

Clerk's Stamp

ESTATE NUMBER 25-2624152

COURT COURT OF QUEEN'S BENCH OF ALBERTA IN  
BANKRUPTCY AND INSOLVENCY

JUDICIAL CENTRE CALGARY

PROCEEDING IN THE MATTER OF THE BANKRUPTCY AND  
INSOLVENCY OF DIRECT OIL & GAS INC.

APPLICANT MNP LTD., IN ITS CAPACITY AS TRUSTEE IN  
BANKRUPTCY OF DIRECT OIL & GAS INC.

DOCUMENT BENCH BRIEF OF MNP LTD.

ADDRESS FOR SERVICE AND CONTACT  
INFORMATION OF PARTY FILING THIS  
DOCUMENT **GOWLING WLG (CANADA) LLP**  
Suite 1600, 421 – 7<sup>th</sup> Avenue SW  
Calgary, AB T2P 4K9

Attention: Tom Cumming / Caireen E. Hanert  
Telephone: 403-298-1938 / 403-298-1992  
Facsimile: 403-695-3490  
Email: [tom.cumming@gowlingwlg.com](mailto:tom.cumming@gowlingwlg.com)  
[caireen.hanert@gowlingwlg.com](mailto:caireen.hanert@gowlingwlg.com)  
File No.: A163489

## I. INTRODUCTION AND FACTS

1. This Bench Brief is submitted on behalf of MNP Ltd. (“**MNP**”), in its capacity as trustee in bankruptcy of Direct Oil & Gas Inc. (“**Direct**”, and MNP in such capacity, the “**Trustee**”) in support of its Application for two sale approval and vesting orders substantially in the forms attached to the Application as Schedules “B” and “C” (collectively, the “**SAVOs**”):
  - (a) Approving the sale transaction (the “**Tallahassee Transaction**”) contemplated by an agreement of purchase and sale (the “**Tallahassee Sale Agreement**”) between the Trustee and Tallahassee Exploration Inc. (“**Tallahassee**”) dated March 18, 2021 and vesting in Tallahassee the right, title and interest of the Trustee and Direct in and to the assets described in the Tallahassee Sale Agreement (the “**Tallahassee Purchased Assets**”) free and clear of all mortgages, charges, security interests and other encumbrances other than permitted encumbrances; and
  - (b) Approving the sale transaction (the “**First Helium Transaction**”, and together with the Tallahassee Transaction, the “**Transactions**”) contemplated by an agreement of purchase and sale (the “**First Helium Sale Agreement**”, and together with the Tallahassee Sale Agreement, the “**Sale Agreements**”) between the Trustee and 2060547 Alberta Ltd. (“**First Helium**”), and vesting in First Helium the right, title and interest of the Trustee and Direct in and to the assets described in the First Helium Sale Agreement (the “**First Helium Purchased Assets**”, and together with the Tallahassee Purchased Assets, the “**Purchased Assets**”) free and clear of all mortgages, charges, security interests and other encumbrances other than permitted encumbrances.
2. Effective February 28, 2020, Direct made an assignment of all of its property for the general benefit of its creditors under section 49 of the *Bankruptcy and Insolvency Act* (the “**BIA**”) and MNP was appointed as Trustee.
3. The Trustee engaged Sayer Energy Advisors to market and sell the assets of Direct. To date, the Trustee has entered into two asset purchase agreements that were approved by this Court on the same basis as outlined herein.

4. Pursuant to the Sale Agreements, the Purchased Assets are to be conveyed to Tallahassee and First Helium respectively pursuant to the SAVOs free and clear of any encumbrances. The encumbrances to be vested off include:
  - (a) A security interest in favour of Rothwell Development Corporation registered in the Personal Property Registry of Alberta (the “PPR”) as registration number 17082334112 on August 23, 2017, as amended by registration number 18100239995 made on October 2, 2018;
  - (b) A land charge in favour of Rothwell Development Corporation registered in the PPR as registration number 17082334177 on August 23, 2017, as amended by registration number 18100240035 made on October 2, 2018; and
  - (c) A land charge in favour of Rothwell Development Corporation registered in the PPR as registration number 20022431952 made on February 24, 2020.
5. Both Agreements represent the highest and best available offers for the Purchased Assets, and therefore the Trustee seeks approval of the SAVOs.
6. The purpose of this Bench Brief is to outline for the Court the legislation and jurisprudence that is relevant to an application for a sale approval and vesting order as sought by the Trustee.

