

CANADA / JUDGMENT

McLash (Re)

2025 BCSC 2012

COURT

Supreme Court of British Columbia

DECIDED

15 October 2025

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

2025 BCSC 2012 McLash (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

McLash (Re),

2025 BCSC 2012

Date: 20251015

Docket: B230026

Registry: Vancouver

Estate Nos. 11-2904692 and 11-2904693

IN BANKRUPTCY AND INSOLVENCY

In the Matter of the Proposal of

Mathew Allen McLash and Tammy Lynn McLash

Before: Associate Judge Robertson

Reasons for Judgment

Counsel for 105 Strathcona Limited Partnership:

K. Sandulescu

E. Abiusi, Articled Student

Counsel for Mathew Allen McLash and Tammy Lynn McLash:

J.D. West

Place and Date of Hearing:

Vancouver, B.C.

September 9, 2025

Place and Date of Judgment:

Vancouver, B.C.

October 15, 2025

Table of Contents

Background.. 3

Analysis. 6

Disposition and Order Made. 14

- [1] 105 Strathcona Limited Partnership ("105 LP") seeks an order pursuant to s. 69.4 of the Bankruptcy and Insolvency Act, R.S.C. c. B-3 (the "BIA"), for an declaration nunc pro tunc that the statutory stay arising in these proposal proceedings involving Mathew McLash ("Mr. McLash") and Tammy McLash ("Ms. McLash", and collectively with Mr. McLash the "Proposal Debtors") cease to apply so that it may proceed with claims they allege they have against the Proposal Debtors.

Background

- [2] 105 LP, through its general partner, 105 Strathcona GP Ltd ("105 GP") was involved in a real estate development project involving the acquisition and construction of a 16-storey building in Edmonton, Alberta (the "Mezzo Project"). At all relevant times, Mr. McLash was the controlling mind of 105 GP. To fund the development, 105 LP sought investment through a subscription agreement whereby investors would purchase partnership units in the LP at a cost of \$150,000 per unit. 105 LP represented that it would use the subscription proceeds for the specific purpose of acquiring the lands for the Mezzo Project.
- [3] \$3,850,000 was raised through subscriptions made by 14 separate entities, with \$450,000 being invested by McLash Ventures Ltd. ("McLash Ventures"), a company controlled by the Proposal Debtors with Mr. McLash being the sole shareholder, and \$250,000 by J.T.D. Holdings Ltd. ("JTD")
- [4] On January 8, 2015, 105 GP and WestOak Development Ltd. ("WestOak"), a company controlled and owned by Mr. McLash, entered into a management and administration services agreement (the "Management Agreement") for the development of the Mezzo Project.

- [5] The allegation being advanced on this application is that in early 2020, principals of JTD and other subscribers learned that 105 LP and 105 GP were in default of their credit facilities, which lead to further inquiries being made through which the subscribers determined that Mr. McLash had, on behalf of 105 LP and/or 105 GP:
- a) obtained a high interest (26.92%) mortgage in the principal amount of \$990,000 (the "Pillar Mortgage"), without notice to the subscribers, and used a significant amount received from the loan advance to make payments to the Proposal Debtors, WestOak and McLash Ventures which have been calculated as an overpayment of \$465,750; and
 - b) entered into a lease with 1788212 Alberta Ltd. ("1788"), a company controlled and owned by Mr. McLash, on terms that included rent being paid to 1788 well in excess of market rates (\$78 per square foot, rather than \$12 per square foot). The allegation is that, as a result of the excessive rate \$258,918.45 was overpaid by 105 LP to 1788.
- [6] The total of the alleged overpayments is \$958,743.45.
- [7] Upon learning of these financial issues, the subscribers, as limited partners to the LP, took steps to remove 105 GP as the general partner, and replace it with a new general partner, 2276207 Alberta Ltd. ("2276 GP").
- [8] Eventually, foreclosure proceedings were commenced and the lands making up the Mezzo Project were sold, leaving a shortfall on the Pillar Mortgage, and resulting in a complete loss to the 105 LP subscribers on their investment.
- [9] On August 26, 2022, three of the subscribers, including JTD (the "Current Plaintiffs"), filed a statement of claim in the Court of Queen's Bench of Alberta, against the Proposal Debtors, 105 LP, 105 GP, WestOak, and McLash Ventures (the "Alberta Proceedings").
- [10] The claims made by the Current Plaintiffs in the Alberta Proceedings include claims for breach of the Management Agreement, breach of fiduciary duty, oppression, conspiracy, fraudulent conveyances and/or fraudulent preferences, unjust enrichment and fraud and, with respect specifically to Ms. McLash, knowing receipt. They claim damages in the amount of \$2,700,000, punitive or exemplary damages of \$1,00,000, pre-judgment interest, and an accounting and tracing of the funds raised and expended on the Mezzo Project (the "Current Claims").
- [11] The Proposal Debtors moved to Victoria B.C., and filed a notice of intention to make a Division 1 Proposal on January 24, 2023, triggering the statutory stay by operation of s. 69.1 of the BIA.

