The Legal Eye: Technical Update

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Regional Practice Leader
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SASKIN, RE, 2024 ONSC 3488

WHEN IS A BANKRUPT RESPONSIBLE FOR ASSETS BEING WORTH LESS THAN 50% OF LIABILITIES?

FARBER
Licensed Insolvency Trustee

RE SASKIN, 2024 ONSC 3501

- Bankrupt files a holding proposal in 2016 – no proposal is ever filed
- Bankrupt files for bankruptcy in 2019 and applied for discharge in 2024.
- Bankrupt was a developer associated with multiple real estate ventures that failed amidst complex financial and corporate structures, and lawsuits. Various entitles filed under the CCAA or had became subject to receivership.
- Realizable assets of bankrupt: $0
- Claims in estate: $15,107,097 unsecured, an additional $116 million in unproven contingent claims
- The debtor applied for his discharge six years after filing, while creditors opposed his discharge, alleging misconduct, inadequate disclosure, and asset shielding.

IN THE MATTER OF THE BANKRUPTCY OF
ALAN SASKIN
OF THE CITY OF TORONTO,
IN THE PROVINCE OF ONTARIO

BEFORE: Associate Justice Ilchenko, Registrar in Bankruptcy

COUNSEL appearing at the Discharge Hearing and at Case Conferences preparatory to Discharge Hearing:

Fred Tayar ("**Tayar**"), Colby Linthwaite ("**Linthwaite**") and Joshua Tayar ("**Joshua**") for Bankrupt Alan Saskin (the "**Bankrupt**")

Robert Drake ("**Drake**"), Mario Forte ("**Forte**"), Gary Abrahamson LIT ("**Abrahamson**"), David Filice, LIT ("**Filice**"), Adam Erlich LIT ("**Erlich**") and Joshua Sampson LIT ("**Sampson**") for Trustee in Bankruptcy of the Bankrupt, Fuller Landau Group Inc. (the "**Trustee**"), opposing discharge

Emilio Bisceglia ("**Bisceglia**") and R. Battista Frino ("**Frino**") for Alpa Stairs and Railing Inc. ("**Alpa**") Opposing Creditor

Kevin Sherkin ("**Sherkin**"), Bobby Sachdeva ("**Sachdeva**") and Matthew Walwyn ("**Walwyn**") for Speedy Electrical Contractors Ltd.("**Speedy**"), Dolvin Mechanical Contractors Ltd.("**Dolvin**"), Franline Investments Limited ("**Franline**"), and Downing Street Financial Inc. ("**Downing Street**") (collectively the "**MT Creditors**"), Opposing Creditors

Neil Rabinovitch ("**Rabinovitch**") and Kenneth Kraft ("**Kraft**") for Adv. Guy Gissin, ("**Gissin**") in His Capacity as the Israeli Functionary (the "**Israeli Representative**") of Urbancorp Inc. ("**UCI**") in certain Proceedings in the Courts Israel (the "**Israeli Proceedings**") as well as Hylton Levy LIT ("**Levy**") financial advisor to Israeli Representative, Opposing Creditors

Edward Park ("**Park**"), Kelly Smith-Wayland and Kevin Dias for Department of Justice ("**DOJ**"), Counsel for Canada Revenue Agency ("**CRA**"), Opposing Creditor

Matthew Gottlieb ("**Gottlieb**"), Andrew Winton ("**Winton**") and Joseph Stonehouse ("**Stonehouse**") Counsel for Doreen Saskin

Adam M. Slavens ("**Slavens**"), for Tarion Warranty Corporation, as well as in his own capacity as a possible witness requested to be subpoenaed at the Discharge Hearing

Harvey Chaiton, ("**Chaiton**") Counsel for Jeremy Cole and MNP LLP, accountants for the Bankrupt, and for certain relevant Urbancorp Group companies

Superintendent of Bankruptcy not appearing

HEARD: Trial of Bankrupt's Discharge heard on:

January 17, 18, and 19, 2023 in person,
July 18, 19, and 20, 2023 in person,
July 27 and 29, 2023 by Zoom,
August 11, 2023 by Zoom,
September 27 and 29 , 2023 by Zoom,
October 26 and 27, 2023 by Zoom and
November 16, 2023 by Zoom

RE SASKIN, 2024 ONSC 3501

173 (1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

Position of the bankrupt:

His financial problems were the result of business failure and not personal misconduct. The bankrupt emphasized that cooperated with the trustee and requested an absolute discharge.