## II. LAW AND ARGUMENT

### Trustee’s Power to sell Direct’s Assets

7. The Trustee is seeking approval of the Transactions as complemented by the Sale Agreements.
8. Pursuant to section 30(1) of the BIA, the Trustee, with the approval of the inspectors is empowered to, *inter alia*:

“... (a) sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private

contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;”

BIA, s. 30(1) [Tab 1]

9. Both Transactions were approved by resolution of the inspectors of Direct on May 19, 2021.

Third Report of the Trustee dated September 20, 2021  
(the “Third Report”) at paras 19, 24

**Jurisdiction to Grant a Sale Approval and Vesting Order**

10. Pursuant to section 183(1)(d) of the BIA, the Court of Queen’s Bench of Alberta has jurisdiction at law and in equity as will enable it to exercise jurisdiction in bankruptcy.

BIA, s. 183(1)(d) [Tab 1]

11. Granting the SAVOs sought by the Trustee is within the inherent jurisdiction of this Honourable Court. For carrying out the purposes of the BIA, courts are deemed to be vested with the necessary power and jurisdiction to authorize and sanction acts required to be done by the trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the BIA expressly conferring such power and jurisdiction.

*Re Wiggins*, 2003 CarswellOnt 3514 at paras 6-7 (SC)  
[Tab 2]

12. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the BIA, including the proper administration and protection of the bankrupt's estate. For an exercise of inherent jurisdiction to be permitted, a Court must be satisfied on two points. First, the BIA must be silent on the point or not have dealt with it exhaustively. Second, upon a balancing of the competing interests at play, the benefit of granting the relief must outweigh the relative prejudice to those affected by it.

*Re Residential Warranty Co. of Canada Inc.*, 2006  
ABQB 236 at para 26 [Tab 3]

13. With respect to the first point to be considered, no provision of the BIA provides this Honourable Court with the express power to grant a sale approval and vesting order. The

Trustee submits that granting such an order would flow from this Honourable Court's inherent jurisdiction.

14. With respect to the second point to be considered, the granting of the SAVOs is in the best interests Direct's bankruptcy estate, Direct's creditors, Tallahassee and First Helium. The Trustee respectfully submits that limited to no prejudice will be suffered by any party as a result of the granting of the relief sought.
15. Further, the granting of the SAVOs benefits the estate in bankruptcy of Direct in the following manner:
  - (a) The SAVOs will give certainty to Tallahassee and First Helium with respect to the title they are each respectively acquiring pursuant to the Tallahassee Purchased Assets and the First Helium Purchased Assets;
  - (b) A bill of sale and other conveyances by the Trustee does not have the effect of vesting out all mortgages, charges, security interests and other encumbrances. Therefore, in order for the Trustee to convey title free and clear of such interests, the Trustee would be required to negotiate with the holders thereof in order to obtain their discharge. The estate lacks the resources to support such negotiations; and
  - (c) By providing for a more efficient mechanism for conveying title to the Purchased Assets, and thereby conserving scarce resources, the SAVOs benefit the creditors and other stakeholders of Direct.

### **III. CONCLUSION AND RELIEF SOUGHT**

16. Both Transactions represent the highest and best available offers for the Purchased Assets and will each benefit the stakeholders of Direct. Accordingly, the Trustee seeks approval of the SAVOs under the BIA substantially in the forms attached to its Application as Schedules "B" and "C".

