vendor's lien if the bank acquired its interest without knowledge of the lien, or other liens which arise from legislation).⁴

Under the *PPSA*, secured creditors have a lesser right. Such creditors simply obtain an interest that secures payment or performance of an obligation. The *PPSA* also explicitly gives priority to lien holders who furnish materials or services in the ordinary course of business with respect to goods that are subject to a security interest (unless the lien is created by legislation which provides otherwise), thus further diminishing the position of *PPSA* secured lenders.⁵

(b) Bank Act interests vs. PMSIs

Bank Act security also allows a lender to maintain priority over a competing lender's purchase-money security interest (a "PMSI"). In this case, priority is typically determined according to the common law rules, which provide that as long as the security in question is valid, the party whose security interest arose "first in time" wins⁶. Thus, a properly registered *Bank Act* security interest will prevail over a lender's PMSI.

Unfortunately, the same analysis does not apply if the holder of the PMSI (or any other *PPSA* security interest) is a seller or a lessor under a conditional sales contract. In these cases, the seller maintains title to the collateral by virtue of the contract. Since the bank takes its rights *subject* to the seller's title, the bank is unable to claim a better title to the same property. The bank is therefore defeated.⁷

(c) Interests in farm property

Bank Act security also maintains priority over interests given in respect of certain specific types of collateral. Under the *PPSA*, a lender who provides financing for the purpose of helping the debtor produce or harvest crops has priority over prior secured creditors who have interests in the same collateral (lenders have similar rights to creditors holding animals as collateral, where such creditor enables a debtor to acquire food, drugs or hormones for the animals).

The situation is different if the prior secured party is a *Bank Act* security holder. In this case, the bank obtains priority over subsequent creditors in respect of all of the debtor's growing crops and agricultural products. Since the "first in time" rule governs priority, the bank receives a first and preferential lien on the crops and the proceeds or receivables from the sale of the crops.⁸

(d) Section 426 security

Unlike other provinces in Canada, the Alberta *PPSA* provides a priority ranking system in respect of floating charges. Section 426 of the *Bank Act* provides a regime under which banks may take security over hydrocarbons or minerals in, under or on the ground, in place or in storage. Banks may also take security over any person's right or licence in respect of such hydrocarbons or minerals and in respect of the equipment and casing used in their extraction.

In instances where the validity, perfection and enforcement of security is governed by a Canadian jurisdiction other than Alberta, obtaining security under this section of the *Bank Act* will be particularly advantageous⁹.

(e) Enforcement

Last, banks realizing under the *Bank Act* need not comply with the provincial civil enforcement restrictions in the *Alberta Civil Enforcement Act*. For instance, on default, banks can simply take possession of the secured collateral without judicial process.¹⁰

Bank Act Security Drawbacks

Although it is clear that there are certain advantages available to banks through the *Bank Act*, there are also certain reasons why obtaining this type of security may actually be less beneficial than security under the *PPSA*.

First, unlike the *PPSA*, the *Bank Act* security interest does not explicitly extend to proceeds that the debtor obtains if he or she sells the collateral. In fact, there is great uncertainty in the law concerning the bank's rights to proceeds.¹¹

Another stark difference between the two statutes is that the *Bank Act* does not solve priority disputes based on the date of the security's registration. Under the federal statute, a bank does not have a valid security interest unless and until the debtor delivers the security agreement to the bank. Thus, a bank which registered a valid security notice may not have priority over subsequent valid interests if it did not take a security agreement from the debtor until after the subsequent parties registered their interests.

The *PPSA* determines priority between perfected (i.e. registered) security interests based on the order of registration. A registered security interest has priority over subsequent registered security interests regardless of the order of attachment (i.e. a party may have priority even if its security interest did not come into existence (i.e. "attach") until after the subsequent registrations took place).