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RE SASKIN, 2024 ONSC 3501

Issues before the court:

- Did the bankrupt's lack of assets arise from circumstances beyond his control?
- Did the bankrupt comply with his duties under the BIA?
- What impact will this have on his application for discharge?

RE SASKIN, 2024 ONSC 3501

173(1)(a) - Could not pay guarantee cases:

[369] In each case in the "gave guarantee" cases the "moral blameworthiness" of the Bankrupt was found as result of the Bankrupt:

- "…sign[ing] a guarantee knowing there are no assets with which to honour it." (*Dziedziuch*);
- "…did not have sufficient assets of his own to give the guarantee and ultimately, to implement it, if called upon to do so." ("*Forsberg*"):
- "…to have available sufficient assets of his own to be able honestly to give the guarantee and ultimately to implement it" (*Buceta*):
- "…when he gave his personal guarantee to the bank for credit, he had no assets to stand behind it."(*Kirk*)
- "There is no evidence that when he personally guaranteed the debts of the company he was in any position to implement such a guarantee should he be required to do so" (*Gafni*)

[380] From all of the "could not pay guarantee" cases cited, there does not otherwise appear to be a requirement that there be proof under s.173(1)(a) that the creditors were in some way mislead about the Bankrupts ability to pay, but rather the Bankrupt's knowledge of the sufficiency of his personal assets to grant the guarantee is the issue.

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RE SASKIN, 2024 ONSC 3501

- [372] In the Trustee's view the key issue was that in this case merely employing an "asset protection strategy" from the beginning of the business, as the Bankrupt testified in cross-examination (January 19, p.92, from 1- for example) but that after doing so, the Bankrupt deliberately and personally assumed the liabilities under the Dolvin Promissory Notes, the Franline Promissory Notes and the obligations that form the Terra Firma Claim, being, per the analysis in Martino "…that they knew full well in undertaking those guarantees that they would never be able to meet them" if the only source of repayment of these personal obligations was the "equity in real estate development partnerships".

- Therefore – bankrupt is morally blameworthy under 173(1)(a).

s. 172(2), BIA: if a s. 173 fact is proven, court can only refuse, suspend or grant conditional discharge.

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RE SASKIN, 2024 ONSC 3501

- Failure also failed to disclose income
  - Evidence that bankrupt was living a lavish lifestyle that doesn't reflect his income disclosed
  - Bankrupt reported income to LIT at $0 for all years of bankruptcy, advised living expenses paid by spouse
  - Bankrupt failed to disclose/account for living expenses charged to an undisclosed corporate credit card

<u>Outcome:</u>

[625] In applying all of the factors that I have considered and enumerated above, and in employing by broad discretion as Registrar under the BIA, I Order that the Bankrupt be discharged on the completion and fulfillment of the following payment conditions:

1) The Bankrupt shall pay $960,000 to the Trustee on account of:

   a) the amount of $600,000 requested by the Trustee for the s.173(1)(a) fact issues opposed by the Trustee as being 10% of the obligations entered into by the Bankrupt, as detailed in these reasons; and

   b) the Bankrupt shall pay an additional $360,000 being approximately 15% of the CRA Debt owing, as requested by CRA in the range of 10% and 20% of the tax indebtedness of $2,371,447.17.

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NSAIR (RE)

WHAT IS THE SCOPE OF THE BANKRUPT'S DUTY TO ASSIST IN THE REALIZATION OF ASSETS ?

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NSAIR (RE) 2024 ABKB 450

- May 2020 - ATM Financial appoints a receiver over a number dental clinics of Dr. Omar Nsair, a dentist. ATB is left with a $1.9 million.
- January 11, 2022 – Dr. Nsair files for bankruptcy, eligible for auto discharge in Oct 2023, but ATB objected.
- ATB was concerned that Dr. Nsair did not sufficiently assist in the realization of three commercial condominium units owned by him Beirut, Lebanon.
- The three condos were significantly damaged during a massive explosion at the port of Beirut in August 2020.
- The condos were disclosed to the Receiver, but were not disclosed in the bankrupt's SOA in bankruptcy. The bankrupt stated that he did not advise the LIT of the condos as he believed that they were dealt with in the receivership.