**ALL OF WHICH IS RESPECTFULLY SUBMITTED this 21<sup>st</sup> day of September, 2021.**

**GOWLING WLG (CANADA) LLP**

Per: \_\_\_\_\_  
Tom Cumming/Caireen E. Hanert  
Counsel for the Applicant

**TABLE OF AUTHORITIES**

1. *Bankruptcy and Insolvency Act*, RSC 1985, c B-3
2. *Re Wiggins*, 2003 CarswellOnt 3514 (SC)
3. *Re Residential Warranty Co. of Canada Inc.*, 2006 ABQB 236

**TAB 1**





CANADA

CONSOLIDATION

CODIFICATION

## Bankruptcy and Insolvency Act

## Loi sur la faillite et l'insolvabilité

R.S.C., 1985, c. B-3

L.R.C. (1985), ch. B-3

Current to March 19, 2020

À jour au 19 mars 2020

Last amended on November 1, 2019

Dernière modification le 1 novembre 2019

---

## OFFICIAL STATUS OF CONSOLIDATIONS

Subsections 31(1) and (2) of the *Legislation Revision and Consolidation Act*, in force on June 1, 2009, provide as follows:

### Published consolidation is evidence

**31 (1)** Every copy of a consolidated statute or consolidated regulation published by the Minister under this Act in either print or electronic form is evidence of that statute or regulation and of its contents and every copy purporting to be published by the Minister is deemed to be so published, unless the contrary is shown.

### Inconsistencies in Acts

**(2)** In the event of an inconsistency between a consolidated statute published by the Minister under this Act and the original statute or a subsequent amendment as certified by the Clerk of the Parliaments under the *Publication of Statutes Act*, the original statute or amendment prevails to the extent of the inconsistency.

## LAYOUT

The notes that appeared in the left or right margins are now in boldface text directly above the provisions to which they relate. They form no part of the enactment, but are inserted for convenience of reference only.

## NOTE

This consolidation is current to March 19, 2020. The last amendments came into force on November 1, 2019. Any amendments that were not in force as of March 19, 2020 are set out at the end of this document under the heading “Amendments Not in Force”.

## CARACTÈRE OFFICIEL DES CODIFICATIONS

Les paragraphes 31(1) et (2) de la *Loi sur la révision et la codification des textes législatifs*, en vigueur le 1<sup>er</sup> juin 2009, prévoient ce qui suit :

### Codifications comme élément de preuve

**31 (1)** Tout exemplaire d'une loi codifiée ou d'un règlement codifié, publié par le ministre en vertu de la présente loi sur support papier ou sur support électronique, fait foi de cette loi ou de ce règlement et de son contenu. Tout exemplaire donné comme publié par le ministre est réputé avoir été ainsi publié, sauf preuve contraire.

### Incompatibilité – lois

**(2)** Les dispositions de la loi d'origine avec ses modifications subséquentes par le greffier des Parlements en vertu de la *Loi sur la publication des lois* l'emportent sur les dispositions incompatibles de la loi codifiée publiée par le ministre en vertu de la présente loi.

## MISE EN PAGE

Les notes apparaissant auparavant dans les marges de droite ou de gauche se retrouvent maintenant en caractères gras juste au-dessus de la disposition à laquelle elles se rattachent. Elles ne font pas partie du texte, n'y figurant qu'à titre de repère ou d'information.

## NOTE

Cette codification est à jour au 19 mars 2020. Les dernières modifications sont entrées en vigueur le 1 novembre 2019. Toutes modifications qui n'étaient pas en vigueur au 19 mars 2020 sont énoncées à la fin de ce document sous le titre « Modifications non en vigueur ».

with a list of and report on the unadministered property of every estate under the trustee's administration for which the trustee has not been discharged, and shall forward to such other trustee as may be appointed in the trustee's stead or, pending the appointment of the other trustee, to the official receiver all the remaining property of every estate under the trustee's administration together with all the books, records and documents relating thereto.