Third, banks acquire only title to collateral that the debtor actually owns at the relevant time. As mentioned above, this means that a pre-existing *PPSA* security interest may be superior to a subsequent *Bank Act* interest even if the pre-existing *PPSA* security interest was not properly perfected at the Personal Property Registry ("PPR") until after the bank obtained its interest.¹²

Last, although *Bank Act* security is not subordinated in favour of most non-consensual liens, there are some obscure provisions in the *Bank Act* that explicitly subordinate the bank to certain specific types of unsecured creditors (e.g. unpaid wage claimants, certain growers or producers of agricultural products).¹³

Relative Priorities Between Bank Act Security and Other Interests

Neither the *Bank Act* nor the *PPSA* provides a system to determine priority between the two types of security. The relative priority provisions outlined in the *PPSA* have no application to *Bank Act* security interests. In fact, section 4 of the *PPSA* clearly ousts the application of the *PPSA* to *Bank Act* security. Similarly, nothing in the *Bank Act* subordinates a prior *PPSA* security interest for lack of perfection.¹⁴

As such, priority between competing interests is established by the “first in time” common law rule. This means that a *Bank Act* security interest may be subordinated to a prior *PPSA* security interest and vice versa. More importantly, as the *PPSA* priority rules have no application in this context, a *PPSA* security interest created first in time can have priority over its *Bank Act* counterpart even if the prior *PPSA* security interest was not perfected when the bank took its interest.

With respect to security granted over after-acquired property—where attachment of both interests occurs simultaneously—the first secured party to have an enforceable security agreement prevails.¹⁵ This is determined by the date when the respective parties executed the security agreements.

Finally, both regimes preserve the bank’s superior position in priority competitions with most unsecured creditors, the debtor’s trustee in bankruptcy, and subsequent purchasers for value without knowledge of the bank’s security interest.

Double Dipping: Taking Security Under the Bank Act and Security Under the PPSA

Although a bank cannot rely on the provisions of the *PPSA* to govern its *Bank Act* security, nothing prevents the bank from taking security interests under both regimes. In fact, some banks choose to take security under both the *PPSA* and the *Bank Act* depending on the circumstances at hand.¹⁶

To date, courts in Alberta have failed to address the anomaly of having two systems of law apply to the same transaction. Although some courts have held that there is no conflict between the two registration systems and that banks can rely on either to assert priority¹⁷, when it comes to enforcing security, it is clear that a bank must decide whether to realize under the *PPSA* or the *Bank Act*. Presumably, once the bank sends out enforcement notices under the *PPSA*, the bank is deemed to elect to be bound by the enforcement scheme in the *PPSA*.¹⁸

Some writers have suggested that banks may draft the *PPSA* and *Bank Act* security agreements in such a way so as to expressly avoid covering the same collateral. However, this strategy may not have much use in practice, where it may be difficult for lenders to predict the nature and type of their borrower’s future collateral.

Conclusion

As a result of the advent of personal property and security legislation across Canada, it appears that the *Bank Act* security is not necessarily a more effective way of securing loans than security under the provincial *PPSA*. Where possible, lenders may wish to register security interests under both regimes to maximize their realization potential.

Regardless of which security is chosen, lenders should evaluate their security position and ensure that the advantages and disadvantages of each regime have been considered before proceeding with realization.

Footnotes

¹ S.C. 1991 c. 46 (the “*Bank Act*”).

² R.S.A. 2000, c. P-7 TA \ “Personal Property Security Act, R.S.A. 2000, c. P-7” \s “Personal Property Security Act, R.S.A. 2000, c. P-7” \c 2 (the “*PPSA*”).

³ Uniform Law Conference of Canada, “Background Paper 1, Harmonization of The Federal Bank Act Security and The Provincial Secured Transactions Regimes”, online: *Papers on PPSA Harmonization Presented by The Commercial Law Strategy Uniform Law Conference of Canada/Law Commission of Canada Joint Committee on Harmonization of The Federal Bank Act Security and The Provincial Secured Transactions Regimes* <http://www.ulcc.ca/en/cls/ppsa-bp1.html> [Last Accessed: March 19, 2010].