NSAIR (RE) 2024 ABKB 450

- The Registrar found that the failure to disclose the condos was a *de minimus* breach of his duties, and imposed a 10 day period of suspension.
- The bankrupt believed the condos to be unsellable. The condos were valued between 1.2 and 1.7 million USD by the bankrupt, but the bankrupt had been advised that there was a glut of similar properties.
- ATB retained an expert that believed the condos to be worth approx. $875K.
- The Trustee opted not to sell the condos given the unknown state of the condos, the general uncertainty of the market following the 2020 explosion, and the war in Israel to Lebanon's south, the trustee believed that values had dropped by 50% of more. The trustee issues a section 38 notice. No creditors, including ATB, responded to the notice.

NSAIR (RE) 2024 ABKB 450

Question: what obligation did Dr. Nsair have with respect to the Beirut condos?

ATB took the position that Dr. Nsair breached his obligation under section 158(k) by "making essentially no effort at all to list, market and sell the Beirut properties." The Registrar did not agree.

The Registrar found that Dr. Nsair, as a bankrupt, had no capacity to deal with the condo properties himself. There was no evidence that the Trustee asked Dr. Nsair to do anything to assist in determining marketability. Further, since the Trustee declined to pursue realization, no obligation on Dr. Nsair's part to assist in realization ever arose.

<u>ATB's appeal of the Registrar's decision on two grounds:</u>

1. the Registrar failed to interpret and give meaning to s 158(k), which ATB says must mean something more than acting when called upon by the Trustee in relation to the assets or, as in this case, passive indifference; and
2. the Registrar erred in not finding that the facts established on the record indicate a failure to meet obligations under s 158(k), such that any discharge should contain a significant financial condition.

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NSAIR (RE) 2024 ABKB 450

- Comments from the Registrar:
  - I do not at all understand ATB's argument that Dr. Nsair breached his obligation under section 158(k) of the ***Bankruptcy and Insolvency Act*** by "making essentially no effort at all to list, market, and sell the Beirut properties". Those properties were not Dr. Nsair's to list, market, and sell. Any interest he held in them vested with his Trustee upon his assignment. A bankrupt's obligation is to assist their Trustee in the realization of assets. There is no evidence that the Trustee meaningfully involved Dr. Nsair in its assessment of the marketability of the Beirut properties, and no evidence that Dr. Nsair failed to comply with any requests made of him by the Trustee for information related to those properties. The Trustee elected not to pursue realization of the Beirut properties, which of course means that Dr. Nsair's obligation to aid the Trustee in its marketing efforts did not arise…

- [36] The duty under s 158(k) cannot, as a matter of practicality as well as statutory construction, require a bankrupt to do something impossible, near-impossible, unidentifiable or unfathomable.

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NSAIR (RE) 2024 ABKB 450

[38] It is not possible to assemble an exhaustive list of what might be reasonably requested or expected of the bankrupt under s 158(k). I suggest some examples:

- making assets available for appraisal or viewing;
- handing over all documentation and records relating to the assets;
- producing the assets;
- signing over control of the assets;
- maintaining the assets or keeping them in working order;
- providing expertise or special knowledge in relation to the assets;
- sharing knowledge of the market, potential buyers, optimal selling price, and what needs to be done in order to present the assets or put them in a condition to attract the highest and best price.

These, of course, are only examples that I can think of at the moment and, like any example, would apply as circumstances dictate.

NSAIR (RE) 2024 ABKB 450

What does this mean for ATB?

[48] Dr. Nsair's counsel points to s 40(2) which provides that the Court may make any Order it considers necessary "where the Trustee is unable to dispose of any property as provided in this section" and says all is not lost for ATB. It can invoke s 40(2) at the Trustee's application for discharge and seek an Order to deal with the unrealized property for the benefit of creditors.

What does this mean for the bankrupt under section 158(k)?

Duty of bankrupt to aid in realization of property is limited to assisting the Trustee or creditors with reasonable, ascertainable requests.

