

The Canadian Abridgment eDigests -- Bankruptcy and Insolvency

2012-3
January 16, 2012

BKY.I.2.b

Subject Title: Bankruptcy and insolvency

Classification Number: I.2.b

Bankruptcy and insolvency jurisdiction -- Jurisdiction of courts -- Jurisdiction of general courts

Plaintiff T, resident of Ontario, brought action against S Inc., P Inc. and defendants L for breach of contract and oppression (first action) -- S Inc. and P Inc. made assignments in bankruptcy one day after T brought motion to appoint receiver -- T brought action in Ontario against corporate defendants as successors or secured creditor to S Inc. and P Inc., L, trustee in bankruptcy, alleging defendants conspired to bring fraudulent bankruptcy proceedings (second action) -- All defendants were located in Quebec -- Defendants unsuccessfully brought motion to have action dismissed for lack of jurisdiction -- Motion judge held that Ontario had jurisdiction simpliciter to entertain second action -- Defendants appealed -- Appeal allowed in part -- Motion judge did not err in holding that Ontario had jurisdiction to entertain second action -- T was not required to proceed in Quebec within or on account of bankruptcy proceedings pending in that province -- Remedy T sought in second action was against parties who were not before bankruptcy court, except for trustee -- T was not asking Ontario court to nullify Quebec bankruptcy proceedings, but to award damages arising from that bankruptcy -- Ontario proceedings did not amount to direct or collateral attack on Quebec bankruptcy.

Title v. Canadian Asset Based Lending Enterprise (Cable) Inc. ([2011](#)), [2011 CarswellOnt 12253](#), [2011 ONCA 715](#), David Watt J.A., R.G. Juriansz J.A., Robert J. Sharpe J.A. (Ont. C.A.); reversing in part ([2011](#)), [2011 CarswellOnt 882](#), [2011 ONSC 922](#), Newbould J. (Ont. S.C.J.); additional reasons at ([2011](#)), [2011 ONSC 1562](#), [2011 CarswellOnt 1676](#), Newbould J. (Ont. S.C.J.) [Ontario]

BKY.IV.1

Subject Title: Bankruptcy and insolvency

Classification Number: IV.1

Receivers -- Appointment

Debtor corporation provided Shari'a law compliant mortgages -- Debtor created independent board of Shari'a law scholars (board) who reviewed compliance of debtor's lending with Shari'a principles -- Creditor loaned funds to debtor to provide mortgages to its clients -- Debtor granted creditor general security agreements (GSAs) charging personal property and assigned to creditor real property residential mortgages made by debtor to its customers (assignment agreements) -- GSAs and assignment agreements stated that they were governed by Ontario law, and did not reference Shari'a law -- Creditor gave notice to debtor of default -- Creditor applied to appoint receiver -- Board brought motion to intervene as party -- Motion dismissed -- It was not established that board had interest in subject-matter of receivership application, would be adversely affected by judgment, or otherwise would make useful contribution to hearing of application -- Board did not put itself forward as

possible creditor of debtor, and evidence did not disclose any contractual relationship between board and debtor -- GSAs and assignment agreements were governed by Ontario law, and it was not apparent from those documents that any need existed for court to seek assistance on Shari'a law -- Shari'a law is non-domestic law and must be proved by expert evidence -- It was open to debtor to file report of expert in Shari'a law and Islamic financing -- Debtor had not filed such evidence, so it was not open to stranger to litigation to attempt to gain entry to proceeding to do so.

Central 1 Credit Union v. UM Financial Inc. ([2011](#)), [2011 CarswellOnt 11979](#), [2011 ONSC 5612](#), D.M. Brown J. (Ont. S.C.J. [Commercial List]) [Ontario]

BKY.IV.1

Subject Title: Bankruptcy and insolvency

Classification Number: IV.1

Receivers -- Appointment

Indirect parent of applicant corporation filed for bankruptcy in Delaware -- Corporation was solvent and had ability to pay day-to-day obligations -- Bidding procedure would be involved in American bankruptcy proceedings -- Corporation brought application for order appointing receiver and stay of proceedings -- Application granted -- Receiver was appointed -- Appointment of receiver was just and convenient -- Requirements of s. 101 of Courts of Justice Act were satisfied.