⁴ See, for instance *Re: Newmarket Lumber Co.*, [1951] O.R. 462 (H.C.). Section 428(2) specifically subordinates the interest of an unpaid vendor lien holder unless the same was acquired without the bank’s knowledge.

⁵ *PPSA*, s. 32; note that this section does not apply to operator’s and gas processor’s liens. Such liens arise by virtue of contract and must be perfected through registration in order to enter the priority competition.

⁶ See *Royal Bank of Canada v. Moosomin Credit Union*, [2004] 5 W.W.R. 494 (Sask. C.A.).

⁷ See *Bank Act*, s. 428(2); See also Cumming and Wood, p.91).

⁸ *Royal Bank v. United Grain Growers Ltd.* (2000), 21 C.B.R. (4th) 123, 198 Sask. R. 24 (Q.B.), aff’d at (2001), 24 C.B.R. (4th) 125, 203 Sask. R. 302 (C.A.). The *Bank Act* also fails to place a time restriction on when the crops must be grown. The *PPSA*, on the other hand, does not allow parties to take a security interest in crops to be grown more than one year after the parties have entered into the security agreement.

⁹ Unfortunately, unlike section 427 security, *Bank Act* security obtained under section 426 does not appear to be assignable. Section 428(14) outlines the specific types of security that are assignable under the statute.

¹⁰ This advantage is derived from the doctrine of paramouncy, which renders the provincial statute inoperative. Note that this right is subject to contractual provisions stipulating the contrary.

¹¹ Cumming, Walsh and Wood, *Essentials of Canadian Personal Property Security Law* (Toronto: Irwin Law Inc., 2005) (“Cumming, Walsh and Wood”), at p. 595-596. These writers explain that the right to proceeds depends on the source of the bank’s right. For instance, if the right is founded on an agreement (e.g. a clause requiring the borrower to hold the proceeds in trust for the bank), the right is probably caught by the *PPSA* and must be registered under the statute to be valid. At the same time, if the right arises by operation of law, the *PPSA* likely does not govern the bank’s interest in the proceeds.

¹² *Innovation Credit Union v. Bank of Montreal* (2009), 2009 CarswellSask 156, 51 C.B.R. (5th) 163 (Sask. C.A.). Registration under the *PPSA* establishes priorities for the purposes of the *PPSA* only. Bank Act security holders cannot gain access to the *PPSA* security regime. Under the provisions of the *Bank Act* the bank acquires only the right and title of the person from whom the interest is taken, and if the person does not have an interest in the property at the time the bank acquired its interest, the bank cannot acquire the property. A party’s failure to register under the *PPSA* therefore does not affect the validity or enforceability of its interest in relation to the *Bank Act* security.

¹³ *Bank Act*, s. 427(7)-(8).

¹⁴ Cumming, Walsh and Wood, at p. 590.

¹⁵ This rule is an extension of the *qui prior est tempore potior est jure* – whomever is first in time is first in right. See *Bank of Montreal v. Pulsar Ventures Inc.*, [1988] 1 W.W.R. 250 (Sask. C.A.); see also *Radius Credit Union Ltd. v. Royal Bank* (2009), 51 C.B.R. (5th) 197 (Sask. C.A.).

¹⁶ Cumming, Walsh and Wood, at p. 594-595.

¹⁷ *Birch Hills Credit Union v. Canadian Imperial Bank of Commerce* (1988), 52 D.L.R. (4th) 113 (Sask. C.A.).

¹⁸ See, for instance, *Kassian v. National Bank of Canada* (1998), 225 A.R. 46 (Alta. Q.B.) aff’d at (1999), 237 A.R. 127 (C.A.).

The Supreme Court Answers: A Decision on the Status of Crown Claims to GST upon a Bankruptcy

by Elizabeth Toews, Student-at-law



Introduction

On October 30, 2009 the Supreme Court of Canada rendered judgment in the matter of *Quebec (Revenue) v. Caisse Populaire Desjardins de Montmagny*¹ (“Caisse Populaire”).