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CONTINENTAL SHED RENTALS INC. V. ALLAN MARSHALL & ASSOCIATES INC.
2024 NBCA 86

VALIDITY OF UNPERFECTED SECURITY IN A BANKRUPTCY

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Licensed Insolvency Trustee

CONTINENTAL SHED RENTALS INC. V. ALLAN MARSHALL & ASSOCIATES INC. 2024 NBCA 86

- Ms. Negru entered into an agreement with the Company to lease a shed. Does not register in the PPRS.
- Ms. Negru failed to make required payment. Continental unable to repossess shed because of a fence and dogs
- Continental successfully sues her in small claims court for possession of the shed and for monetary damages of $6,760. Value of shed approx. $13,000.
- Feb 1, 2023 - court awards judgment. Orders sheriff to repossess shed.
- June, 2023 – Before sheriff takes possession – Ms. Negru files for bankruptcy.
- Continental files proof of claim (property) with LIT – LIT disallows claim due to:
  - (1) Continental held a security interest that was “ineffective against” the Trustee since it was “unperfected at the time of the bankruptcy” (s. 20(2) of the PPSA), and
  - (2) the Order did not change this since bankruptcy “takes precedence over all judicial or other attachments, […] judgments, […] executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor”

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CONTINENTAL SHED RENTALS INC. V. ALLAN MARSHALL & ASSOCIATES INC. 2024 NBCA 86

- How to differentiate from *Re Giffen*?
  - Re Giffen – SCC finds that the interaction between the BIA and PPSA can result in a bankrupt's leasehold interest turning into true ownership by the LIT.

- On appeal to the NBKB, Continental claimed that the decision of the small claims adjudicator terminated the lease. As such, Ms. Negru had no right to possess the shed at the time that she was bankrupt. Claimed that Ms. Negru had had no interest that could vest in the LIT under section 71.
  - Appeal dismissed.

NBCA had to consider:

- Did the bankrupt have any proprietary interest in the shed to vest in the Trustee.
- Did the lease survive the Small Claims Court order?
- Was the PPSA was determinative of the company's claim for the return of the property under the BIA?

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CONTINENTAL SHED RENTALS INC. V. ALLAN MARSHALL & ASSOCIATES INC. 2024 NBCA 86

- NB PPSA section 20(2):

20(2)An unperfected security interest in collateral is not effective against

(a) a trustee in bankruptcy if the security interest is unperfected at the time of the bankruptcy,

(b) a liquidator appointed under the Winding-up and Restructuring Act (Canada) if the security interest is unperfected when the winding-up order is made, or

(c) a person who has registered a notice of claim in the Registry pursuant to subsection 18(1) of the Enforcement of Money Judgments Act if the security interest is unperfected at the time the notice of claim is registered.

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CONTINENTAL SHED RENTALS INC. V. ALLAN MARSHALL & ASSOCIATES INC. 2024 NBCA 86

- What is the impact of the small claims court decision?
- Continental claimed that the small claims order terminated the lease, and therefore the bankrupt had no lawful interest to vest in the LIT. (Did Giffen require this?)
- NBCA disagrees – notes numerous sources for the proposition that termination of a security agreement does not cure the lack of perfection.
- This can only be resolved if the creditor, before the debtor files for bankruptcy, does one of the following:
  - files a financing statement in the PPRS, or
  - Takes possession of the collateral
- Finally, if the lease was a security lease, the small claims decision did not purport to override any of the obligations of a secured party under Part V of the PPSA.

CONTINENTAL SHED RENTALS INC. V. ALLAN MARSHALL & ASSOCIATES INC. 2024 NBCA 86

Was this a security lease or a true lease? Substance over form!

> The process of characterization is guided by numerous factors. In his article at 285, Professor Cuming refers to a helpful list of factors derived from American jurisprudence. The factors that support a finding that the lease is a security lease include:
>
> 1. whether there was an option to purchase for a nominal sum;
> 2. whether there was a provision in the lease granting the lessee an equity or property interest in the equipment;
> 3. whether the nature of the lessor's business was to act as a financing agency;
> 15. whether the aggregate rentals approximate the value or purchase price of the equipment.

- Note – the above only includes those factors highlighted by the NBCA in this case.

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CONTINENTAL SHED RENTALS INC. V. ALLAN MARSHALL & ASSOCIATES INC. 2024 NBCA 86

- Possession and Bankruptcy: The bankrupt individual's possession of the shed at the time of bankruptcy meant that the Trustee could rely on s. 20(2) of the PPSA to render the company's unperfected security interest ineffective

- Options for Continental if they couldn't get access to the shed before bankruptcy?
  - Part V of the PPSA
    - Appoint receiver
    - Supervisory powers of the Court
    - Register a financing statement!!!!!