Graceway Canada Co., Re ([2011](#)), [2011 ONSC 6292](#), [2011 CarswellOnt 12770](#), Morawetz J. (Ont. S.C. J. [Commercial List]) [Ontario]

BKY.IV.1

Subject Title: Bankruptcy and insolvency

Classification Number: IV.1

Receivers -- Appointment

Plaintiff creditor invested \$6.2 million with defendant debtor group of companies, to be invested in specific loans -- Debtor did not place investments with real companies and was not registered with Ontario Securities Commission -- Creditor brought action to recover its investment on grounds of fraud -- Independent restructuring officer was appointed for debtor -- Debtor filed notices of intention to make proposal under Bankruptcy and Insolvency Act, naming B Ltd. as proposal trustee, on same day as creditor's motion was served -- Creditor brought motion for appointment of F Inc. as receiver and manager of debtor pursuant to security agreement -- B Ltd. was appointed as interim receiver and manager of debtor -- Receiver was required -- Section 47.1(1) of Act permitted appointment of interim receiver after notice of intention to make proposal was filed, and provided that interim receiver may be proposal trustee -- Potential of extra costs and duplication of work involved in having F Inc. appointed interim receiver should not be caused if not necessary -- B Ltd. was appointed as interim receiver to avoid extra costs, despite potential conflict between position of B Ltd. as proposal trustee and interim receiver.

Tucker v. Sequest Capital Corp. (2011), 2011 CarswellOnt 12809, 2011 ONSC 6558, Newbould J. (Ont. S.C. J. [Commercial List]) [Ontario]

BKY.IV.3

Subject Title: Bankruptcy and insolvency

Classification Number: IV.3

Receivers -- Powers, duties and liabilities

Secured creditor granted loan to debtor amounting to \$7 million -- Loan was secured by first ranking charge on asset of debtor -- When debtor encountered serious financial difficulties, interim receiver was appointed and given power to take conservatory measures -- Interim receiver found party interested in purchasing debtor's asset -- Secured creditor brought motion under s. 243 of Bankruptcy and Insolvency Act asking court to give receiver power to sell debtor's asset, which was opposed by another secured creditor who asserted that hypothecary remedies found in Civil Code of Quebec were more appropriate -- Motion granted in part -- Under s. 243 of Act, court may appoint receiver to take any action that court considers advisable -- Court was of view that words "any other action that the court considers advisable" used in s. 243 of Act were indicative of Parliament's intent -- Here, evidence showed that asset consisted of contaminated lands -- Court noted that Act provided protection to receiver if property involved in bankruptcy was contaminated, whereas Code did not -- If Parliament had found it appropriate to restrict application of s. 243 of Act, it would have expressed so -- Further, evidence showed that receiver was now trustee and had power to sell debtor's asset -- Therefore, Court found it proper to rely on s. 243 of Act and authorize receiver to sell asset and found sale price to be reasonable.

9113-7521 Québec inc., Re (2011), 2011 QCCS 3429, EYB 2011-193002, 2011 CarswellQue 7544, Castonguay J. C.S (Que. S.C.) [Quebec]

BKY.IV.3

Subject Title: Bankruptcy and insolvency

Classification Number: IV.3

Receivers -- Powers, duties and liabilities

Plaintiff creditor invested \$6.2 million with defendant debtor group of companies, to be invested in specific loans -- Debtor did not place investments with real companies and was not registered with Ontario Securities Commission -- Creditor brought action to recover its investment on grounds of fraud -- Independent restructuring officer was appointed for debtor -- Debtor filed notices of intention to make proposal under Bankruptcy and Insolvency Act, naming B Ltd. as proposal trustee, on same day as creditor's motion was served -- Creditor brought motion for appointment of F Inc. as receiver and manager of debtor pursuant to security agreement -- B Ltd. was appointed as interim receiver and manager of debtor -- Receiver was required and investigation of business and affairs of debtor was required to determine what assets were available -- Receiver was appointed under s. 47(1) of Act on interim basis -- Power to sell assets was limited

to disposing of property that was perishable or likely to rapidly depreciate in value -- In light of fact that notice of proposal had been filed, it would work against purposes of stay to permit assets to be sold at this stage.