**(2)** [Repealed, 2005, c. 47, s. 22]

R.S., 1985, c. B-3, s. 29; 1997, c. 12, s. 21; 2005, c. 47, s. 22.

### **Powers exercisable by trustee with permission of inspectors**

**30 (1)** The trustee may, with the permission of the inspectors, do all or any of the following things:

**(a)** sell or otherwise dispose of for such price or other consideration as the inspectors may approve all or any part of the property of the bankrupt, including the goodwill of the business, if any, and the book debts due or growing due to the bankrupt, by tender, public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels;

**(b)** lease any real property or immovable;

**(c)** carry on the business of the bankrupt, in so far as may be necessary for the beneficial administration of the estate of the bankrupt;

**(d)** bring, institute or defend any action or other legal proceeding relating to the property of the bankrupt;

**(e)** employ a barrister or solicitor or, in the Province of Quebec, an advocate, or employ any other representative, to take any proceedings or do any business that may be sanctioned by the inspectors;

**(f)** accept as the consideration for the sale of any property of the bankrupt a sum of money payable at a future time, subject to such stipulations as to security and otherwise as the inspectors think fit;

**(g)** incur obligations, borrow money and give security on any property of the bankrupt by mortgage, hypothec, charge, lien, assignment, pledge or otherwise, such obligations and money borrowed to be discharged or repaid with interest out of the property of the bankrupt in priority to the claims of the creditors;

**(h)** compromise and settle any debts owing to the bankrupt;

**(2)** [Abrogé, 2005, ch. 47, art. 22]

L.R. (1985), ch. B-3, art. 29; 1997, ch. 12, art. 21; 2005, ch. 47, art. 22.

### **Pouvoirs du syndic avec la permission des inspecteurs**

**30 (1)** Avec la permission des inspecteurs, le syndic peut :

**a)** vendre ou autrement aliéner, à tel prix ou moyennant telle autre contrepartie que peuvent approuver les inspecteurs, tous les biens ou une partie des biens du failli, y compris l'achalandage, s'il en est, ainsi que les créances comptables échues ou à échoir au crédit du failli, par soumission, par enchère publique ou de gré à gré, avec pouvoir de transférer la totalité de ces biens et créances à une personne ou à une compagnie, ou de les vendre par lots;

**b)** donner à bail des immeubles ou des biens réels;

**c)** continuer le commerce du failli, dans la mesure où la chose peut être nécessaire pour la liquidation anticipée de l'actif;

**d)** intenter ou contester toute action ou autre procédure judiciaire se rapportant aux biens du failli;

**e)** employer un avocat ou autre représentant pour engager des procédures ou pour entreprendre toute affaire que les inspecteurs peuvent approuver;

**f)** accepter comme contrepartie pour la vente de tout bien du failli une somme d'argent payable à une date future, sous réserve des stipulations que les inspecteurs jugent convenables quant à la garantie ou à d'autres égards;

**g)** contracter des obligations, emprunter de l'argent et fournir des garanties sur tout bien du failli par voie d'hypothèque, de charge, de privilège, de cession, de nantissement ou autrement, telles obligations devant être libérées et tel argent emprunté devant être remboursé avec intérêt sur les biens du failli, avec priorité sur les réclamations des créanciers;

**h)** transiger sur toute dette due au failli et la régler;

shall vest in any person that the court may appoint, or, in default of any appointment, revert to the bankrupt for all the estate, or interest or right of the trustee in the estate, on any terms and subject to any conditions, if any, that the court may order.

#### Final statement of receipts and disbursements

**(3)** If an order is made under subsection (1), the trustee shall, without delay, prepare the final statements of receipts and disbursements referred to in section 151.

R.S., 1985, c. B-3, s. 181; 2004, c. 25, s. 86; 2005, c. 47, s. 109.

#### Stay on issue of order

**182 (1)** An order of discharge or annulment shall be dated on the day on which it is made, but it shall not be issued or delivered until the expiration of the time allowed for an appeal, and, if an appeal is entered, not until the appeal has been finally disposed of.

