

CANADA / JUDGMENT

Gidda (Re)

2020 BCSC 121

COURT

Supreme Court of British Columbia

DECIDED

3 February 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 121 Gidda (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gidda (Re),

2020 BCSC 121

Date: 20200203

Docket: B53854

Registry: Vernon

In the Matter of the Bankruptcy of

Kaldep Singh Gidda

Before: Master Taylor

(as Registrar)

Reasons for Judgment

Counsel for Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue:

C. Matthews

J. Paoletti

Counsel for E. Sands & Associates Inc. (the "Trustee"):

B. Lewis-Hand

Place and Date of Hearing:

Vancouver, B.C.

December 2-3, 2019

Place and Date of Judgment:

Vancouver, B.C.

February 3, 2020

- [1] This is an appeal of the decision of a Trustee in Bankruptcy where the applicant, Her Majesty the Queen in Right of Canada (the "Crown") as represented by the Minister of National Revenue (the "Minister"), seeks to set aside the decision of the Trustee to disallow the secured portion of the Crown's proof of claim. As well, the Crown seeks orders that the trustee be directed to allow the Crown's proof of claim as a secured claim at the value set out in the proof of claim for all purposes; that the trustee remit to the Crown the proceeds of sale including interest from the sale of the property legally described as parcel identifier 003-439-658 (the "Property"); and costs payable personally by the trustee, or alternatively, costs payable from the estate.

Factual Matrix

- [2] Kaldep Singh Gidda (the "Bankrupt") is indebted to the Crown for unremitted income tax and Goods and Services Tax ("GST") in the total amount of \$1,107,248.85 as of the date of his bankruptcy on November 1, 2016.
- [3] At all times material to these proceedings, the Bankrupt was the owner of an undivided one-half interest in the Property, with his brother, Nirmal Gidda, who was the other owner of an undivided one-half interest in the Property.
- [4] On October 27, 2014, the Federal Court certified part of the GST debt, and part of the income tax debt on October 28, 2014, under Certificates ETA-9078-14 ("Judgment #1") and ITA 12575-14 ("Judgment #2") respectively.
- [5] On March 17, 2016, the Federal Court certified another part of the income tax debt under Certificate ITA 2911-16 ("Judgment #3").
- [6] The Minister registered Judgments #1, #2 and #3 (collectively "the Crown's Judgments") in the land title office against the Bankrupt's interest in the Property under registration numbers CA4735690, CA4735669 and CA5100661 respectively.
- [7] Judgments #1 and #2 were registered in the land title office on October 9, 2015. Judgment #3 was registered on April 11, 2016.
- [8] The Bankrupt made a voluntary assignment into bankruptcy on November 1, 2016.
- [9] The Bankrupt was also jointly and severally indebted to Farm Credit Canada ("FCC") along with numerous other non-arm's length companies and individuals including his brother, Nirmal Gidda ("the FCC Defendants").

- [10] FCC commenced proceedings under court file no. S146599 against the FCC Defendants and obtained a personal judgment against those Defendants. FCC registered its judgment in the land title office against both the interest of the Bankrupt as well as the interest of Nirmal Gidda in the Property and then brought applications under the Court Order Enforcement Act to enforce its judgment.
- [11] A reference to the Registrar took place on or about July 27, 2016. At that time, there were several judgments registered against title of the Property, including the Crown's Judgments. The Crown maintains that none of the judgments at that time had any priority or preferential status over any of the other judgments.
- [12] As of the date of the bankruptcy, FCC had conduct of sale of the Property (both the interest of the Bankrupt as well as the interest of his brother) in action no. S146599 and the Property was listed for sale.
- [13] Approval of sale was granted by court order on or about January 9, 2017. This was done with the acquiescence if not consent of the trustee when FCC applied for and obtained the order approving sale.
- [14] The Crown maintains that the bankruptcy triggered section 87 of the Bankruptcy and Insolvency Act ("BIA") which, combined with the Income Tax Act ("ITA") subsection 223(11.1) and Excise Tax Act ("ETA") subsection 316(10.1), results in the Crown's Judgments being deemed secured claims in the bankruptcy.
- [15] The Crown filed a proof of claim as a secured creditor for the amounts owing under the Crown's Judgments, and as unsecured for the balance. The secured claim is \$985,988.24 and the unsecured claim is \$121,260.61 for a total claim of \$1,107,248.85.

The Notice of Disallowance

- [16] By Notice of Disallowance dated May 22, 2019, the trustee gave notice to the Crown of disallowance of its Proof of Claim ("POC") as follows:

As Trustee acting in the matter of the bankruptcy of Kaldep Singh Gidda, I have disallowed the secured portion of the POC in the amount of \$985,988.24 pursuant to subsection 135(2) of the BIA, and more particularly, the following:

1. \$320,381.09 from certificates issued by the Federal Court pursuant to the ITA. The Federal Crown registered the said certificates as judgments under #CA4735669 and CAS 100661 on the title to the Property prior to the date of bankruptcy; and
2. \$665,607.15 from a certificate issued by the Federal Court pursuant to the ETA. The Federal Crown registered the certificate as a judgment under CA4735690 on the title to the Property prior to the date of bankruptcy.