These were joint reasons stemming from three separate appeals from the Quebec Court of Appeal, all of which shared the same basic facts: a business went bankrupt and, at the time of bankruptcy, had either collected Quebec Sales Tax (“GST/QST”) on its sales or GST/QST receivables which had not been remitted to the tax authorities.

The Supreme Court of Canada confirmed the judgments rendered at the Quebec Court of Appeal level, holding that the GST/QST collected by a supplier forms a part of the estate of the bankrupt on bankruptcy and is subject to the distribution scheme provided in the *Bankruptcy and Insolvency Act*² (the “BIA”).

Argument of Tax Authorities

The tax authorities argued that the bankrupt supplier merely acts as a collection agent for the tax authorities, and that the tax authorities should therefore not be treated as creditors—they are the rightful owners of the GST/QST and these amounts should not be included in the bankrupt’s patrimony.

Reasons for Judgement

The Supreme Court of Canada (“the Court”) based its decision on three main contentions. First, the Court reminded the parties that the 1992 amendments to section 67 of the *BIA* explicitly stated that government’s deemed trust ceased to exist upon bankruptcy. The Court found that this amendment demonstrated the clear intent of the legislature to make the Crown an ordinary creditor in bankruptcy. Moreover, the Court also noted the consistency between section 67 of the *BIA* and section 222(1.1) of the *Excise Tax Act*³, which also provides that a deemed trust in favour of tax authorities becomes ineffective upon a bankruptcy.

To further determine the intent of the legislation, the Court then looked at the policy reasons behind the 1992 amendments to the *BIA*, and reviewed the House of Commons debates and the minutes of the Committee on Consumer and Corporate Affairs from that time period. The Court found that prior to the 1992 amendments to the *BIA*, deemed trusts in favour of the Crown during a bankruptcy were seen as unfair and unjust; such trusts were not seen as striking a proper balance between different creditors.³ The following is an excerpt from the minutes of the Committee on Consumer and Corporate Affairs:

With the Crown priority, creditors are less likely to participate in an insolvency, in a bankruptcy, and today rarely come out to meetings of creditors because there are no assets. The assets are fully secured to the secured creditors, the banks and major lenders as well as to Crowns. As a result there is virtually nothing left for the unsecureds. We recommend that the Crown priority be abolished and that if the Crown wants to contract directly with the debtor, it be entitled to a contractual priority but not a Crown priority.⁴

Last, the Court found that the collection process was not as simple as the tax authorities argued. The supplier or the trustee in bankruptcy do not merely collect GST as a “property” or “thing” belonging to the Crown; the tax collected is not necessarily the amount remitted, as the suppliers remit only the net tax amounts based on the difference between the taxes they have collected and the taxes they themselves have paid. Additionally, there is nothing in the legislation requiring that the GST and QST be kept separate.

Conclusion

The Court’s decision in *Caisse Populaire* will be of great interest to bankruptcy trustees and secured lenders as it finally clarifies the effect of a bankruptcy on collectible or collected GST/QST. With the eradication of the statutory deemed trust, such amounts are now considered to form a part of the estate of the bankrupt person and are available for distribution to creditors according to the scheme set out in the *BIA*.

Still pending before the Court is the case of *Ted Leroy Trucking Ltd., Re (Century Services Inc. v. Attorney General of Canada)*⁵, which deals with deemed trusts for tax collected by insolvent companies who have commenced restructuring proceedings under the *Companies’ Creditors Arrangement Act*⁶. Although the Court granted leave to appeal on November 5, 2009⁷, the matter has not yet been heard.

The Court’s decision in *Caisse Populaire* will be of great interest to bankruptcy trustees and secured lenders as it finally clarifies the effect of a bankruptcy on collectible or collected GST/QST.

