

Hot Topics

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Hot Topics – What's Hot

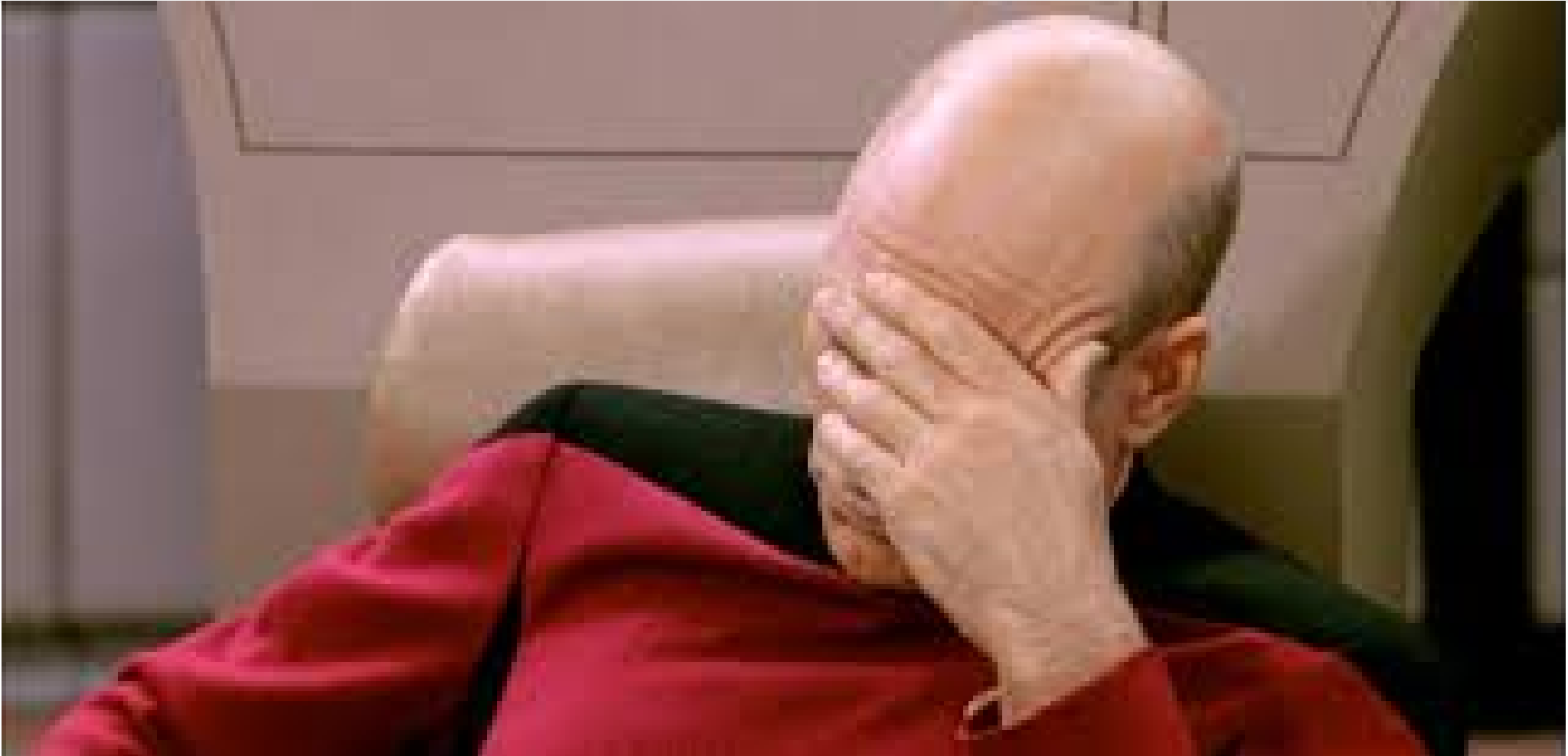
- An obscure case from some small province?



Secondary purposes of the BIA

1. Equitable distribution of debtor's assets amongst creditors
2. Investigation of the affairs of the bankrupt
3. Setting aside of preferences and other fraudulent transactions
4. Creditors can pursue claims through collective action

The Prime Directive



The Fundamental Purpose of the BIA

The rehabilitation of the honest but unfortunate debtor



Innovation, Science and
Economic Development Canada

Office of the Superintendent
of Bankruptcy Canada

Innovation, Sciences et
Développement économique Canada

Bureau du surintendant
des faillites Canada

BANKRUPTCY AND INSOLVENCY
at a glance

The Options

Bankruptcy
Bankruptcy is a legal process designed to relieve honest but unfortunate debtors of their debts.
At the end of the process, the bankrupt is released from the obligation to repay the debts they had when the bankruptcy was filed (with some exceptions).