(herein referred to as the "Secured Portion of the POC")

for the following reasons:

A. The Secured Portion of the POC is disallowed in its entirety based on the following:

1. Statutory interpretation principles relating to taxation statutes provide that the words of a statute are to be read in context, in light of the statute as a whole, and keeping in mind the words of the other provisions. Subsections (2), (4), (5) and (6) of section 316 of the ETA and subsections (3), (5) (6) and (7) of section 223 of the ITA provide that the certificates registered in the Federal Court and/or the memorials are subject to the same restrictions as judgments of a superior court of the province.

Section 72 of the BIA provides that the provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law in addition to the rights and remedies provided by the BIA.

Subsection (6) of s.223 of the ITA and subsection (5) of section 316 of the ETA provide that if a memorial is registered, the charge, lien or priority that is created on property in the province is subordinate to any charge, lien, priority or binding interest in respect of which all steps necessary to make it effective against other creditors were taken before the time the memorial was filed or registered. Section 87(2)(a) of the BIA provides that in relation to a bankruptcy a security in favour of the crown that is registered in accordance with s.87(l) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration. The Other Judgments were registered on the title to the Property prior to the registration of the CRA judgments, and the said registrations were charges within the meaning of the Land Title Act, R.S.B.C. 1996, c.250 ("LTA"), Pursuant to the laws of the province of British Columbia, the said registrations was all that was needed to make the Other Judgments effective against other creditors. Pursuant to s. 28 of the LTA, the priority ranking of all charges is the date of registration and, therefore, the Other Judgments ranked in priority to the CRA judgments up to the date of bankruptcy.

Upon the Bankrupt making an assignment into bankruptcy on November 3, 2016 [sic], sections 70-72 of the BIA became applicable to his property, including his interest in the Property. Pursuant to s. 70 of the BIA, the Bankrupt's assignment into bankruptcy took precedence over all judgments including certificates have the effect of judgments except the rights of secured creditors. By reason of s. 28 of the LTA, and sections 70 and 72 of the BIA, the Trustee is entitled to the rights that accrued to the creditors holding the Other Judgments since they were registered prior to the CRA judgments. As the amount owing on the Other Judgments exceeds the Net Sale Proceeds, the Trustee Is entitled to same.

The Federal Crown's position that by reason of the registration of the CRA judgments on title to the Property it is entitled to the Net Sale Proceeds requires one to ignore, or give no effect to, the Other Judgments that were registered on title to the Property prior to the registration of the CRA judgments. This position is contrary to sections 70 and 72 of the BIA, s.223(6) of the ITA and s.316(5) of the ETA.

2. The Federal Crown's position regarding the interplay of s. 316(10.1) of the ETA", s.223 (11.1) of the ITA, and sections 86 and 87 of the BIA undermines the purpose

of the BIA, namely that a bankrupt's assets are to be divided fairly among all creditors.

B. In the alternative, the Secured Portion of the POC is limited to a pro rata share of the Net Sale Proceeds after allowing for the Other Judgments based on the following:

1. The Federal Crown obtained the benefit of provincial legislation in British Columbia, including the COEA that was required in order for the Federal Crown to be able to register the certificates as judgments on land in British Columbia and consequently, the Federal Crown must take the burden associated with the provincial legislation. The Property was sold pursuant to COEA, and therefore, the Federal Crown is subject to the rateable distribution scheme provided for in this legislation and the CAA.
2. The Secured Portion of the POC arises from section 223 (11.1) of the ITA and section 316(10.1) of the ETA. It is deemed to be a claim that is "secured by a security". By reason of the subsections of s. 316 of the ETA and s. 223 of the ITA, the security is in the form of a judgment. Those subsections provide that once a memorial is registered it creates a charge or lien on the property "in the same manner and to the same extent as if the memorial were a judgment".

S. 136 of the BIA provides for the priority ranking of claims (preferred and unsecured) in a bankruptcy. Section 136 is "subject to the rights of secured creditors". Since the Federal Crown's security is in the form of a judgment, the Federal Crown's rights as a secured creditor are limited to those of a judgment creditor. In British Columbia, judgment creditors have the right to register their judgments on land pursuant to COEA. The COEA further provides that judgment creditors share ratably in the proceeds of sale for land that is sold pursuant to that legislation. Pursuant to s. 94 of COEA, the district registrar of the Supreme Court determines what judgments form liens and charges on the property in question and the priority between judgments. On July 27, 2016, the District Registrar filed a report in the Realization Proceedings wherein it determined that there would be no priority between the judgment creditors (i.e. CRA judgments and the Other Judgments) and the proceeds would be distributed in accordance with the CAA. The Registrar's Report was confirmed by court order on September 1, 2016. The CAA provides for a rateable sharing of the sale proceeds among all execution creditors. Accordingly, once the Federal Crown's certificates were registered as judgments on the title to the Property, it was bound in the same manner and to the same extent as the creditors with the Other Judgments. However, given the bankruptcy of Gidda, the Trustee assumes the rights accruing to the creditors with the Other Judgments registered on the Property pursuant to sections 70 and 72 of the BIA.