Footnotes

¹ [2009] S.C.J. No. 49

² R.S.C. 1985, c.B-3

³ R.S.C. 1985, c.E-15

⁴ *Supra*, Note 1, para 12 and 13

⁵ Minutes of Proceedings and Evidence of the Standing Committee on Consumer and Corporate Affairs

⁶ [2009] B.C.J. No. 918

⁷ R.S.C. 1985, c. C-36

⁸ [2009] S.C.C.A. 280

Seizure and Aviation Law: Clarifying Airport Authorities’ Detention Remedy

by Simina Ionescu-Mocanu

Introduction

Air carriers’ payment obligations should not be taken lightly. Airlines who fail to pay landing fees, general terminal fees or other charges related to the use of an airport, may be subject to stringent consequences under the *Federal Airport Transfer (Miscellaneous Matters) Act*¹ (the “*Airport Transfer Act*”). One such remedy is the “detention remedy”—an airport authority’s court-ordered right to seize and detain (though not sell or dispose of) an aircraft “owned or operated” by the airline liable for the fees.

Recent case law, however, has shown that airport authorities’ remedies are not without boundaries, particularly when the ownership and control of the subject aircraft is in dispute.

The Detention Remedy – Generally Defined

As mentioned above, the detention remedy is available to any airport authority that can prove to a court that airport fees remain outstanding and that the entity liable to pay owns or operates the aircraft in question. Detention is available without a court judgment and may be obtained *ex parte* (without notice) to the operating airline.

Because the remedy essentially attaches the airport debt to the *aircraft* and its parts, the designated authority may use the remedy irrespective of who is the aircraft’s ultimate titleholder and in spite of any security interests in the aircraft or insolvency proceedings commenced by its owner.² This is the case so long as the aircraft is *owned or operated by the non-payor*. Nevertheless, this broad power is not without limitations—especially when third parties take realization steps before the airport authority has a chance to exercise detention.

Applying the Detention Remedy After Repossession by a Lessor: Calgary Airport Authority v. Zoom Airlines Inc.

Prior to *Calgary Airport Authority v. Zoom Airlines Inc.*³ (“*Zoom Airlines*”), courts had not specifically addressed whether airport authorities could exercise the detention remedy if an unpaid lessor of the aircraft (who was also owed money by the debtor airline) repossessed the aircraft before the authority had a chance to obtain the court order authorizing detention.

In *Zoom Airlines*, Zoom Airlines Inc. (“*Zoom*”) leased a Boeing 767 aircraft from AerCap Group Services Inc. (“*AerCap*”). By August 2008, Zoom was in default of its lease payments to AerCap by US \$832,073.63. It also owed Calgary Airport Authority (the “*Authority*”) \$347,982.95 in airport fees. Under the terms of its lease, AerCap was entitled to take possession of the aircraft once the lease terminated. After faxing notices of default and providing written notice to Zoom that its lease was terminated, AerCap availed itself of its termination rights and retained an agent to repossess the aircraft.

The agent subsequently seized the aircraft on August 27, 2008 at approximately 2:30 p.m. In doing so, the agent collected the aircraft’s certificate of airworthiness, its certificate of registration, and its logbooks. That same day, at about 4:00 p.m., the Authority, unaware of the agent’s actions, obtained an *ex parte* (without notice) order seizing and detaining the aircraft pursuant the *Airport Transfer Act*.

AerCap, represented by BD&P, sought to set aside the order, arguing that the Authority could not exercise its detention right after AerCap’s repossession. The Court of Queen’s Bench of Alberta agreed with AerCap and set aside the order authorizing the Authority’s seizure and detention. The Authority appealed.