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BURGESS V. MASTERMIND LP

IMPACT OF CCAA PROCEEDINGS ON HUMAN RIGHTS COMPLAINTS

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Licensed Insolvency Trustee

BURGESS V MASTERMIND LP, 2025 CANLII 35566 (NL HRC)

- Burgess worked for Mastermind for a few weeks in 2018, but was dismissed due to repeated absences. Burgess was dismissed from her employment. Burgess files complaint with NLHRC alledging that dismissal was due to a disability.
- Complaint was filed on November 26, 2018. The Respondent filed its response on June 6, 2019. The Complainant filed her rebuttal on April 8, 2020. The Commission completed its Case Summary on July 25, 2023.
- November 2023 – Mastermind filed for protection under CCAA.
- Claims bar order containing a claims bar date of April 19, 2024.

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BURGESS V MASTERMIND LP, 2025 CANLII 35566 (NL HRC)

THIS COURT ORDERS that, subject to paragraphs 17 to 22 of this Claims Procedure Order, any Person that does not deliver a Proof of Claim in respect of a Claim in the manner required by this Claims Procedure Order so that it is actually received by the Monitor on or before the Claims Bar Date or the Restructuring Period Claims Bar Date, as applicable:

(a) shall not be entitled to attend or vote at a Meeting in respect of such Claim;

(b) shall not be entitled to receive any distribution in respect of such Claim pursuant to a Plan or otherwise;

(c) shall not be entitled to any further notice in the CCAA Proceedings (unless it has otherwise sought to be included on the Service List); and

(d) shall be and is hereby forever barred from making or enforcing such Claim, and such Claim shall be and is hereby extinguished without any further act or notification. [emphasis added]

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BURGESS V MASTERMIND LP, 2025 CANLII 35566 (NL HRC)

- Burgess continued to try to pursue the matter and NLHRC continued with various administrative steps after the claims bar date.
- The complainant maintained that she was unaware of the CCAA proceedings and the requirement to file a proof of claim.

Issues:

1. Can the Complaint proceed against the Respondent in light of the CCCA proceedings and the stay of proceedings under the Amended and Restated Initial Order (ARIO)?
2. Is the Complaint barred and extinguished under the Claims Procedure Order (CPO) issued in the CCCA proceedings?

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BURGESS V MASTERMIND LP, 2025 CANLII 35566 (NL HRC)

- Outcome:
  - NLHRC found that the definition of claim under the Claims Procedure Order was broad enough to include claims falling under Human Rights legislation. Burgess failed to comply with the CPO.

- Result:
  - The NLHRC matter was stayed by the stay of proceedings.
  - Because Burgess failed to meet the deadline under the CPO, her claim was extinguished.

- Practical issues:
  - Human rights complainants are typically self-represented
  - Generally, human rights legislation is generally considered to be quasi-constitutional in nature.

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JOHN DOE V. ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S

APPROPRIATE DATE TO VALUE CLAIMS?

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JOHN DOE V. ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S, 2024 NLCA 26

- Hundreds of victims intending to sue RCEC for sexual abuse claims. Six victims filed an action as a test-case.
- 2 victims passed away pending trial. Judge assessed damages for remaining four. Parties agreed that judgment would not be enforced while the respondent figured out how to pay.
- Dec 30, 2021 (initial filing date) – Respondent files NOI, subsequently converted to CCAA.
- Court was advised there could be 150 or more claimants with total damages surpassing $50 million
- What does the court do with claimants that have passed away after the initial filing date?
- *Survival of Actions Act* – limits damages recoverable by deceased estates
  - 4. Where a cause of action survives under this Act for the benefit of the estate of a deceased person, only damages that have resulted in actual monetary loss to the estate are recoverable and the damages recoverable
- What is the date for valuation of claims?

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JOHN DOE V. ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S, 2024 NLCA 26

[21] The issues are as follows:

(1) Should this Court grant leave to appeal?

(2) Should the Court interpret the BIA and CCAA as providing that the Initial Filing Date is the date on which the claims of the plaintiffs should be valued, based on the circumstances (including that the deceased plaintiffs were then alive) that existed at that time?

(3) In the alternative, should the Supreme Court judge have exercised discretion to fix the Initial Filing Date as the date on which the claims of the plaintiffs should be determined, based on the circumstances (including that the deceased plaintiffs were then alive) that existed at that time?