3. Had Parliament intended for a secured claim in the form of a judgment under s. 86 and 87 of the BIA to gain a priority ranking higher than is permitted by the laws of the province in relation to judgment creditors then Parliament would have included language within s. 86 and 87 that excluded s. 70 and 72 from operation.
4. The Federal Crown's position requires (the court to fill in a gap in legislation. The courts will not generally fill a gap in legislation when interpreting taxation statutes or legislation that severely affect property rights. The Federal Crown's position severely affects the property rights that vested with the Trustee pursuant to s. 71 and 72 of the BIA, and it severely undermines the intention of the BIA, namely that a bankrupt's property are to be divided fairly among all creditors.
5. The cases relied on by the Federal Crown in support of its position have not thoroughly considered the various subsections of s. 223 of the ITA and s. 316 of the OTA, in relation to s. 70-72, 86, 87, and 136 of the BIA.

And further take notice that if you are dissatisfied with our decision in disallowing your claim in whole or in part (or a right to rank or your security or valuation of your claim), you may appeal to the court within the 30-day period after the day on which this notice is served, or within any other period that the court may, on application made within the same 30-day period, allow.

Dated at the City of Surrey in the Province of British Columbia, this day 22 of May, 2019.

[17] Thus, the issues that arise for determination are:

- (a) Whether the Trustee was correct in his determination that the Crown is not a secured creditor under the Income Tax Act, the Bankruptcy and Insolvency Act and the Excise Tax Act and therefore not entitled to the proceeds of the sale of the said lands as a secured creditor following bankruptcy of the tax debtor.
- (b) Whether, the Secured Portion of the POC is limited to a pro rata share of the Net Sale Proceeds after allowing for the Other Judgments

The Legislation

[18] The following statutory authorities are engaged in the discourse between the Crown and the Trustee in the case at bar:

Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3, sections 70, 71, 72, 74, 86, 87, & 141.

Precedence of bankruptcy orders and assignments

70 (1) Every bankruptcy order and every assignment made under this Act takes precedence over all judicial or other attachments, garnishments, certificates having the effect of judgments, judgments, certificates of judgment, legal hypothecs of judgment creditors, executions or other process against the property of a bankrupt, except those that have been completely executed by payment to the creditor or the creditor's representative, and except the rights of a secured creditor.

- (2) Despite subsection (1), one bill of costs of a barrister or solicitor or, in the Province of Quebec, an advocate, including the executing officer's fees and land registration fees, shall be payable to the creditor who has first attached by way of garnishment or filed with the executing officer an attachment, execution or other process against the property of the bankrupt.

Vesting of property in trustee

71 On a bankruptcy order being made or an assignment being filed with an official receiver, a bankrupt ceases to have any capacity to dispose of or otherwise deal with their property, which shall, subject to this Act and to the rights of secured creditors, immediately pass to and vest in the trustee named in the bankruptcy order or assignment, and in any case of change of trustee the property shall pass from trustee to trustee without any assignment or transfer.

Application of other substantive law

72 (1) The provisions of this Act shall not be deemed to abrogate or supersede the substantive provisions of any other law or statute relating to property and civil rights that are not in conflict with this Act, and the trustee is entitled to avail himself of all rights and remedies provided by that law or statute as supplementary to and in addition to the rights and remedies provided by this Act.

Operation of provincial law re documents executed under Act

- (2) No bankruptcy order, assignment or other document made or executed under the authority of this Act shall, except as otherwise provided in this Act, be within the operation of any legislative enactment in force at any time in any province relating to deeds, mortgages, hypothecs, judgments, bills of sale, chattel mortgages, property or registration of documents affecting title to or liens or charges on real or personal property or immovables or movables.

Registration of bankruptcy order or assignment

74 (1) Every bankruptcy order, or a true copy certified by the registrar or other officer of the court that made it, and every assignment, or a true copy certified by the official receiver, may be registered by or on behalf of the trustee in respect of the whole or any part of any real property in which the bankrupt has any interest or estate, or in respect of the whole or any part of any

immovable in which the bankrupt has any right, in the registry office in which, according to the law of the province in which the real property or immovable is situated, deeds or transfers of title and other documents relating to real property, an immovable or any interest or estate in real property or any right in an immovable may be registered.

Effect of registration

- (2) If a bankrupt is the registered owner of any real property or immovable or the registered holder of any charge, the trustee, on registration of the documents referred to in subsection (1), is entitled to be registered as owner of the real property or immovable or holder of the charge free of all encumbrances or charges mentioned in subsection 70(1).

Caveat may be filed

- (3) If a bankrupt owns any real property or immovable or holds any charge registered in a land registry office or has or is believed to have any interest, estate or right in any of them, and for any reason a copy of the bankruptcy order or assignment has not been registered as provided in subsection (1), a caveat or caution may be filed with the official in charge of the land registry by the trustee, and any registration made after the filing of the caveat or caution in respect of the real property, immovable or charge is subject to the caveat or caution unless it has been removed or cancelled under the provisions of the Act under which the real property, immovable, charge, interest, estate or right is registered.