At the appeal level, the Court of Appeal affirmed that the crux of the case was whether Zoom “owned or operated” the aircraft in question when the Authority exercised its detention rights. AerCap held legal title to the aircraft as its lessor. However, the Authority argued that Zoom was the “owner” or “operator” of the aircraft for the purposes of the *Aeronautics Act* because it was listed as its registered owner with Transport Canada, in compliance with the statute and the *Canadian Aviation Regulations* (the “*CAR*”).⁴

Applying the lower court’s analysis, the Court of Appeal examined the definition of “owner” and “operator” under the *CAR*, which focused not on registration but on principles of legal custody and control.⁵ Relying on the *CAR* and on recent judicial interpretation of its provisions⁶, the Court of Appeal concluded that the detention remedy could be defeated by a loss of legal ownership and operatorship (i.e. a transfer or a loss of legal custody and control through the repossession by a titleholder prior to the detention).



To determine whether Zoom has lost custody and control of the aircraft, the Court of Appeal examined the repossession steps that AerCap's agent had taken. It found that when the agent entered the aircraft and seized the certificate of airworthiness, the certificate of registration, and the logbooks, Zoom transferred legal custody and control to AerCap. By the time the Authority obtained its detention order, Zoom no longer "owned and operated" the aircraft.

As such, the Court of Appeal dismissed the Authority's appeal. On March 18, 2010, the Supreme Court of Canada also denied the Authority leave to appeal, thus affirming the analysis at the provincial level.

Conclusion

Although aircraft detention continues to be a valuable collection remedy available to airport authorities, with the release of *Zoom Airlines*, the ambit of the remedy has received some needed clarity.

Aircraft lessors now know that they can avoid detention if they regain ownership and operatorship of the aircraft for the purposes of the *Aeronautics Act*. To obtain effective repossession, lessors should follow

the court-approved procedure noted above (i.e. lessors should enter an aircraft and seize its certificate of airworthiness, its certificate of registration, and its logbooks).

Unfortunately, the Court of Appeal did not state whether a transfer of legal custody and control could occur for the purposes of the *Aeronautics Act* if other third parties (such as secured creditors) take possession of an aircraft through contractual or statutory seizure. This issue may require additional judicial consideration in the future.

Footnotes

¹ S.C. 1992, c. 5.

² *NAV Canada c. Wilmington Trust Co.* (sub nom. *Canada 3000 Inc.*, (Bankrupt), Re), [2006] 1 S.C.R. 865.

³ (2009), 460 A.R. 341 (C.A.), leave to appeal refused at 2010 CarswellAlta 483 (S.C.C. Mar 18, 2010).

⁴ SOR 96-433.

⁵ SOR, ss. 101.01, 202.35.

⁶ *Re Canada 3000 Inc.*, (2004), 69 O.R. (3d) 1 (C.A.) (Binnie J.).



Insolvency Issues:

Introduction

Debtor companies often enter into insolvency and restructuring proceedings because they hope to free themselves of all of their present and future obligations. However, the recent case of *677960 Alberta Ltd. v. Petrokazakhstan Inc.*¹ (“*Petrokazakhstan*”) illustrates that some claims survive restructuring proceedings even after the plan of arrangement or proposal receives all of the creditors’ approval and the blessing of the Court.

What happened in *677960 Alberta Ltd. v. Petrokazakhstan Inc.*?

a. The Facts

As the case name suggests, *Petrokazakhstan* arose out of a joint venture for the exploration and development of four oil fields in Kazakhstan. *677960 Alberta Ltd.* (“*677*”) held rights pursuant

to a guarantee granted by Petrokazakhstan Inc. (“*PKI*”). This guarantee secured the obligations of a working interest owner to *677* in the joint venture under two agreements—a Net Profits Interest Agreement and a Success Fee Agreement.

The two agreements required the working interest owner to pay a percentage of its profits and a fee to *677* based on the amount of oil production from the joint venture. In early 1999, *PKI* sought protection from its creditors and initiated proceedings under the *Companies Creditors Arrangement Act*² (the “*CCAA*”).

On May 14, 1999, the Court stayed all proceedings against *PKI*. At the time, there had not been sufficient production of oil or gas at sufficiently high prices from the four fields to require the working interest owner or *PKI* to make any payments to *677*. *677* therefore did

not receive notice of the *CCAA* proceedings, was not listed as a creditor of *PKI*, and did not file a proof of claim or otherwise participate in the *CCAA* proceedings.