**(2)** [Repealed, 1992, c. 27, s. 65]

R.S., 1985, c. B-3, s. 182; 1992, c. 27, s. 65.

### PART VII

## Courts and Procedure

### Jurisdiction of Courts

#### Courts vested with jurisdiction

**183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

**(a)** in the Province of Ontario, the Superior Court of Justice;

**(b)** [Repealed, 2001, c. 4, s. 33]

**(c)** in the Provinces of Nova Scotia and British Columbia, the Supreme Court;

**(d)** in the Provinces of New Brunswick and Alberta, the Court of Queen's Bench;

**(e)** in the Province of Prince Edward Island, the Supreme Court of the Province;

**(f)** in the Provinces of Manitoba and Saskatchewan, the Court of Queen's Bench;

mais les biens du failli sont dévolus à la personne que le tribunal peut nommer, ou, à défaut de cette nomination, retournent au failli pour tout droit, domaine ou intérêt du syndic, aux conditions, s'il en est, que le tribunal peut ordonner.

#### État définitif des recettes et des débours

**(3)** Malgré l'annulation de la faillite, le syndic prépare sans délai l'état définitif des recettes et des débours visé à l'article 151.

L.R. (1985), ch. B-3, art. 181; 2004, ch. 25, art. 86; 2005, ch. 47, art. 109.

#### Suspension de l'émission de l'ordonnance

**182 (1)** L'ordonnance de libération ou d'annulation porte la date à laquelle elle est rendue, mais ne peut être émise ou délivrée avant l'expiration du délai accordé pour un appel ni, si appel est interjeté, avant que l'appel ait été finalement jugé.

**(2)** [Abrogé, 1992, ch. 27, art. 65]

L.R. (1985), ch. B-3, art. 182; 1992, ch. 27, art. 65.

### PARTIE VII

## Tribunaux et procédure

### Compétence des tribunaux

#### Tribunaux compétents

**183 (1)** Les tribunaux suivants possèdent la compétence en droit et en equity qui doit leur permettre d'exercer la juridiction de première instance, auxiliaire et subordonnée en matière de faillite et en d'autres procédures autorisées par la présente loi durant leurs termes respectifs, tels que ces termes sont maintenant ou peuvent par la suite être tenus, pendant une vacance judiciaire et en chambre :

**a)** dans la province d'Ontario, la Cour supérieure de justice;

**b)** [Abrogé, 2001, ch. 4, art. 33]

**c)** dans les provinces de la Nouvelle-Écosse et de la Colombie-Britannique, la Cour suprême;

**d)** dans les provinces du Nouveau-Brunswick et d'Alberta, la Cour du Banc de la Reine;

**e)** dans la province de l'Île-du-Prince-Édouard, la Cour suprême;

**f)** dans les provinces du Manitoba et de la Saskatchewan, la Cour du Banc de la Reine;

# TAB 2

2003 CarswellOnt 3514  
Ontario Superior Court of Justice

Wiggins, Re

2003 CarswellOnt 3514, [2003] O.J. No. 3685, [2003] O.T.C. 837, 125 A.C.W.S. (3d) 563, 50 C.B.R. (4th) 306, 67 O.R. (3d) 133

## IN THE MATTER OF the Consumer Proposal of Sally Teresa Wiggins

Swinton J.

Heard: September 16, 2003  
Judgment: September 18, 2003  
Docket: 31-388321

Counsel: Sanjeev P.R. Mitra for Administrator  
Valerie Anderson for Superintendent of Bankruptcy

Subject: Insolvency

### Related Abridgment Classifications

Bankruptcy and insolvency  
[VI Proposal](#)  
[VI.9 Consumer proposals](#)