Duty of official

- (4) Every official to whom a trustee tenders or causes to be tendered for registration any bankruptcy order, assignment or other document shall register it according to the ordinary procedure for registering within the official's office documents relating to real property or immovables.

Status of Crown claims

86 (1) In relation to a bankruptcy or proposal, all provable claims, including secured claims, of Her Majesty in right of Canada or a province or of anybody under an Act respecting workers' compensation, in this section and in section 87 called a "workers' compensation body", rank as unsecured claims.

Exceptions

- (2) Subsection (1) does not apply
- (a) to claims that are secured by a security or charge of a kind that can be obtained by persons other than Her Majesty or a workers' compensation body
- (i) pursuant to any law, or

(ii) pursuant to provisions of federal or provincial legislation, where those provisions do not have as their sole or principal purpose the establishment of a means of securing claims of Her Majesty or of a workers' compensation body; and

(b) to the extent provided in subsection 87(2), to claims that are secured by a security referred to in subsection 87(1), if the security is registered in accordance with that subsection.

Exceptions

(3) Subsection (1) does not affect the operation of

(a) subsections 224(1.2) and (1.3) of the Income Tax Act;

(b) any provision of the Canada Pension Plan or of the Employment Insurance Act that refers to subsection 224 of the Income Tax Act and provides for the collection of a contribution, as defined in the Canada Pension Plan, an employee's premium, or employer's premium, as defined in the Employment Insurance Act, or a premium under Part VII.1 of that Act, and of any related interest, penalties or other amounts; or

(c) any provision of provincial legislation that has a similar purpose to subsection 224(1.2) of the Income Tax Act, or that refers to that subsection, to the extent that it provides for the collection of a sum, and of any related interest, penalties or other amounts, where the sum

(i) has been withheld or deducted by a person from a payment to another person and is in respect of a tax similar in nature to the income tax imposed on individuals under the Income Tax Act, or

(ii) is of the same nature as a contribution under the Canada Pension Plan if the province is a province providing a comprehensive pension plan as defined in subsection 3(1) of the Canada Pension Plan and the provincial legislation establishes a provincial pension plan as defined in that subsection,

and for the purpose of paragraph (c), the provision of provincial legislation is, despite any Act of Canada or of a province or any other law, deemed to have the same effect and scope against any creditor, however secured, as subsection 224(1.2) of the Income Tax Act in respect of a sum referred to in subparagraph (c)(i), or as subsection 23(2) of the Canada Pension Plan in respect of a sum referred to in subparagraph (c)(ii), and in respect of any related interest, penalties or other amounts.

Statutory Crown securities

87 (1) A security provided for in federal or provincial legislation for the sole or principal purpose of securing a claim of Her Majesty in right of Canada or of a province or of a workers' compensation body is valid in relation to a bankruptcy or proposal only if the security is registered under a prescribed system of registration before the date of the initial bankruptcy event.

- (2) In relation to a bankruptcy or proposal, a security referred to in subsection (1) that is registered in accordance with that subsection
- (a) is subordinate to securities in respect of which all steps necessary to make them effective against other creditors were taken before that registration; and
- (b) is valid only in respect of amounts owing to Her Majesty or a workers' compensation body at the time of that registration, plus any interest subsequently accruing on those amounts

Claims generally payable rateably

141 Subject to this Act, all claims proved in a bankruptcy shall be paid rateably.

Excise Tax Act, R.S.C 1985 c. #15, section 316

Certificates

316 (1) Any tax, net tax, penalty, interest or other amount payable or remittable by a person (in this section referred to as the "debtor") under this Part, or any part of any such amount, that has not been paid or remitted as and when required under this Part may be certified by the Minister as an amount payable by the debtor.

Registration in court

- (2) On production to the Federal Court, a certificate made under subsection (1) in respect of a debtor shall be registered in the Court and when so registered has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court against the debtor for a debt in the amount certified plus interest and penalty thereon as provided under this Part to the day of payment and, for the purposes of any such proceedings, the certificate shall be deemed to be a judgment of the Court against the debtor for a debt due to Her Majesty and enforceable as such.

Costs

- (3) All reasonable costs and charges incurred or paid in respect of the registration in the Court of a certificate made under subsection (1) or in respect of any proceedings taken to collect the amount certified are recoverable in like manner as if they had been included in the amount certified in the certificate when it was registered.

Charge on property

- (4) A document issued by the Federal Court evidencing a certificate in respect of a debtor registered under subsection (2), a writ of that Court issued pursuant to the certificate or any notification of the document or writ (such document, writ or notification in this section referred to as a "memorial") may be filed, registered or otherwise recorded for the purpose of creating a charge, lien or priority on, or a binding interest in, property in a province, or any interest in such property, held by the debtor in the same manner as a document

evidencing

- (a) a judgment of the superior court of the province against a person for a debt owing by the person, or
- (b) an amount payable or required to be remitted by a person in the province in respect of a debt owing to Her Majesty in right of the province

may be filed, registered or otherwise recorded in accordance with or pursuant to the law of the province to create a charge, lien or priority on, or a binding interest in, the property or interest.