Proposal
A proposal is an offer to creditors to pay a percentage of what is owed over a specific period of time, or to extend the amount of time to pay off the debt, or a combination of both. Creditors vote to accept or reject the proposal.
There are two types of proposals:

CCAA Proceeding
The Companies' Creditors Arrangement Act (CCAA) is a federal law that applies to companies with more than \$5 million in debt.
Under the CCAA, a company can obtain protection while it develops a plan to pay its creditors over time for some form of payment.

Rehabilitation of the Honest but Unfortunate Debtor



What Percentage of your Clients are Honest but Unfortunate Debtors?

- Over 95%
- 80% - 95%
- 50% - 79%
- Less than 50%

Why do we care?

Only LITs have the responsibility to assist with the rehabilitation of the honest but unfortunate debtor

- Creditors?
- OSB?
- Other stakeholders?

Supreme Court

- [*Poonian v. British Columbia \(Securities Commission\)*, 2024 SCC 28](#) (*Poonian*),

Poonian

- Bankruptcy discharge does **not** release compensation or disgorgement orders because of fraud
- But
- Administrative monetary fines and penalties **are** dischargeable

Fresh Start Principle

- “Fresh Start” principle trumps “deterrence”

Securities Regulators Disagree, but

- Parliament makes the laws, and Parliament has decided that, unlike compensation orders where the money goes to the victims, administrative penalties go to the regulators or the government

Securities Regulators Disagree, but

- Parliament has decided that most bankrupts are entitled to a “fresh start” after a discharge, regardless of any morally blameworthy conduct that led them into bankruptcy
- (If the Regulator doesn’t like it, they can ask a judge to impose a fine, and that will likely survive bankruptcy)

The Point: Rehabilitation

- Even when the bankrupt has committed fraud, a fresh start (rehabilitation) is the desired outcome

Topic #2 – What is a debt?

Claims Provable

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

So, according to the *Act*

- A debt is a debt

Form 31

4. That, to the best of my knowledge, **this debt has never been** (or this debt has been or part of this debt has been) **statute-barred** as determined under the relevant legislation.
5. That payment for this debt by the debtor to the creditor has been due (or **has been in default**) since the ___ day of ___ month ___ year, and that the **last payment**, if any, on this debt by the debtor to the creditor was made on the ___ day of ___ month ___ year, and/or that the **last acknowledgement**, if any, of liability for this debt by the debtor to the creditor was made on the ___ day of ___ month ___ year, as follows:

(Give full particulars of the claim, including its history, any acknowledgement or legal action)

Why does Form 31 contravene the Act?

- *Eyton*

Eyton

*121 (1) All debts and liabilities, present or future, to which the bankrupt is **subject***

- The bankrupt cannot be “subject” to a claim that cannot be enforced.
- Therefore, a statute-barred claim is not a provable claim.

So whose opinion do we follow?

- The *Act*: a debt is a debt
- *Eyton* (Ontario case) a statute barred debt is not a debt
- Other authorities?

This is not simply a theoretical question

- Our primary job as an LIT is to bring about the **rehabilitation** of the **honest** but **unfortunate** debtor
- If we disallow a claim, we do not bring about the **rehabilitation** of the **honest** but **unfortunate** debtor

Mary, single mother

- Hairdresser; business closed during lockdowns
- Used her Capital One credit card in 2020
 - Maxed out by 2021
 - Final payment made August 1, 2021
- February 1, 2022 account forwarded to collection agency

Do we file a CP or PB for Mary?

So, what is an LIT to do?

Tell Mary “sorry, the laws are designed to protect the big lenders, not single mothers, sorry.”



What does Mary do?

- She opinion shops
- She finds a debt consultant to advise her



Debt Consultant's Approach

- No problem
- Take a cash advance from your Visa card to make a \$100 payment to Capital One
- When the trustee asks “when did you last pay Capital One” you say “yesterday”
- Also, take a cash advance of \$3,000 from your Visa card to pay me

What is the law?