### Headnote

Bankruptcy and insolvency --- Proposal — Consumer proposals

Debtor failed to make payments under consumer proposal for three months and then resumed payments and made up arrears — Pursuant to s. 66.31(1) of Bankruptcy and Insolvency Act debtor's consumer proposal was deemed annulled — Administrator of consumer proposal nevertheless allowed debtor to pay arrears and continued to make distributions to creditors as if consumer proposal remained in effect — Administrator brought application for declaration that court had inherent jurisdiction to waive default in consumer proposal more than three months following default — Application dismissed — Inherent jurisdiction cannot be exercised if exercise conflicts with provisions of Act — Section 66.31 deals specifically with what follows if consumer debtor is in default in payments for three months and makes it clear that consumer proposal is deemed annulled unless court has ordered otherwise or unless amendment to proposal has been filed before three-month period expires — Court did not have inherent jurisdiction to waive debtor's default and to set aside deemed annulment of her consumer proposal in view of express terms of Act.

### Table of Authorities

#### Cases considered by *Swinton J.*:

*Dziewiacien, Re* (2002), 2002 CarswellOnt 3599, 37 C.B.R. (4th) 250 (Ont. S.C.J.) — considered

*Schrader, Re* (1999), 13 C.B.R. (4th) 256, 1999 CarswellNS 330 (N.S. S.C.) — considered

*Thustie, Re* (1923), 3 C.B.R. 654, 23 O.W.N. 622, 1923 CarswellOnt 12 (Ont. S.C.) — considered

effect.

4 Mr. Justice Ground approved the omnibus procedure for this motion, which groups individuals like Ms. Wiggins in Schedule A and seeks an order waiving the default and setting aside the deemed annulment. Schedule B includes individuals who were in arrears over three months and who are making progress to make up the arrears. The Administrator seeks an order of waiver of the default, the setting aside of the deemed annulment and filing of an amended proposal, or the granting of leave to file a second consumer proposal. Finally, Schedule C consists of individuals who were in arrears over three months and who made unsuccessful attempts to catch up. An order is sought with respect to the distribution of funds held by the Administrator which were received after the deemed annulment.

5 Decisions of the Registrar in both Nova Scotia and Ontario have held that there is no specific authority under the *BIA* to allow a court to waive the default by the debtor following the deemed annulment of a consumer proposal (*Schrader, Re* (1999), 13 C.B.R. (4th) 256 (N.S. S.C.); *Dziewiacien, Re* (2002), 37 C.B.R. (4th) 250 (Ont. S.C.J.)). Deputy Registrar Nettie in *Dziewiacien, Re* held that s. 187(11) of the Act does not permit the court to extend a time period in the Act where there has been an intervening statutory event consequent upon default. That decision was not appealed.

6 Section 183(1) of the Act vests the Superior Court of Justice in Ontario and the named courts in other jurisdictions with “such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy”. The Administrator argued that this section confers inherent jurisdiction on this Court, which should be exercised in this case to waive the default and set aside the deemed annulment under the Act for debtors in Schedule A and B. Counsel for the Superintendent agreed with this position, based on the facts before me in this motion.

7 The Bankruptcy Court may authorize and sanction acts required to be done by a trustee for the due administration and protection of the bankrupt estate, even though there is no specific provision in the Act (*Thustie, Re* (1923), 3 C.B.R. 654 (Ont. S.C.)). However, inherent jurisdiction can not be exercised if the exercise conflicts with the provisions of the Act (*Wasserman, Arsenault Ltd. v. Sone* (2000), 22 C.B.R. (4th) 153 (Ont. S.C.J. [Commercial List]), aff'd (2000), 33 C.B.R. (4th) 145 (Ont. C.A.)). Here, s. 66.31 deals specifically with what follows if the consumer debtor is in default in payments for three months: the consumer proposal is deemed annulled unless the court has ordered otherwise or unless an amendment to the proposal has been filed *before* the three month period expires.

8 In my view, there is no inherent jurisdiction to waive a default like that of Ms. Wiggins and to set aside the deemed annulment of her consumer proposal, given the express terms of the Act. While Ontario courts may have granted the relief sought in this motion prior to the decision in *Dziewiacien, Re*, in my view, they had no inherent jurisdiction to do so.