Creation of charge

- (5) If a memorial has been filed, registered or otherwise recorded under subsection (4),
 - (a) a charge, lien or priority is created on, or a binding interest is created in, property in the province, or any interest in such property, held by the debtor, or
 - (b) such property or interest in the property is otherwise bound,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph (4)(a) or an amount referred to in paragraph (4)(b), and the charge, lien, priority or binding interest created shall be subordinate to any charge, lien, priority or binding interest in respect of which all steps necessary to make it effective against other creditors were taken before the time the memorial was filed, registered or otherwise recorded.

Proceedings in respect of memorial

- (6) If a memorial is filed, registered or otherwise recorded in a province under subsection (4), proceedings may be taken in the province in respect of the memorial, including proceedings

- (a) to enforce payment of the amount evidenced by the memorial, interest and penalty on the amount and all costs and charges paid or incurred in respect of

§ (i) the filing, registration or other recording of the memorial, and

§ (ii) proceedings taken to collect the amount,

- (b) to renew or otherwise prolong the effectiveness of the filing, registration or other recording of the memorial,
- (c) to cancel or withdraw the memorial wholly or in respect of any of the property or interests affected by the memorial, or
- (d) to postpone the effectiveness of the filing, registration or other recording of the memorial in favour of any right, charge, lien or priority that has been or is intended to be filed, registered or otherwise recorded in respect of any property or interest affected by the memorial,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph (4)(a) or an amount referred to in paragraph (4)(b), except that, if in any such proceeding or as a condition precedent to any such proceeding, any order, consent or ruling is required under the law of the province to be made or given by the superior court of the province or by a judge or official of that court, a like order, consent or ruling may be made or given by the Federal Court or by a judge or official of the Federal Court and, when so made or given, has the same effect for the purposes of the proceeding as if it were made or given by the superior court of the province or by a judge or official of that court.

Presentation of documents

(7) If

- (a) a memorial is presented for filing, registration or other recording under subsection (4), or a document relating to the memorial is presented for filing, registration or other recording for the purpose of any proceeding described in subsection (6), to any official in the land, personal property or other registry system of a province, or
- (b) access is sought to any person, place or thing in a province to make the filing, registration or other recording,

the memorial or document shall be accepted for filing, registration or other recording or the access shall be granted, as the case may be, in the same manner and to the same extent as if the memorial or document relating to the memorial were a document evidencing a judgment referred to in paragraph (4)(a) or an amount referred to in paragraph (4)(b) for the purpose of a like proceeding, except that, if the memorial or document is issued by the Federal Court or signed or certified by a judge or official of that Court, any affidavit, declaration or other evidence required under the law of the province to be provided with or to accompany the memorial or document in the proceedings is deemed to have been provided with or to have accompanied the memorial or document as so required.

Sale, etc.

- (8) Despite any law of Canada or of a province, a sheriff or other person shall not, without the written consent of the Minister, sell or otherwise dispose of any property or publish any notice or otherwise advertise in respect of any sale or other disposition of any property pursuant to any process issued or charge, lien, priority or binding interest created in any proceeding to collect an amount certified in a certificate made under subsection (1), interest or penalty on the amount or costs, but if that consent is subsequently given, any property that would have been affected by such a process, charge, lien, priority or binding interest if the Minister's consent had been given at the time the process was issued or the charge, lien, priority or binding interest was created, as the case may be, shall be bound, seized, attached, charged or otherwise affected as it would be if that consent had been given at the time the process was issued or the charge, lien, priority or binding interest was created, as the case may be.

Completion of notices, etc.

- (9) If information required to be set out by any sheriff or other person in a minute, notice or document required to be completed for any purpose cannot, because of subsection (8), be so set out without the written consent of the Minister, the sheriff or other person shall complete the minute, notice or document to the extent possible without that information and, when the Minister's consent is given, a further minute, notice or document setting out all the information shall be completed for the same purpose, and the sheriff or other person, having complied with this subsection, is deemed to have complied with the Act, regulation or rule requiring the information to be set out in the minute, notice or document.

Application for an order

- (10) A sheriff or other person who is unable, because of subsection (8) or (9), to comply with any law or rule of court is bound by any order made by a judge of the Federal Court, on an ex parte application by the Minister, for the purpose of giving effect to the proceeding, charge, lien, priority or binding interest.

Deemed security

(10.1) When a charge, lien, priority or binding interest created under subsection (5) by filing, registering or otherwise recording a memorial under subsection (4) is registered in accordance with subsection 87(1) of the Bankruptcy and Insolvency Act, it is deemed

- (a) to be a claim that is secured by a security and that, subject to subsection 87(2) of that Act, ranks as a secured claim under that Act; and
- (b) to also be a claim referred to in paragraph 86(2)(a) of that Act.