JOHN DOE V. ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S, 2024 NLCA 26

- [42] The appellants argue that the *BIA* and *CCAA* provide that the plaintiffs' claims should be valued as of the Initial Filing Date. Their position is that because the statutes provide that provable claims are only those that exist at the date of insolvency (the Initial Filing Date in this case), any event or circumstance that occurs following that date is irrelevant to the valuation of the claims. The effective date for valuation should be the same as the effective date for the determination of validity.
- [44] However, neither the *CCAA* nor the *BIA* expressly state the operative date for the valuation of claims. Whether the statutes should be interpreted to fix a valuation date has only rarely been the subject of judicial consideration.
- *Kolodychuk (Re)*, 1978 CanLII 324 (BCSC)

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JOHN DOE V. ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S, 2024 NLCA 26

- [54] There is no reason inherent in the objectives of insolvency legislation to depart from these principles when valuing tort damages in an insolvency. Damages should be assessed once and for all at the time of proving the claim to a monitor in a *CCAA* arrangement, a trustee in bankruptcy, or a supervising court. Events intervening between the date of insolvency and the date of valuation must be considered: "any event that would otherwise be assessed as a future contingency is a relevant factor for assessing damages if it occurs before trial" (*Penner v. Mitchell*, 1978 AltaSCAD 201, at para. 29). Past events once proven are treated as certainties: *Athey v. Leonati*, 1996 CanLII 183 (SCC), [1996] 3 S.C.R. 458, at paragraph 28.

- [55] I therefore would not interpret the *BIA* and *CCAA* as providing that the plaintiffs' claims should be valued as of the Initial Filing Date. I would dismiss the appellants' appeal based on the statutory interpretation ground.

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JOHN DOE V. ROMAN CATHOLIC EPISCOPAL CORPORATION OF ST. JOHN'S, 2024 NLCA 26

Should the Supreme Court judge have exercised discretion to fix the Initial Filing Date as the date on which the claims of the plaintiffs should be determined?

- Trial judge believed that he was unable to make an order that would conflict with the SAA. NLCA reviews vast power under CCAA s. 11.
- CA – trial judge may have erred in imposing this limit upon his own discretion, but the claimants have not shown that the trial judge erred in principle by failing to exercise that discretion to pick the initial filing date.

RE MCINNIS

GOOD FAITH AND DISCLOSURE TO STAKEHOLDERS

FARBER
Licensed Insolvency Trustee

RE MCINNIS 2025 NSSC 119

- McInnis filed bankruptcy with LIT 1 – July 26, 2018.
- Nov 19, 2021 – court issued order requiring bankrupt to pay $24,563.55 for discharge. Order was not appealed or varied.
- May 2023 – Bankrupt meets with LIT 1 to discuss possibility of proposal. LIT 1 advises that proposal would need to be for at least $24,563.55.9
- April 2024 – Bankrupt files a Div II proposal with LIT 2. Div II proposal is for a total of $2,500 ($250 monthly for 10 months). This proposal did not refer to the Nov 19 order. Bankrupt was apparently referred to LIT2 from a debt referrer.
- Four creditors voted – all in favour. The total debts owed to these creditors was approximately $6,878 (approx. 10% of claims)
- LIT 2 originally recommended creditors accept proposal, subsequently acknowleged that proposal was not reasonable and recommended the court refuse the proposal. The debtor recommended the Court approve the proposal.
- LIT2 confirmed that it did not send a copy of the Nov 19 order to creditors, but confirmed that it would have done so upon request.

RE MCINNIS 2025 NSSC 119

Comments from the court:

- Candour is needed from the bankrupt under requirements for good faith
- If bankrupt disagreed with his discharge order, he should appealed it or applied to vary it
- The bankrupt's income calculation was "murky at best" – the bankrupt was neither credible nor reliable
- LIT2 had a positive obligation to advise creditors of the Nov 19th order.
- LIT2 stated that "… the debt from the prior bankruptcy has all been written off", which is not accurate. Saying a proposal is fair and reasonable solely because creditors have given up is not acceptable.
- As for the debt advisor - The occasion may arise to bring proper evidence, on proper notice, to the Court if there are systemic integrity issues at hand and there are issues upon which the Court may have jurisdiction to provide an appropriate disposition or remedy.

RE MCINNIS 2025 NSSC 119

[31] From this, one can derive two salient points:

1. the burden is on the debtor to establish good faith; the test is not that another stakeholder must establish bad faith;
2. in addition to the statutory test of reasonableness and general benefit to creditors, there is an overarching public interest in the insolvency system's integrity.

[32] In the consumer proposal context, this is rephrased as requiring:

(a) reasonableness

(b) fairness to creditors and debtor and

(c) good faith.