- [12] On January 20, 2025, the Current Plaintiffs brought an application to lift the stay for the purpose of proceeding with the Alberta Proceedings in respect of those elements of the Current Claims they argued (a) were complex and not suitable for summary determination under the BIA claims process and (b) are not compromised by the proposals by virtue of s. 178(1)(d) of the BIA, specifically those in respect of the allegations of embezzlement, misappropriation and defalcation while acting in a fiduciary duty.
- [13] The application was dismissed, with reasons indexed at 2025 BCSC 342.
- [14] In dismissing the application, among other concerns as to the sufficiency of the pleadings to found the claims alleged, or to satisfy that they fall within s. 178(1)(d) of the BIA, the court found that the Current Plaintiffs lacked standing:
- [52] I am also concerned that the pending claims in the Alberta Action appear likely to fail in their current configuration, based on it appearing that the Applicants lack standing to advance the key claims which they suggest are relevant to the s. 178(1) BIA analysis.
- [53] The claims are being advanced by two individual Limited Partners who say they hold units in 105 LP. The types of claims they are advancing are ones which appear to belong to 105 LP itself. The rule in *Foss v. Harbottle* has been found to apply to claims involving Limited Partnerships, such that individual Limited Partners generally cannot advance claims which belong to the Limited Partnership. Only if the claims had been framed as derivative claims or as a representative action would there be an exception. That was not done in the Alberta Action as it currently stands. See *Watson v. Imperial Financial Services Ltd.*, [1994] B.C.J. No. 271, 1994 CanLII 3293 at paras. 24-28
- [55] This appears to apply to the Alberta Action. The applicants are not in a position to advance claims which belong to 105 LP based on the current form of the Alberta Action. There are also no properly pled individual claims that the Applicants have against Mr. and Ms. McLash personally which appear to fall under s. 178(1) of the BIA.
- [56] Given this fundamental defect in the Alberta Action, I am also not persuaded this qualifies as a complex claim for which the summary procedure under the BIA is inappropriate or that it qualifies as an action for which the participation of Mr. and Ms. McLash is necessary for the complete adjudication of the matters involving the other parties.
- [15] Following those reasons, the Current Plaintiffs sought formal authorization from 2276 GP, as the new general partner of 105 LP, to pursue the Alberta Proceedings against the Proposal Debtors, and by resolution "effective as of June 16, 2025", 2276 GP resolved that it could pursue litigation "and any necessary remedies" in the name of 105 LP against the Proposal Debtors, including in respect of the Alberta Proceedings and any application to lift the stay.

- [16] The resolution in evidence was, unfortunately, not signed. During the lunch break a further affidavit was filed and provided to the court with the signed version. The Proposal Debtors did not take issue with the further affidavit being admitted. However, did note that the resolution is by 105 GP, and not one approved by the majority of the partners of 105 LP themselves.
- [17] The application now before the court is virtually identical to that before Associate Judge Bilawich, with the applicant being 105 LP, pursuant to the authorization given by that resolution.

Analysis

- [18] By virtue of s. 69.1 of the BIA, upon the Proposal Debtors filing their notices of intention to make a proposal a statutory stay of proceedings took effect. The stay in s. 69.1 is worded as follows:

no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged or the insolvent person becomes bankrupt.

[emphasis added]

- [19] Thus, in order for 105 LP to "commence or continue" the Alberta Proceedings, an order to lift that stay must be made, as available in s. 69.4 of the BIA, which reads as follows:

69.4 A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied

- (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
- (b) that it is equitable on other grounds to make such a declaration.

- [20] As was the case during the earlier application, 105 LP relies upon *Advocate Mines Ltd.* (1984), 52 CBR (NS) 277 (Ont. S.C.), as adopted by this court in *Maple Homes Canada Ltd. (Re)*, 2000 BCSC 1443, at para. 28 as to the actions for which a stay may be lifted to enable a creditor to pursue them, those being:

1. Actions against the bankrupt for a debt to which a discharge would not be a defence.
2. Actions in respect of a contingent or unliquidated debt, the proof of which and valuation has that degree of complexity which makes the summary procedure prescribed by s. 95(2) of the Bankruptcy Act inappropriate.