Details in certificates and memorials

- (11) Notwithstanding any law of Canada or of a province, in any certificate made under subsection (1) in respect of a debtor, in any memorial evidencing the certificate or in any writ or document issued for the purpose of collecting an amount certified, it is sufficient for all purposes
- (a) to set out, as the amount payable by the debtor, the aggregate of amounts payable by the debtor without setting out the separate amounts making up that aggregate; and
 - (b) to refer to the rate of interest or penalty to be charged on the separate amounts making up the amount payable in general terms as

§ (i) in the case of interest, interest at the prescribed rate under this Part applicable from time to time on amounts payable to the Receiver General, without indicating the specific rates of interest to be charged on each of the separate amounts or to be charged for any particular period of time, or

§ (ii) in the case of a penalty, a penalty under section 280.1 on amounts payable to the Receiver General.

Income Tax Act, R.S.C. 1985 c. 1-21 (5th Supp.)

Definition of amount payable

223 (1) For the purposes of subsection 223(2), an amount payable by a person means any or all of

- (a) an amount payable under this Act by the person;
- (b) an amount payable under the Employment Insurance Act by the person;
- (b.1) an amount payable under the Unemployment Insurance Act by the person;
- (c) an amount payable under the Canada Pension Plan by the person; and
- (d) an amount payable by the person under an Act of a province with which the Minister of Finance has entered into an agreement for the collection of taxes payable to the province under that Act.

Certificates

- (2) An amount payable by a person (in this section referred to as a "debtor") that has not been paid or any part of an amount payable by the debtor that has not been paid may be certified by the Minister as an amount payable by the debtor.

Registration in court

- (3) On production to the Federal Court, a certificate made under subsection 223(2) in respect of a debtor shall be registered in the Court and when so registered has the same effect, and all proceedings may be taken thereon, as if the certificate were a judgment obtained in the Court against the debtor for a debt in the amount certified plus interest thereon to the day of payment as provided by the statute or statutes referred to in subsection 223(1) under which the amount is payable and, for the purpose of any such proceedings, the certificate shall be deemed to be a judgment of the Court against the debtor for a debt due to Her Majesty, enforceable in the amount certified plus interest thereon to the day of payment as provided by that statute or statutes.

Costs

- (4) All reasonable costs and charges incurred or paid in respect of the registration in the Court of a certificate made under subsection 223(2) or in respect of any proceedings taken to collect the amount certified are recoverable in like manner as if they had been included in the amount certified in the certificate when it was registered.

Charge on property

- (5) A document issued by the Federal Court evidencing a certificate in respect of a debtor registered under subsection (3), a writ of that Court issued pursuant to the certificate or any notification of the document or writ (such document, writ or notification in this section referred to as a "memorial") may be filed, registered or otherwise recorded for the purpose of creating a charge, lien or priority on, or a binding interest in, property in a province, or any interest in, or for civil law any right in, such property, held by the debtor in the same manner as a document evidencing
- (a) a judgment of the superior court of the province against a person for a debt owing by the person, or
 - (b) an amount payable or required to be remitted by a person in the province in respect of a debt owing to Her Majesty in right of the province

may be filed, registered or otherwise recorded in accordance with or pursuant to the law of the province to create a charge, lien or priority on, or a binding interest in, the property or interest.

Creation of charge

- (6) If a memorial has been filed, registered or otherwise recorded under subsection (5),
- (a) a charge, lien or priority is created on, or a binding interest is created in, property in the province, or any interest in, or for civil law any right in, such property, held by the debtor, or
 - (b) such property, or interest or right in the property, is otherwise bound,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph (5)(a) or an amount referred to in paragraph (5)(b), and the charge, lien, priority or binding interest created shall be subordinate to any charge, lien, priority or binding interest in respect of which all steps necessary to make it effective against other creditors were taken before the time the memorial was filed, registered or otherwise recorded.

Proceedings in respect of memorial

- (7) If a memorial is filed, registered or otherwise recorded in a province under subsection 223(5), proceedings may be taken in the province in respect of the memorial, including proceedings
- (a) to enforce payment of the amount evidenced by the memorial, interest on the amount and all costs and charges paid or incurred in respect of

§ (i) the filing, registration or other recording of the memorial, and

§ (ii) proceedings taken to collect the amount,

- (b) to renew or otherwise prolong the effectiveness of the filing, registration or other recording of the memorial,
- (c) to cancel or withdraw the memorial wholly or in respect of any of the property, or interests or rights, affected by the memorial, or
- (d) to postpone the effectiveness of the filing, registration or other recording of the memorial in favour of any right, charge, lien or priority that has been or is intended to be filed, registered or otherwise recorded in respect of any property, or interest or right, affected by the memorial,

in the same manner and to the same extent as if the memorial were a document evidencing a judgment referred to in paragraph 223(5)(a) or an amount referred to in paragraph 223(5)(b), except that if in any such proceeding or as a condition precedent to any such proceeding any order, consent or ruling is required under the law of the province to be made or given by the superior court of the province or a judge or official of the court, a like order, consent or ruling may be made or given by the Federal Court or a judge or official of the Federal Court and, when so made or given, has the same effect for the purposes of the proceeding as if it were made or given by the superior court of the province or a judge or official of the court.