Tucker v. Seaquest Capital Corp. (2011), 2011 CarswellOnt 12809, 2011 ONSC 6558, Newbould J. (Ont. S.C. J. [Commercial List]) [Ontario]

BKY.XIV.2.g

Subject Title: Bankruptcy and insolvency

Classification Number: XIV.2.g

Administration of estate -- Trustees -- Legal proceedings by trustee

Defendant D Ltd. gave promissory note to bankrupt acknowledging its indebtedness -- Bankrupt made assignment in bankruptcy in Florida nearly 7.5 years later -- Trustee in bankruptcy brought action for payment of promissory note from D Ltd. two years and two days after assignment in bankruptcy -- Defendants pleaded Limitation of Actions Act in their defence -- Trustee brought successful motion to disallow limitation defence -- Motion judge considered all circumstances, given trustee's action was brought more than six years, but less than ten years, after date promissory note was given -- Motion judge found there was no inordinate delay by trustee in bringing action -- Motion judge concluded that defendants would not suffer any prejudice if limitation defence was disallowed, as any deleterious impact of passage of time was lessened because evidence had been preserved in prior litigation -- Defendants appealed -- Appeal dismissed -- Motion judge did not make error of law resulting in injustice -- Motion judge did not err in finding there was no inordinate delay and action was commenced on timely basis, within two years of trustee becoming aware of claim -- Motion judge correctly considered all factors in s. 3(4) of Act -- It was of no consequence that judge did not refer to trustee's explanation of delay.

Chapin (Trustee of) v. Drum Head Estates Ltd. (2011), 2011 NSCA 93, 2011 CarswellINS 747, Bryson J.A., Fichaud J.A., Hamilton J.A. (N.S. C.A.); affirming (2010), (sub nom. *Mills v. Drum Head Estates Ltd.*) 299 N.S.R. (2d) 140, 947 A.P.R. 140, 2010 CarswellINS 846, 2010 NSSC 447, C. Richard Coughlan J. (N.S. S.C. [In Chambers]) [Nova Scotia]

BKY.XIV.6.f

Subject Title: Bankruptcy and insolvency

Classification Number: XIV.6.f

Administration of estate -- Sale of assets -- Jurisdiction of court to approve sale

Applicant corporation's American affiliates (US debtors) filed for bankruptcy in United States of America -- Asset purchase agreement was reached with corporation and US debtors (collectively G) as sellers, and bidder as purchaser in stalking horse auction -- Corporation and receiver brought motion to approve bidding procedures and asset purchase agreement -- Motion granted -- G pursued range of options to address their concern about ability to service debt going forward -- G determined that best way to maximize value of its assets for benefit of creditors was sale of substantially all of its assets -- Asset purchase agreement

was negotiated at arm's length -- Purchase price payable represented fair and reasonable price -- Proceeding in this fashion allowed G to continue operations with least amount of disruption to business operations.

Graceway Canada Co., Re ([2011](#)), [2011 CarswellOnt 11687](#), [2011 ONSC 6403](#), Morawetz J. (Ont. S.C. J. [Commercial List]) [Ontario]

BKY.XIV.6.h

Subject Title: Bankruptcy and insolvency

Classification Number: XIV.6.h

Administration of estate -- Sale of assets -- Miscellaneous

Secured creditor granted loan to debtor amounting to \$7 million -- Loan was secured by first ranking charge on asset of debtor -- When debtor encountered serious financial difficulties, interim receiver was appointed and given power to take conservatory measures -- Interim receiver found party interested in purchasing debtor's asset -- Secured creditor brought motion under s. 243 of Bankruptcy and Insolvency Act asking court to give receiver power to sell debtor's asset, which was opposed by another secured creditor who asserted that hypothecary remedies found in Civil Code of Quebec were more appropriate -- Motion granted in part -- Under s. 243 of Act, court may appoint receiver to take any action that court considers advisable -- Court was of view that words "any other action that the court considers advisable" used in s. 243 of Act were indicative of Parliament's intent -- Here, evidence showed that asset consisted of contaminated lands -- Court noted that Act provided protection to receiver if property involved in bankruptcy was contaminated, whereas Code did not -- If Parliament had found it appropriate to restrict application of s. 243 of Act, it would have expressed so -- Further, evidence showed that receiver was now trustee and had power to sell debtor's asset -- Therefore, Court found it proper to rely on s. 243 of Act and authorize receiver to sell asset and found sale price to be reasonable.