3. Actions in which the bankrupt is a necessary party for the complete adjudication of the matters at issue involving other parties.
 4. Actions brought to establish judgment against the bankrupt to enable the plaintiff to recover under a contract of insurance or indemnity or under compensatory legislation.
 5. Actions in Ontario which, at the date of bankruptcy, have progressed to a point where logic dictates that the action be permitted to continue to judgment.
- [21] 105 LP relies on the first three grounds, namely that the claim is one that would not be compromised by the proposal under s. 178(1)(d) of the BIA, that the debt is a contingent or unliquidated one that it is too complex for the summary procedure prescribed by the BIA, and that the Proposal Debtors are necessary parties for the complete adjudication of the Alberta Proceedings.
- [22] As noted in paras. 29 and 30 in *Maple Homes* the onus is on 105 LP to satisfy those three conditions, and that the applicant is likely to be materially prejudiced, or that it is equitable on other grounds, to make the declaration. In doing so, the court is generally not to inquire into the merits thereby usurping the role of a trial judge, however there must be "compelling reasons" to permit an action to proceed.
- [23] The court in *Maple Homes* summarized the principles that emerge from the case law considering such applications as follows, noting at para. 33 that the standard is more stringent than that for permitting a cause of action not continue, such as that under R. 9-5, with there being some evidence needed to establish that there is a "fair issue to be tried":
- (1) The general scheme of bankruptcy proceedings is that civil actions are stayed against the insolvent person; exemptions are to be made only where there are "compelling reasons". This flows from one of the major purposes of the Bankruptcy and Insolvency Act, which is to permit the rehabilitation of the bankrupt unfettered by past debts.
 - (2) An applicant for exemption from the stay must show that there will be material prejudice to the applicant if the stay is continued or that it is equitable on other grounds to allow the exemption.
 - (3) The existence of one or more of the factors listed in *Re Advocate Mines* will be an important consideration, but is not determinative.
 - (4) The court is not to attempt to determine the proposed claim on its merits.
 - (5) Rather, it must assess whether it is a claim of the nature that would survive discharge, whether it is a claim that could not succeed, and whether if it did succeed it could not result in recovery against the defendants.

- [24] The Proposal Debtors argue that 105 LP has failed to meet the onus upon it to establish that any claims it might have fall within s. 178(1)(d), that the claim is sufficiently complex that it cannot be determined in the summary process as set out in the BIA, or that having the Proposal Debtors as parties is necessary to its adjudication. That position is the same as was advanced on the prior application. However, the Proposal Debtors raise two further bases for opposition on this application:
- a) The application is an abuse of process in that it is res judicata by virtue of the prior application in which, although determined on the basis of standing, Associate Judge Bilawich found a lack of evidence to support a claim in fraud, with 105 LP now reframing the claims to cure the various defects that prevented success at the prior application, including by bringing 105 GP into good standing, which was not the case at the prior application. The Proposal Debtors argue that 105 LP should not be permitted to reframe its claim to bolster its arguments in this fashion, particularly in light of the good faith requirements as set out in s. 4.2 of the BIA.
 - b) There is a complete defence to any potential claims advanced by 105 LP; in that the claims are barred under the Limitations Act, R.S.A. 2000, c. L-12 (the "Alberta Limitation Act"). The parties agreed that the Alberta act applies.
- [25] As a result of the second argument specifically, there is a significant difference between this application and the prior one, that being a threshold issue as to whether 105 LP can bring this application at all by bringing itself within the scope of s. 69.4 of the BIA.
- [26] To seek relief under s. 69.4, the applicant must be a creditor affected by the stay. A creditor is defined in s. 1 of the BIA as a person having a claim "provable as a claim" under the BIA.
- [27] S. 3(1) of the Alberta Limitation Act provides for 2-year limitation period for claims such as this, after which "the defendant, on pleading this Act as a defence, is entitled to immunity from liability in respect of the claim".
- [28] Based upon the materials before the court, the limitation period applicable to the alleged financial misdealings may have expired as early as 2022, approximately one year before the notices of intention to file the proposal were filed. There was no indication in the materials before the court as to 105 LP specifically being a potential creditor or advancing a claim itself until it was raised in the context of the Current Plaintiffs' standing. Specifically:
- a) Currently, 105 LP is a defendant, not a plaintiff in the Alberta Proceedings.
 - b) 105 LP did not file a proof of claim in the proposal proceedings. I note that the previous applicants wrote to the proposal trustee forwarding a copy of the statement of claim in the Alberta Proceedings, and advised that they could not provide a proof of claim in a form that would be readily admitted for voting purposes and that it was a debt that would not be compromised, as the reason for why that was not done. However, the letter did not reference 105 LP as a potential creditor.