Presentation of documents

- (8) If
 - (a) a memorial is presented for filing, registration or other recording under subsection (5) or a document relating to the memorial is presented for filing, registration or other recording for the purpose of any proceeding described in subsection (7) to any official in the land registry system, personal property or movable property registry system, or other registry system, of a province, it shall be accepted for filing, registration or other recording, or
 - (b) access is sought to any person, place or thing in a province to make the filing, registration or other recording, the access shall be granted

in the same manner and to the same extent as if the memorial or document relating to the memorial were a document evidencing a judgment referred to in paragraph 223(5)(a) or an amount referred to in paragraph 223(5)(b) for the purpose of a like proceeding, as the case may be, except that, if the memorial or document is issued by the Federal Court or signed or certified by a judge or official of the Court, any affidavit, declaration or other evidence required under the law of the province to be provided with or to accompany the memorial or document in the proceedings is deemed to have been provided with or to have accompanied the memorial or document as so required.

Sale, etc.

- (9) Notwithstanding any law of Canada or of a province, a sheriff or other person shall not, without the written consent of the Minister, sell or otherwise dispose of any property, or publish any notice or otherwise advertise in respect of any sale or other disposition of any

property pursuant to any process issued or charge, lien, priority or binding interest created in any proceeding to collect an amount certified in a certificate made under subsection 223(2), interest on the amount and costs, but if that consent is subsequently given, any property that would have been affected by such a process, charge, lien, priority or binding interest if the Minister's consent had been given at the time the process was issued or the charge, lien, priority or binding interest was created, as the case may be, shall be bound, seized, attached, charged or otherwise affected as it would be if that consent had been given at the time the process was issued or the charge, lien, priority or binding interest was created, as the case may be.

Completion of notices, etc.

- (10) If information required to be set out by any sheriff or other person in a minute, notice or document required to be completed for any purpose cannot, by reason of subsection 223(9), be so set out, the sheriff or other person shall complete the minute, notice or document to the extent possible without that information and, when the consent of the Minister is given under that subsection, a further minute, notice or document setting out all the information shall be completed for the same purpose, and the sheriff or other person having complied with this subsection is deemed to have complied with the Act, regulation or rule requiring the information to be set out in the minute, notice or document.

Application for an order

- (11) A sheriff or other person who is unable, by reason of subsection 223(9) or 223(10), to comply with any law or rule of court is bound by any order made by a judge of the Federal Court, on an ex parte application by the Minister, for the purpose of giving effect to the proceeding, charge, lien, priority or binding interest.

Deemed security

(11.1) When a charge, lien, priority or binding interest created under subsection 223(6) by filing, registering or otherwise recording a memorial under subsection 223(5) is registered in accordance with subsection 87(1) of the Bankruptcy and Insolvency Act, it is deemed

- (a) to be a claim that is secured by a security and that, subject to subsection 87(2) of that Act, ranks as a secured claim under that Act; and
- (b) to also be a claim referred to in paragraph 86(2)(a) of that Act.

Details in certificates and memorials

- (12) Notwithstanding any law of Canada or of a province, in any certificate made under subsection 223(2) in respect of a debtor, in any memorial evidencing the certificate or in any writ or document issued for the purpose of collecting an amount certified, it is sufficient for all purposes

- (a) to set out, as the amount payable by the debtor, the total of amounts payable by the debtor without setting out the separate making up that total; and
 - (b) to refer to the rate of interest to be charged on the separate amounts making up the amount payable in general terms as interest at the rate prescribed under this Act applicable from time to time on amounts payable to the Receiver General without indicating the specific rates of interest to be charged on each of the separate amounts or to be charged for any particular period of time.
- [19] In my view, the trustee's determination to disallow the security of the Crown in relation to the memorials obtained and registered in advance of the bankruptcy of the bankrupt, based on a statutory interpretation which is not time-tested as the Crown's position is, seeks to impose upon the proceedings at bar an interpretation which is convoluted in the extreme and not in keeping with the case law that has developed over at least the last 25 years. Accordingly, I would allow the applicant's appeal from the trustee's disallowance of the applicant's secured claim and set aside the disallowance for the following reasons.
- [20] The Crown's secured claim arises pursuant to Section 223(11.1) of the ITA and section 316(10.1) of the ETA respectively, and sections 86 and 87 of the BIA.
- [21] Section 223(11.1) of the ITA specifically deems the Crown to have a secured claim in a debtor's bankruptcy when two conditions are met:
- a. The Crown must have created a "charge, lien, priority or binding interest" by registering a Federal Court certificate in accordance with sections 223(5) and 223(6) of the ITA; and
 - b. The registration must be in accordance with section 87(1) of the BIA, which requires the Crown to complete its registration prior to the date of the initial bankruptcy event. (emphasis added).
- [22] The Crown satisfied both conditions in the case at bar.
- [23] Section 223 of the ITA sets out a procedure for the Minister to certify assessed tax debts and to obtain the rights of a judgment creditor so as to collect those tax debts, but without having to commence an action to obtain those rights. The parallel provision in the ETA is section 316.
- [24] Section 223(2) and (3) of the ITA permit the Minister to certify the amount payable by a tax debtor and to register the certificate in the Federal Court. Upon registration of that certificate with the Federal Court, the certificate has the same effect and all proceedings may be taken on the certificate to enforce it as if it were a judgment obtained in the Federal Court against the debtor. These provisions have been in effect since 1948 when amendments were made to the Income Tax Act, R.S.C., 1948, c. 52, section 108.