9 Given that individuals like Ms. Wiggins and those in Schedule A have continued to make payments as if the consumer proposal were still in effect, and the Administrator has continued to make distributions, leave is given to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2. Given the payment history since the default, it appears that there is a reasonable prospect of the new proposal being accepted by the creditors.

10 Given the history of the Schedule B debtors, I also grant leave to this group to file a second consumer proposal, and I order that they are entitled to the relief in ss. 69-69.2 for the same reason.

11 With respect to Schedule C, the Administrator has asked for directions with respect to the distribution of funds which it received after the deemed annulment. According to *White, Re* (2001), 31 C.B.R. (4th) 128 (N.S. S.C.), those funds should be distributed to the creditors.

*Application dismissed.*

**TAB 3**



2006 ABQB 236  
Alberta Court of Queen's Bench

Residential Warranty Co. of Canada Inc., Re

2006 CarswellAlta 383, 2006 ABQB 236, [2006] A.W.L.D. 1798, 21 C.B.R. (5th) 57, 393 A.R. 340, 62 Alta. L.R. (4th) 168

## **In the Matter of the Bankruptcy of Residential Warranty Company of Canada Inc.**

In the matter of the Bankruptcy of Residential Warranty Insurance Services Ltd.

Topolniski J.

Judgment: March 24, 2006\*  
Docket: Edmonton 24-112232, 24-112233

Proceedings: Affirmed, 2006 CarswellAlta 1354, (sub nom. Residential Warranty Co. of Canada Inc. (Bankrupt), Re) 417 A.R. 153, [2006] A.W.L.D. 3143, 275 D.L.R. (4th) 498, (sub nom. Kingsway General Insurance Co. v. Residential Warranty Co. of Canada Inc. (Trustee of)) [2006] I.L.R. I-4552, (sub nom. Residential Warranty Co. of Canada Inc. (Bankrupt), Re) 410 W.A.C. 153, [2006] 12 W.W.R. 213, 2006 ABCA 293, 65 Alta. L.R. (4th) 32, 25 C.B.R. (5th) 38 (Alta. C.A.)

Counsel: John I. McLean for Kingsway General Insurance Company  
Kent Rowan for Deloitte & Touche Inc.

Subject: Insolvency; Estates and Trusts

### **Related Abridgment Classifications**

Bankruptcy and insolvency

XIV Administration of estate

XIV.2 Trustees

XIV.2.k Remuneration of trustee

XIV.2.k.i General principles

### **Headnote**

Bankruptcy and insolvency --- Administration of estate — Trustees — Remuneration of trustee — General principles  
Bankrupts were in process of winding up home warranty business — Trustee was appointed interim receiver in context of minority shareholder's oppression remedy — Creditor was insurance underwriter of home warranty policies brokered or administered by bankrupts — Creditor filed proofs of claim in estates for approximately \$11 million pursuant to contractual, statutory and common law trusts and brought related concurrent action against bankrupts — Trustee gave notice that trust claim was disputed — Trustee maintained that all or substantially all insurance premiums collected by bankrupts for insurance policies were paid to creditor and that balance of estate of bankrupts was income derived from business operations — Creditor appealed trustee's decision — Creditor brought application for order that trustee was not entitled to utilize realizations of assets and property of bankrupts for purpose of fees and expenses — Application dismissed — Trustee was entitled to retrospective charge on assets under administration for fees and expenses in undertaking work on estate to date — Common sense dictated trustees in bankruptcy receive reasonable compensation when called upon to exercise duties and judgment — If compensation were commonly withdrawn in such instances, trustees would be inclined to shy away from problems and few would be willing to take on role — Creditor had not discharged onus of establishing valid trust on date of bankruptcy — Creditor's action had been stayed and creditor had not been vigilant in pursuing other grievances — No evidence was presented illustrating trustee's actions favoured any party to bankruptcy.

prepared three reports for the Court. Kingsway contends that the IR's mention of the BC Action in its first report, dated December 21, 2004, constitutes evidence of notice to Deloitte & Touche LLP of Kingsway's trust claim, and that funding for the Trustee from alleged trust assets, which comprise the entire estate of both Bankrupts, should not be allowed after that date. It asserts that funding should not extend beyond October 4, 2005 at the very latest, when its counsel particularized its trust claim and formally put the Trustee on notice of the position which it now advances.