The Court and all of the creditors involved in the proceedings approved *PKI*’s plan of arrangement (the “*Plan*”) in February 28, 2000. As of March 31, 2000, the *Plan* became “effective” and extinguished the claims of all of the creditors who were contemplated in the *Plan*.

In the present action, *677* asserted a claim against *PKI* under its guarantee. In turn, *PKI* applied for summary judgment (a pre-trial application where the defendant argues that there are no material issues to be tried and therefore there is no need of a trial), arguing that the *Plan* extinguished *677*’s claim.

Does My Claim Survive the Plan?

by Simina Ionescu-Mocanu

b. Was 677 a “Creditor” With a “Claim” under the Plan?

Hoping to reject 677’s claim, PKI argued that the claim was barred pursuant to the Plan. The Plan effectively extinguished the claims of “all creditors” in existence on the Plan’s effective date. To be caught by this section, 677 therefore had to be a “creditor” in the CCAA proceedings. The Plan defined the term “creditor” as any “person having a claim”.

In turn, a “claim” was very broadly defined to include any person’s right against PKI, whether “direct, indirect, reduced to judgment (or not), liquidated, unliquidated, fixed, contingent, ... legal, equitable, secured, unsecured, present, future, known, unknown, by guarantee, by surety or otherwise ...”³.

677 argued that it was not a “creditor” with a “claim” because, *at the time of the Plan*, it did not believe that it had any legal basis upon which it could assert a claim against PKI. 677 took the position that the working interest owner did not owe 677 any payments pursuant to the agreements when the Court approved the Plan. 677 therefore had no reason to believe that PKI breached the agreements in question. 677 claimed that it did not know that it had a potential claim until after PKI emerged from the proceedings.

The Court recognized that the definitions of “claim” under the CCAA and under the Court-approved Plan were extremely broad. Even though the Court admitted that the CCAA is remedial legislation, which should be liberally construed, it also noted that the term “claim”

ought not include “speculative claims” or claims that are “too remote”. The term should be only as inclusive as reasonably practical.

Although contingent unliquidated liabilities may be the subject matter of a claim under the CCAA, the Court agreed with 677. In the Court’s view, it was possible that 677 “reasonably believed” that it was not in a position to participate as a claimant under the Plan because it did not “reasonably believe” that it had a claim under the agreements at the time of the CCAA proceedings. The Court also focused on the fact that 677 did not receive notice of the proceedings.

c. The Court’s View

Mr. Justice Macleod of the Alberta Court of Queen’s Bench concluded that it was at least possible that 677 was not a “creditor” holding a “claim” in the CCAA proceedings when the Plan received the Court’s sanction. PKI’s application for summary judgment was therefore dismissed.

Food for Thought & Practice Points

Although this decision was rendered in the context of a summary judgment application, which means that the Court did not definitively answer whether the Plan extinguished 677’s claim, it is possible that the principles outlined in *Petrokazakhstan* are binding on Alberta courts.

Debtor companies wishing to restructure under the CCAA or its *Bankruptcy and Insolvency Act* counterpart should not be quick to assume that the plan or proposal will extinguish all potential, unliquidated or contingent claims, even when such plan or proposal has been approved by all of the participating creditors and received the Court’s sanction.

Further, given the decision in *Petrokazakhstan*, creditors who fail to submit proofs of claim during a restructuring may be presented with a second chance at recovery. In any event, to avoid the risk of having one’s claim extinguished or barred by the claims bar process, creditors ought to closely monitor their debtors. This is especially so if the debtors are likely to initiate restructuring proceedings under the *BIA* or the *CCAA*.

Footnotes

¹ (2009), 4 Alta. L.R. (5th) 253

² R.S.C. 1985, c. C-36

³ *Supra*, Note 1 at para. 14



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