RE MCINNIS 2025 NSSC 119

Court approval:

[24] Section 66.24(2) of the BIA reads:

> **(2)** Where the court is of the opinion that the terms of the consumer proposal are not reasonable or are not fair to the consumer debtor and the creditors, the court shall refuse to approve the consumer proposal, and the court may refuse to approve the consumer proposal whenever it is established that the consumer debtor
>
> **(a)** has committed any one of the offences mentioned in sections 198 to 200; or
>
> **(b)** was not eligible to make a consumer proposal when the consumer proposal was filed with the official receiver. (emphasis added)

- Court proceeded to refuse proposal.

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FIERA PRIVATE DEBT FUND V. SALTWIRE NETWORK

CHOOSING BETWEEN COMPETING MONITORS

FARBER
Licensed Insolvency Trustee

FIERA PRIVATE DEBT FUND V. SALTWIRE NETWORK 2024 NSSC 79

- SaltWire (debtor) was a local news provider in Nova Scotia
- SaltWire and its main creditor, Fiera, both made urgent CCAA filings with respect to Saltwire simultaneously
- SaltWire and Fiera agreed that SaltWire needed CCAA protection. Key controversy was who would act as the monitor
  - Fiera wanted KSV (who had been acting as their financial advisor for some time), SaltWire wanted Grant Thornton (who was newly engaged)
  - Fiera argued KSV's knowledge of and familiarity with Saltwire's business and operations would be helpful in any restructuring
  - SaltWire argued that KSV's potential for bias and appearance of a conflict should disqualify them, and a new, wholly neutral monitor should be appointed

FIERA PRIVATE DEBT FUND V. SALTWIRE NETWORK 2024 NSSC 79

KEY ISSUES AND FINDINGS

- KSV (creditor's monitor) should be the monitor

Rationale:

- KSV proved itself to be neutral and unbiased
- SaltWire was uncooperative despite contractually agreeing to cooperate in a forbearance agreement (although the contract was not determinative)
- KSV was already familiar with SaltWire's business from its role as Fiera's financial advisor
- KSV's projections were more realistic (CCAA, s. 11.2 considerations)
- KSV's lack of local presence was not determinative (on its own or in combination with other factors)
- SaltWire should be neither preferred nor prejudiced because they are the debtor

FIERA PRIVATE DEBT FUND V. SALTWIRE NETWORK 2024 NSSC 79

TAKEAWAYS

- A court will look at contextual factors when deciding between competing monitors, but a monitor's specific expertise or knowledge about a debtor's business and operations will likely weigh heavily
- Debtors' applications should not be preferred over creditors' applications by mere virtue of being debtor's applications.
- Court cautioned against parties pre-determining the monitor in the terms of DIP financing – Fiera requiring KSV be appointed raised concerns about KSV's independence – and warned that a creditor's former representative should not be automatically installed as monitor without careful scrutiny and assessment for potential bias
- As we see an increase in creditor-led proceedings, this is a good case to keep in mind.

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BTA REAL ESTATE GROUP INC. V. KAISS

CONTINUING TO TRADE AFTER BECOMING INSOLVENT

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- Kaiss was the sole director of Family Fitness Inc.
- BTA leased land to Family Fitness. Family Fitness defaulted on lease, personally indemnified by Kaiss, and took a security interest in Kaiss' property.
- 2021 – Kaiss declares bankruptcy, and is transferring shares before and after his bankruptcy.
- BTA filed a proof of claim totally approx. $2 million.
  - $500K unsecured
  - $1.5 million secured

What did Kaiss own?

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[6] Prior to his bankruptcy, Mr. Kaiss owned shares in a host of companies, including the following:

(a) 50% of the voting shares in Madeiras Investments Inc.;

(b) 50% of the voting shares in Madeiras Investments 51 Inc.;

(c) 50% of the voting shares in Madeiras Investments 52 Inc. [collectively, with the two above, Madeiras Investments];

(d) a 15% share interest in GEO Fitness Inc.;

(e) a 15% share interest in GEO2 Fitness Inc.;

(f) a 17% share interest in GEO3 Fitness Inc.;

(g) a 17% share interest in GEO4 Fitness Inc.;

(h) a 25% share interest in 101260539 Saskatchewan Inc. (operating as Orangetheory Fitness);

(i) a 35% share interest in SM Fitness Inc. (operating as Evolution Fitness); and

(j) a 5% share interest in GEO5 Fitness Inc.