20 The assets under the Trustee's administration include bank accounts and claims against various parties, but the vagaries of the Bankrupts' business and their relationships with others have somewhat complicated the Trustee's work. Apart from the typical issues arising in any bankruptcy (financial analysis, securing assets, reviewing proofs of claim, reporting to and meeting with creditors and inspectors, and acting as the point person coordinating court matters), the Trustee has instructed litigation and dealt with winding up business operations. It has also addressed enquiries from policyholders and builder claimants about warranties and the refund of deposits relating to 550 properties.

21 Kingsway has referred some policyholders to the Trustee on denying coverage under various policies and it has jointly instructed some litigation with the Trustee. The Trustee has provided it with financial analyses and other information, including information concerning the Trustee's findings on premium payments.

22 The Trustee predicts that its future work will entail continued realization of assets through litigation efforts, including intended litigation against Kingsway to recover \$1,500,000.00 in allegedly overdue profit sharing, and resolution of creditor and proprietary claims. In due course, it will wind up the estates, return property rightfully belonging to others, and distribute residual property to the creditors.

23 There are 627 persons interested in the builders' deposit fund and letters of credit (Builder Claimants). The builders' deposit fund is worth approximately \$1,000,000.00 while the letters of credit are valued at approximately \$5,000,000.00. The Trustee concedes that some of the Builder Claimants have trust claims against the cash builders' deposits. The method by which builders' claims are to be proved in the bankruptcy and a claims bar date were set by Order in December 2005. Kingsway has agreed to that process.

24 Kingsway has participated in case management meetings and applications relating to the claims of the Builder Claimants. It has requested that it be given notice of claims that the Trustee disallows. It also wants to participate in the Trustee's application for directions as to whether the letters of credit are impressed with a trust and appeals of the disallowance by the Trustee of some builders' claims. Kingsway maintains that it is entitled to all of the value of the letters of credit, although it has not indicated how these can be considered traceable trust assets. It also claims approximately \$300,000.00 of the builders' cash deposit fund as a result of alleged setoffs owed to it by builders for the cost of repairs. Kingsway takes the position that once the claims of the Builder Claimants who are seeking access to the cash fund have been resolved in these bankruptcy proceedings, the Builder Claimants must "duke it out" with Kingsway in the ordinary courts to determine who is entitled to the funds.

### III. Analysis

#### A. Fairness, Practicality and Neutrality

25 A significant objective of the *BIA* is to ensure that all of the property owned by the bankrupt or in which the bankrupt has a beneficial interest at the date of bankruptcy will, with limited exceptions, vest in the trustee for realization and ratable distribution to creditors. To further this objective, the *BIA* provides for practical, efficient and relatively inexpensive mechanisms for asset recovery, determination of the validity of creditor claims, and distribution of the estate. A fundamental tenet of *BIA* proceedings is that fairness should govern.

26 The *BIA* expressly preserves the Bankruptcy Court's equitable and ancillary powers.<sup>2</sup> Accordingly, inherent jurisdiction is maintained and available as an important but sparingly used tool. There are two preconditions to the Court exercising its inherent jurisdiction: (1) the *BIA* must be silent on a point or not have dealt with a matter exhaustively; and (2) after balancing competing interests, the benefit of granting the relief must outweigh the relative prejudice to those affected by it. Inherent jurisdiction is available to ensure fairness in the bankruptcy process and fulfilment of the substantive objectives of the *BIA*, including the proper administration and protection of the bankrupt's estate.<sup>3</sup>