Supreme Court of Canada in *Schreyer v. Schreyer*, 2011 SCC 35 (CanLII), [2011] 2 SCR 605 interpreted s. 121(1) in the following way (at para. 26):

“[i]f the debt exists and can be liquidated, if the underlying obligation exists as of the date of bankruptcy and if no exemption applies, the claim will be deemed to be provable”

Eyton

121 (1) *All debts and liabilities, present or future, to which the bankrupt is **subject***

- The bankrupt cannot be “subject” to a claim that cannot be enforced.
- Therefore, a statute-barred claim is not a provable claim.

Supreme Court vs. Ontario

Is the emphasis from s. 121 on

- **All debts**

Or

- **Subject?**

Ontario Limitations Act

Basic limitation period

4 Unless this Act provides otherwise, a proceeding shall not be commenced in respect of a claim after the **second anniversary** of the day on which the claim was **discovered**.

Discovery

5 (1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, **loss** or damage **had occurred**,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, **a proceeding would be an appropriate means to seek to remedy it**; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first **ought to have known** of the matters referred to in clause (a).

So when was the claim **DISCOVERED**?

- Is it the “last payment date”?
- No
- All four subsections of 5(1)(a) are required, including (iv), where the creditor determines that “a proceeding would be an appropriate means to seek to remedy” the default.

Discovery

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(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, **a proceeding would be an appropriate means to seek to remedy it**; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first **ought to have known** of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

When is a proceeding the appropriate remedy?

- The day the debtor misses a payment?
 - Two days later?
 - A week?
 - A month?
-
- What is industry practice?

Capital One Bank (Canada Branch) v. Macmillan

hoyes.com/CAIRP

- it was held that it is industry practice to not “charge off” the account until the borrower reaches **180 days of delinquency**, giving the lender and borrower time to work together to bring the account into good standing.
- It would, therefore, appear that the limitation period is extended by an extra six months after default.
- **The limitation period for credit card debt in Ontario is 2 years and six months.**

But what if the debtor acknowledges the claim before the expiration of the limitation period?

13 (1) **If a person acknowledges liability** in respect of a claim for payment of a liquidated sum, the recovery of personal property, the enforcement of a charge on personal property or relief from enforcement of a charge on personal property, **the act or omission on which the claim is based shall be deemed to have taken place on the day on which the acknowledgment was made.**

Acknowledgment

If the debtor acknowledges the debt and asks for time to work out payment arrangements and the creditor agrees to postpone any legal action while they negotiate, does that extend the limitation period?

General Limitation Period

- Ontario – 2 years
- Quebec – 3 years?

- Is it incumbent on the trustee to ascertain if the debtor was a resident of Quebec during the limitation period?

- Residence of debtor or creditor?

Mary, single mother

- Hairdresser; business closed during lockdowns
- Used her Capital One credit card in 2020
 - Maxed out by 2021
 - Final payment made August 1, 2021
- February 1, 2022 account forwarded to collection agency
- August 1, 2024 Mary filed a consumer proposal
- Capital One files POC stating debt not statute barred
- Does trustee accept the claim?

Capital One Proof of Claim

4. That, to the best of my knowledge, this debt has never been (or this debt has been or part of this debt has been) statute-barred as determined under the relevant legislation.
5. That payment for this debt by the debtor to the creditor has been due (or has been in default) since the 1st day of February, 2022, and that the last payment, if any, on this debt by the debtor to the creditor was made on the 1st day of August, 2021, and/or that the last acknowledgement, if any, of liability for this debt by the debtor to the creditor was made on the 1st day of August, 2021, as follows:

(Give full particulars of the claim, including its history, any acknowledgement or legal action)

- Pursuant to industry norms, the claim is not statute-barred.

Trustee's Options: Disallow

- Last payment more than 2 years, therefore statute barred
- Capital One objects to the disallowance
- Long and expensive court process (*Magical Credit*)
- Capital One can't sue her, but they **continue to report on her credit report**
- Honest but unfortunate debtor does not get relief

Trustee's Options: Allow the claim

- Mary gets relief
- Capital One gets money

BUT

- Could other creditors say they were prejudiced?
- Could OSB object?
- >>>>> Trustee at risk?

What should the LIT do?

- What is the Prime Directive?
- Rehabilitation of the honest but unfortunate debtor

When was the default?

- Less than 2.5 years (Capital One case)
 - No problem
- Did debtor acknowledge the debt prior to the limitation period?
 - No problem

Document Your Decision

- If you decide to accept the claim, document your decision

The Point

- Our primary goal is to assist with the rehabilitation of the honest but unfortunate debtor



The Honest but Unfortunate Debtor?