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- Kaiss was busy transferring his shares:
  - While insolvent transferred shares to his father for nominal value
  - Transferred shares worth $486,000 to SM Fitness, subsequently found to be a fraudulent conveyance and was reversed.
  - March 2021 – Kaiss entered into unanimous shareholder agreements requiring him to convey shares if he ever went bankrupt (he was bankrupt 6 months later)
- Dec 6, 2021 – after bankruptcy, Kaiss sold his interest in various companies to his family – sales not initially disclosed to the LIT
- May 2023 – Trustee's report listed shares as being worth $257,000
- LIT subsequently engaged accounting support to value shares – shares were valued at nil.
- LIT opposed discharge: assets not worth 50%, continuing to trade while insolvent

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- Chambers judge:

[4] I find that a suspension of 60 days is sufficient and appropriate for several reasons:

1) The bankrupt is a first-time bankrupt;

2) The bankrupt has cooperated with and continued to make payments to the trustee for the payment to the creditor;

3) The trustee believes the shares have no or nominal value, as stated in the MLT Aikins LLP letter dated February 8, 2022. If so, then the share transaction, however improper, had no effect on the outcome of the bankruptcy or payment to the unsecured creditors. The court is in no better position to estimate the value of the shares, so relies upon the trustee in that regard;

4) BTA has alternate recourse. If BTA believes there is value in the shares, it can apply for an order under s. 38 of the *Act*. The trustee said it would consent to such an order;

5) The discharge has already been delayed by some seven months as a result of the objection.

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Issues:

- Did the Chambers judge err in deciding that the share sale transactions had no effect on the bankruptcy?
- Did the Chambers judge err in failing to consider Mr. Kaiss's repeated transgressions of the Act while insolvent when determining whether to grant his discharge?
- Did the Chambers judge err in failing to give consideration to the factors set out in s. 173 of the Act?
- Did the Chambers judge err in failing to provide adequate reasons?

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Was the judge wrong in concluding that the shares had no value?

- [47] This is not a case where the Chambers judge was required to assess conflicting evidence as to the value of the Shares. The evidence before him was that the Trustee initially reported that the Shares had a value of $257,050.00 but later, having the benefit of a new valuation, the Trustee came to learn that the Shares are worthless. In other words, this is not a situation where two witnesses provided contradictory accounts but, rather, one in which the Trustee took steps to correct its account to the court in light of the subsequent valuation. The Trustee, as an officer of the court, has an obligation to keep the court apprised of the circumstances of the bankruptcy. The Trustee cannot be criticized for doing exactly that which it is required to do by the Act. The Chambers judge was entitled to conclude, from the evidence before him, that the Shares have no real value.

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Did the share transfer impact the bankruptcy? No.

[48] In sum, I find that the Chambers judge did not err in concluding that the Share transactions had no effect on Mr. Kaiss's bankruptcy or BTA's security interests. This is because of the following:

(a) the Shares are subject to BTA's security claim, which is unaffected by the bankruptcy and, therefore, the Shares do not form part of the pool of assets available to unsecured creditors, unless it is established that the value of the Shares exceeds the amount of the secured obligation. There is no evidence to suggest that to be the case in this instance;

(b) the Shares are worthless and have no impact on the bankruptcy based on the nil valuation; or

(c) if BTA is mistaken and the Shares are not subject to its security claim and the Trustee is mistaken and there is value in the Shares, BTA has been offered the opportunity to pursue the Shares at its own cost and expense pursuant to s. 38 of the Act.

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Did the Chambers judge err in failing to give consideration to the factors set out in s. 173 of the Act?

The court reviews the general principles related to determining terms of discharge, and concludes that the judge considered the relevant facts, that his reasons were jutify a 60 day period of suspension.

> [61] A judge's reasons need not be perfect, but they do need to show why the judge decided as they did. In this case, while the reasons are very brief, they tell the parties that the Chambers judge found Mr. Kaiss to have contravened s. 173(1)(c) and that a consequence for such a breach was necessary. The reasons tell the parties why the Chambers judge considered a suspension of 60 days to be an appropriate consequence. The Chambers judge determined this was an appropriate punishment because:
>
> (a) Mr. Kaiss is a first-time bankrupt;
> (b) he was cooperating with the Trustee;
> (c) the breach did not affect the bankruptcy as the Shares are of nominal value; and
> (d) Mr. Kaiss's discharge had already been delayed for a significant period of time.

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THANK YOU.

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