9113-7521 Québec inc., Re ([2011](#)), [2011 QCCS 3429](#), [EYB 2011-193002](#), [2011 CarswellQue 7544](#), Castonguay J. C.S (Que. S.C.) [Quebec]

BKY.XV.4.e

Subject Title: Bankruptcy and insolvency

Classification Number: XV.4.e

Discharge of bankrupt -- Considerations on application -- Unjustifiable extravagance

Bankrupt was successful businessman who entertained business associates at casinos, including opposing creditor casino in U.S. -- Casinos gave bankrupt lines of credit -- Bankrupt sold his business in early 2008 and began to gamble more, forging relationships with wealthy individuals at casino in hope of starting new business venture with them -- Financial crisis occurred in 2008 -- In October 2008, bankrupt was advanced \$5 million by opposing creditor, which was not repaid -- Bankrupt assigned into bankruptcy in January 2010 -- Bankrupt applied for discharge from bankruptcy in 2011 -- Application granted -- Discharge granted absolutely -- Opposing creditor had full remedies in U.S. where its debt originated, and that debt, in that country, would

not be released by Canadian discharge -- There was no evidence of credit misrepresentations or dishonest conduct in securing \$5 million advance from opposing creditor -- There was no evidence money was used for any purpose other than that for which it was intended, i.e. gambling at opposing creditor's tables -- There was no credit or credit card misuse -- Bankrupt created \$30M per year business from nothing, and it was not inconceivable that, but for 2008 financial crisis, he would have turned his new contacts into successful venture -- Bankrupt was credible and had honest belief that he was working towards his next business opportunity -- Amounts owed were staggering, but had to be viewed in context.

Cronenfeld, Re ([2011](#), [2011 CarswellOnt 12782](#), [2011 ONSC 6882](#), Scott W. Nettie Reg. (Ont. S.C.J.) [Ontario])

BKY.XVI.1.a.iii.A

Subject Title: Bankruptcy and insolvency

Classification Number: XVI.1.a.iii.A

Effect of bankruptcy on other proceedings -- Proceedings against bankrupt -- Before discharge of trustee -- Effect of failure to obtain leave -- General principles

Plaintiff T, resident of Ontario, brought action against S Inc., P Inc. and defendants L for breach of contracts and oppression (first action) -- S Inc. and P Inc. made assignments in bankruptcy one day after T brought motion to appoint receiver -- T brought action in Ontario against corporate defendants as successors or secured creditor to S Inc. and P Inc., L, trustee in bankruptcy, alleging defendants conspired to bring fraudulent bankruptcy proceedings (second action) -- All defendants were located in Quebec -- Defendants unsuccessfully brought motion to have action dismissed for lack of jurisdiction -- Trustee unsuccessfully brought motion to have action dismissed or stayed on basis T failed to obtain leave pursuant to s. 215 of Bankruptcy and Insolvency Act -- Motion judge held that Ontario had jurisdiction over second action -- Motion judge held that failure to obtain leave pursuant to s. 215 of Act was mere irregularity -- Defendants appealed -- Appeal allowed in part -- Trustee's appeal allowed with respect to stay pursuant to s. 215 of Act -- All other aspects of appeal dismissed -- Motion judge erred by failing to grant stay of action against trustee unless and until T obtained leave from "the court" pursuant to s. 215 of Act -- "The court" referred to court with jurisdiction over bankruptcy proceedings, namely Quebec Superior Court.

Title v. Canadian Asset Based Lending Enterprise (Cable) Inc. ([2011](#), [2011 CarswellOnt 12253](#), [2011 ONCA 715](#), David Watt J.A., R.G. Juriansz J.A., Robert J. Sharpe J.A. (Ont. C.A.); reversing in part ([2011](#)), [2011 CarswellOnt 882](#), [2011 ONSC 922](#), Newbould J. (Ont. S.C.J.); additional reasons at ([2011](#)), [2011 ONSC 1562](#), [2011 CarswellOnt 1676](#), Newbould J. (Ont. S.C.J.) [Ontario])

BKY.XVII.4

Subject Title: Bankruptcy and insolvency

Classification Number: XVII.4

Practice and procedure in courts -- Stay of proceedings

Indirect parent of applicant corporation filed for bankruptcy in Delaware -- Corporation was solvent and had

ability to pay day-to-day obligations -- Bidding procedure would be involved in American bankruptcy proceedings -- Corporation brought application for order appointing receiver and stay of proceedings -- Application granted -- Stay of proceedings was granted -- Stay of proceedings was primarily directed towards ensuring status quo in American bankruptcy proceedings -- Considering corporation had ability to pay normal obligations, stay was appropriate.