- c) The list of creditors on the notice of proposal did not list 105 LP as a creditor nor was any liability noted to be owing to 105 LP, with the only reference to it being a business that the Proposal Debtors had operated within the prior five years.
- d) In its report on the proposal the proposal trustee referred to the Alberta Proceedings as being advanced by RRR Investments Ltd., one of the other subscribers, and addressed how it was dealing with the claims advanced in the Alberta Proceedings but did so without reference to 105 LP having a claim against the Proposal Debtors in that context or otherwise.
- e) The prior applicants and 105 LP have made statements in these proceedings that may constitute an admission that the alleged acts were discovered by the subscribers of 105 LP in early 2020. Certainly, there can be little dispute that they were discovered by August 2022 when the statement of claim was filed.
- f) It has been nearly three years since the proposal was approved.

[29] However, notwithstanding the expiry of a relevant limitation period, pursuant to s. 6(1) of the Alberta Limitation Act, when a claim is "added to a proceeding previously commenced, either through a new pleading or an amendment to pleadings", the defendant is not entitled to that immunity if the requirements in subsections (2), (3) or (4) are satisfied, those being:

(2) When the added claim

- (a) is made by a defendant in the proceeding against a claimant in the proceeding, or
- (b) does not add or substitute a claimant or a defendant, or change the capacity in which a claimant sues or a defendant is sued,

the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding.

(3) When the added claim adds or substitutes a claimant, or changes the capacity in which a claimant sues,

- (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding,
- (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits, and

(c) the court must be satisfied that the added claim is necessary or desirable to ensure the effective enforcement of the claims originally asserted or intended to be asserted in the proceeding.

(4) When the added claim adds or substitutes a defendant, or changes the capacity in which a defendant is sued,

- (a) the added claim must be related to the conduct, transaction or events described in the original pleading in the proceeding, and
 - (b) the defendant must have received, within the limitation period applicable to the added claim plus the time provided by law for the service of process, sufficient knowledge of the added claim that the defendant will not be prejudiced in maintaining a defence to it on the merits.
- [30] 105 LP advises that it intends to bring an application in the Alberta Proceedings to amend the statement of claim to substitute 105 LP as the plaintiff and remove it as a defendant. I also note that the proposed amendments include further particulars as to the allegations against the Proposal Debtors and WestOak, and include a pleading to essentially mirror s. 178(1)(d) of the BIA, presumably to address whether any such claim would be compromised by a judgment in those proceedings.
- [31] That presumably has not yet been done given the stay. Thus, 105 LP finds itself in a catch 22.
- [32] 105 LP is currently not a creditor as, on its face, the Proposal Debtors are "immune" from any liability to 105 LP such that 105 LP cannot fit within the threshold requirement of s. 69.4 of the BIA to lift the stay, but is stayed from taking any steps by which it could bring itself within that requirement.
- [33] That, however, presumes that the stay in s. 69.1 applies to the proposed application to amend, and circumstances such as this.
- [34] As a matter of statutory interpretation, it is well established that the legislature does not intend to produce absurd consequences: *Rizzo & Rizzo Shoes Ltd.*, 1998 CanLII 837, at para. 27. When speaking about the BIA specifically in *Song Corp. (Re)* (2002), 19 C.B.R. (4th) 235 (Ont.Sup.Ct.), the court stated:

The Act should be interpreted in a practical and not a legalistic manner. It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided.

- [35] Counsel for the Proposal Debtors seemingly acknowledged that it would be an absurd result to say that 105 LP could not avail itself of s. 69.4 to lift the stay but also, because of that stay, could not take any steps to determine if it could do so, by confirming that they would not take such a position on an application to amend the statement of claim in the Alberta Proceedings, of course without any admission that such amendments are available or that 105 LP could bring itself within the scope of s. 6(1) of the Alberta Limitation Act. The Proposal Debtors do intend to strongly oppose such an application. The merits of that application are not clear.
- [36] In my view, the legislature did not intend to create such an absurd circularity of result. To avoid such a result, any interpretation would require either a broadening of the definition of "creditor" or a narrowing of the scope of the stay of proceedings.