- [25] Section 223(5) of the ITA also provides that the Federal Court may issue a document evidencing a certificate. Such a document is referred to as a "memorial". A memorial issued by the Federal Court may be registered in accordance with the law of a province for the purpose of creating a charge, lien or priority on or a binding interest in, the property of the debtor in the same manner as a judgment of the superior court of the province in which the debtor resides and the property is located.
- [26] In the province of British Columbia, the memorial may be registered in the land title office against interests in real property, and in the personal property registry against interests in personal property.
- [27] Registration of the memorial at this point pursuant to section 223(6) of the ITA, indicates the memorial is subordinate to charges, liens, priorities or binding interests that were registered before the registration of the memorial.
- [28] The provisions in the ITA in section 223(5) and (6) apply to any circumstance outside of a bankruptcy.
- [29] Then in 1998 and 2000 respectively, Parliament added provisions to the ITA, subsection (11.1) of section 223 and subsection (10.1) of section 316 of the ETA with the intent to create security for the sole purpose of securing a claim of the federal Crown in relation to a bankruptcy or proposal, in accordance with sections 86 and 87 of the BIA.
- [30] Thus, if the memorial has been registered in accordance with section 223(11.1) of the ITA, and the tax debtor becomes bankrupt, the charge so registered is deemed to be a secured claim pursuant to this section and section 86(2)(b) and section 87 of the BIA.
- [31] While the trustee is correct in that under certain amendments made in 1992, the Crown's preferred claim was abolished under section 136(2), the amendments also abolished the statutory deemed trusts with the exception of those that provide for income tax, Canada Pension and Employment Insurance. All other deemed trusts of the Crown, whether created by federal or provincial legislation, are not applicable in a bankruptcy or in a proposal.
- [32] The effect of this is that rather than share *pari passu* with all the other preferred and unsecured creditors, the Crown becomes a secured creditor and the property so secured never passes to the trustee for distribution among the unsecured creditors, but instead, when an income tax debt is so secured, the Crown has priority to the secured property together with any other secured creditors. Given that the Crown is the only secured creditor in these proceedings, the Crown is entitled to all of the proceeds of sale of the bankrupt's properties secured by the memorials issued by the Federal Court prior to the bankruptcy.
- [33] Any other interpretation of the legislation creates an absurdity and does not take into account the jurisprudence in existence prior to the Trustee's disallowance.

- [34] In the result, having already determined that the Trustee's disallowance is to be set aside, the Trustee is directed to allow the applicant's proof of claim as submitted at the value set out in the proof of claim for all purposes, subject to any subsequent amendment pursuant to section 132 of the Bankruptcy and Insolvency Act, and the Trustee is ordered to forthwith pay to the applicant the proceeds of sale of the property legally described as PID 003-439-658, Lot B District Lot 2710 Similkameen Division Yale District Plan 36415, secured by the memorials, including all accrued interest.
- [35] The applicant also seeks costs, alternatively from the estate, or personally as against the Trustee. According to counsel, this is the first time a trustee has challenged the security of the Crown following a bankruptcy. Accordingly, it is, if I may say so, a run-it-up-the-flagpole-type of challenge in spite of the history of the litigation surrounding this issue. If costs are payable from the estate, then there is no penalty for disallowing the Crown's secured claim as the costs would be paid by a reduction to the Crown's security. Therefore, costs must be payable by the Trustee personally in these circumstances.

"Master G. Taylor"

Cases Reviewed and Considered

Alberta (Attorney General) v. Moloney, [2015] 3 S.C.R. 327

Attorney-General of Quebec v. Larue, [1928] 1 D.L.R. 945 (P.C.)

Attorney General of Canada v. National Bank of Canada, [2004] DTC 6195

Barr v. Barr, 2009 BCSC 1433

Bell ExpressVu Ltd Partnership v. Rex, 2002 SCC 42

Brenner v. Brenner, 2010 BCCA 553

Canadian Credit Men's Trust Association Ltd. v. Beaver Trucking Ltd., [1959] S.C.R. 311

Galaxy Sports Inc. (Re), [2004] B.C.J. No. 1008

Re Gillford Furniture Mart Ltd. (1993), 25 C.B.R. (3d) 4 (B.C.S.C.), aff'd 36 C.B.R. (3d) 157 (B.C.C.A.)

Husky Oil Operations Ltd. v. Minister of National Revenue, [1995] 3 S.C.R. 453

Re Ledrew (2005), 13 C.B.R. (5th) 63 (Ont. S.C.)

Minister of National Revenue v. Keith G. Collins Ltd., 2008 MBQB 64, aff'd 2008 MBCA 92

Quinco Financial Inc. v. R., 2014 FCA 108

Rizzo & Rizzo Shoes Ltd. (Re), [1998] 1 S.C.R. 27

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/01/2020BCSC0121.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/gidda-re-2020>

Prepared on 27 October 2026 · Esheria