Graceway Canada Co., Re ([2011](#)), [2011 ONSC 6292](#), [2011 CarswellOnt 12770](#), Morawetz J. (Ont. S.C. J. [Commercial List]) [Ontario]

BKY.XVII.6.d.iii.B

Subject Title: Bankruptcy and insolvency

Classification Number: XVII.6.d.iii.B

Practice and procedure in courts -- Discovery and examinations -- Evidentiary issues -- Privilege -- Miscellaneous

Bankrupt was assigned into bankruptcy -- Lawyer for trustee had been involved in proceedings against bankrupt for several years, and was currently representing creditor L in action against others who had acted for bankrupt in litigation -- In course of proceedings trustee signed document purporting to waive privilege of bankrupt -- Bankrupt brought motion to remove counsel for trustee and to nullify waiver of privilege -- Motion for removal of counsel dismissed, motion regarding waiver allowed -- Bankrupt brought application for leave to appeal -- Application dismissed -- Bankrupt had not satisfy test for leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act -- Trustee had sworn that there was no conflict, that counsel had not preferred L's interests over those of trustee, and that bankrupt's largest creditors, together with trustee, wished counsel to continue as counsel to trustee.

Kaiser, Re ([2011](#)), [2011 CarswellOnt 12822](#), [2011 ONCA 713](#), E.A. Cronk J.A. (Ont. C.A. [In Chambers]); refusing leave to appeal ([2011](#)), [2011 CarswellOnt 8304](#), [2011 ONSC 4877](#), Newbould J. (Ont. S.C.J. [Commercial List]) [Ontario]

BKY.XVII.9

Subject Title: Bankruptcy and insolvency

Classification Number: XVII.9

Practice and procedure in courts -- Miscellaneous

Bankrupt was assigned into bankruptcy -- Lawyer for trustee had been involved in proceedings against bankrupt for several years, and was currently representing creditor L in action against others who had acted for bankrupt in litigation -- In course of proceedings trustee signed document purporting to waive privilege of bankrupt -- Bankrupt brought motion to remove counsel for trustee and to nullify waiver of privilege -- Motion for removal of counsel dismissed, motion regarding waiver allowed -- Bankrupt brought application for leave to appeal -- Application dismissed -- Bankrupt had not satisfy test for leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act -- Trustee had sworn that there was no conflict, that counsel had not

preferred L's interests over those of trustee, and that bankrupt's largest creditors, together with trustee, wished counsel to continue as counsel to trustee.

Kaiser, Re (2011), 2011 CarswellOnt 12822, 2011 ONCA 713, E.A. Cronk J.A. (Ont. C.A. [In Chambers]); refusing leave to appeal (2011), 2011 CarswellOnt 8304, 2011 ONSC 4877, Newbould J. (Ont. S.C.J. [Commercial List]) [Ontario]

BKY.XIX.5

Subject Title: Bankruptcy and insolvency

Classification Number: XIX.5

Companies' Creditors Arrangement Act -- Miscellaneous

Debtor in possession financing -- Business was under protection of Companies' Creditors Arrangement Act -- Business sought debtor in possession financing and received offer on certain terms -- Two secured creditors opposed debtor in possession financing -- Business brought application for order approving financing -- Application granted -- Debtor in possession financing to have priority -- Specific amount was set out, lender was named and financing was required by business having regard to cash flow statement -- Monitor recommended financing -- Financing was necessary to keep up production -- New lender created prejudice, but not material prejudice to secured creditors -- Although no appraisal had been taken place, new priority and amount owed to objecting creditors was likely less than value of business -- Agreement would have effect on cash flow projections, but this was not bar to granting application -- Reasonable prospect business could be restructured with new equipment and more efficient production -- That future loans might be required, that previous capital injection had not been repaid and that projected payment of \$284,000 to one creditor had not been made was not reason to reject application -- Financial well being of majority of creditors was not at risk.

Scanwood Canada Ltd., Re (2011), 305 N.S.R. (2d) 26, 966 A.P.R. 26, 2011 CarswellINS 563, 2011 NSSC 188, Suzanne M. Hood J. (N.S. S.C.) [Nova Scotia]

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