- [37] There would likely be unintended consequences of expanding the definition of "creditor" given the scope and importance of that term in the BIA, and the approach to applications to lift stays, which are only to be granted where there are "compelling circumstances" to do so: see for example *Munro (Re)* 2014 ABQB 636, as relied upon by the Proposal Debtors.
- [38] In addition, the court in *Eyton (Re)* 2021 ONSC 3646 noted as follows with respect to statute barred claims:
- [20] While a statute-barred claim continues to exist in the sense that it has not actually been extinguished, it is not a claim upon which any proceeding to enforce payment may be brought. The bankrupt cannot be said to be "subject" to a claim that cannot be enforced.
- [25] Accordingly, I find that the appellant's claim - being one that it was prohibited from enforcing at the time of bankruptcy by reason of s. 4 of the Limitations Act, 2002 - is not provable in bankruptcy within the meaning of s. 121(1) of the BIA because it is not a claim to which the bankrupt was subject.
- [39] Broadening the definition of the claim would be contrary to these findings.
- [40] However, in *Forder Estate (Re:)* 2002 CanLII 49604 (Ont.S.C.), an application to lift a stay was made where there was a limitation defence being advanced with Registrar Sprout finding at para. 7 that such an application was not the appropriate forum to determine a limitation defence. A distinguishing feature of that claim was that it was a complicated medical malpractice claim which would require the parties to "adduce a significant amount of evidence, particularly on the discoverability issue", such that the court found it was not appropriate for summary determination.
- [41] Here, there is no dispute as to the issues that give rise to the claims being discovered in early 2020. There may be an argument as to identifying the proper plaintiff or claimant in that respect. However, on a plain reading of the Alberta Limitation Act, the Proposal Debtors are, currently, immune from liability for the claims arising from the alleged financial mismanagement discovered in early 2020. Thus, as noted in *Eyton*, the claims are not provable claims and 105 LP is unable to bring itself within s. 69.4 as a creditor.
- [42] A more practical approach would be to interpret the stay provisions in s. 69.1 in a way that excludes steps that are entirely procedural in nature and necessary to protect the right to advance a potential provable claim.
- [43] In doing so, I recognize that such circumstances would rarely apply given that the running of a limitation period for claims provable in bankruptcy is generally suspended during the stay period.
- [44] However, it does continue to run for claims outside of the bankruptcy where the running of the time may "resume", as noted at para. 53 of *BDC v. Quattro* 2021 ABQB 638. When a limitation period may "resume", and the calculation of time in respect of claims that are not compromised may not always be readily determinable.

- [45] Notably, the court commented at para. 54 as to the practice in receiverships to allow a party to commence an action to preserve a limitation defence without seeking leave to lift the stay as being sufficient to ameliorate the potential prejudice in cases where the stay does not suspend a limitation period. Interpreting s. 69.4 to similarly allow for such steps to be taken achieves that same balance.
- [46] Such an interpretation is also consistent with the treatment of court proceedings filed in violation of stay without having the stay lifted. Specifically, if a creditor commences or continues a proceeding in violation of a stay without obtaining leave those steps are not a nullity, but rather an irregularity, through which a court may later grant leave nunc pro tunc, see F§117, Houlden, Morawetz and Sarra, Annotated Bankruptcy and Insolvency Act.
- [47] As such, even if I am wrong in my interpretation of s. 69.4, and the stay does apply in respect of the proposed application to amend and add 105 LP as a plaintiff to the Alberta Proceedings, the application for leave to continue those proceedings could still be made, and leave granted nunc pro tunc upon such an order being granted. I note that this application does in fact seek such leave on a nunc pro tunc basis.

Disposition and Order Made

- [48] In the circumstances of this case where, on its face, the Proposal Debtors are currently immune from liability in respect of a claim by 105 LP by operation of the Alberta Limitations Act, subject to a court making an order under s. 6(1), I cannot find that they are creditors entitled to bring the application. This application is premature.
- [49] Accordingly, I adjourn the application pending the determination of 105 LP's application to amend the statement of claim, and add itself as a plaintiff, to the Alberta Proceedings.
- [50] The parties are at liberty to seek further directions as to costs of this application, once the proposed amendment application is determined.

"Associate Judge Robertson"

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/25/20/2025BCSC2012.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/mclash-re-2025-bcsc-2012>

Prepared on 26 October 2026 · Esheria