The interim receiver: A “Trustee in Bankruptcy” dispensed from obtaining a clearance certificate

August 18, 2015

In a judgment rendered in the case of *9210-6905 Québec Inc. (proposal of)*,[1] the Superior Court of Québec held that an interim receiver is not required to obtain a clearance certificate from the tax authorities before proceeding with the distribution of a debtor's property, and is not subject to personal liability for this reason.

Indeed, the Court stated that an interim receiver appointed under the *Bankruptcy and Insolvency Act*[2] is a "trustee in bankruptcy" within the meaning of subsection 159(2) of the *Income Tax Act*[3] ("BIA") is a "trustee in bankruptcy" within the meaning of subsection 159(2) of the Income Tax Act ("ITA"). Therefore, the interim receiver benefits from the exception dispensing the "trustee in bankruptcy" from obtaining a certificate ("clearance certificate") attesting that all amounts due under the ITA have been paid.

CONTEXT

On March 24, 2014, the debtor 9210-6905 Québec Inc. (“**Debtor**”) filed a notice of intention to make a proposal and Richter Advisory Group Inc. (“**Richter**”) was appointed to act as trustee under the notice of intention.

On March 27, 2014, the Court rendered an order appointing Richter to act as interim receiver under the BIA. The Debtor, with Richter’s help, then undertook a process aimed at soliciting offers from potential purchasers for its assets.

On July 17, 2014, the Court rendered an order authorizing the sale of the majority of the Debtor’s assets and ordering that the proceeds of sale be remitted to Richter for distribution to the Debtor’s creditors.

DISTRIBUTION OF THE AMOUNTS COLLECTED BY RICHTER

Following the sale of the assets and the collection of the Debtor’s claims, Richter wished to distribute a net amount of more than $500,000 to the creditors, according to their respective rights.

As part of this distribution, Richter proposed to pay first the amounts that were owed to the tax authorities in respect of source deductions made by the Debtor which were subject to deemed trusts within the meaning of the tax statutes or certain other statutes.

The amounts owed by the Debtor to the tax authorities which were not source deductions subject to

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deemed trusts were however not paid under the proposed distribution. Indeed, the Debtor's secured creditors ranked ahead of the tax authorities in respect of these amounts, and the balance of the net amount to be distributed by Richter was clearly insufficient to allow for the full payment of the amounts owed to the secured creditors.

QUESTION IN ISSUE

Richter presented a Motion for directions to the Court for authorization to proceed with the proposed distribution and asked the Court to declare that it was not required to obtain a clearance certificate under the relevant federal and Quebec statutory provisions (i.e. section 159(2) ITA and section 14 of the *Tax Administration Act*[4] (the "**TAA**")).

Revenu Québec did not contest Richter's motion, as opposed to the Canada Revenue Agency (the "**CRA**"), which essentially alleged that the exception provided for in section 159(2) ITA did not apply to Richter acting as an interim receiver, so that Richter would be bound to obtain a clearance certificate.

Section 159(2) ITA states that "[e]very legal representative **(other than a trustee in bankruptcy)** of a taxpayer shall, before distributing to one or more persons any property in the possession or control of the legal representative acting in that capacity, obtain a [clearance] certificate from the Minister". Under section 159(3) ITA, where a legal representative fails to obtain a clearance certificate before proceeding with a distribution, such representative is personally liable for the amounts owed to the tax authorities to the extent of the value of the property distributed.

It should be noted that section 14 TAA contains provisions to the same effect.

DECISION

Analyzing the practical effects of the terms of sections 159(2) and 159(3) ITA in light of the position put forward by the CRA, the Court stated as follows:

> [Translation]
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> [11] However, the trustee will not be able to get a clearance certificate because, as we saw above, an amount of $29,640 remains due to the CRA.
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> [12] The trustee is therefore caught in this predicament in which it has fulfilled the Court's order, but must retain the proceeds of sale due to the lack of a clearance certificate which it will never be able to obtain, whereas in the case of a bankruptcy, the issue would not arise.

The Court rejected the position taken by the CRA that the expression "trustee in bankruptcy" used in section 159(2) ITA excludes an interim receiver appointed under the BIA.

Firstly, the Court noted that only a "trustee" can act as an interim receiver within the meaning of the BIA.

Next, the Court explained that the expression "in bankruptcy" was added after the word "trustee" in section 159(2) ITA because it was the federal legislator's intention [translation] "to distinguish the trustee acting under the Bankruptcy Act from, for example, the syndic of a professional corporation or an agent chosen by the co-owners of a building."[5].

The Court held as follows:

> [Translation]
>
> [23] Since only a licensed trustee, commonly referred to as a trustee in bankruptcy, is authorized

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to act under section 47 BIA, what the legislator had in mind was that the immunity in section 159(2) ITA applied to a trustee appointed under the BIA to act as an interim receiver.

This interpretation is also consistent with the spirit of section 215 BIA which provides that the interim receiver, like the trustee, benefits from relative immunity when carrying out any duty under the law.[6].

Finally, the Court rejected the CRA's argument to the effect that it could not grant the conclusion sought by Richter without exceeding its jurisdiction on the grounds that only the Tax Court of Canada could dispense Richter from the requirement to obtain a clearance certificate. Indeed, the judge held that the Superior Court has jurisdiction to interpret the meaning of the expression "trustee in bankruptcy" and to declare that an interim receiver appointed under the BIA is included in this expression.

CONCLUSION

Therefore, the Court declared that Richter, acting as interim receiver, was a "trustee in bankruptcy" within the meaning of section 159(2) ITA.

Given the similar terminology used in the Quebec statute,[7] in our view, the Court's holding applies both to the federal statute and the provincial statute.

As well, we are of the opinion that the Court's holding also applies to a trustee under a notice of intention, a trustee under a proposal, a receiver appointed under section 243 BIA, a monitor appointed under the *Companies' Creditors Arrangement Act*,[8] and a liquidator appointed under the *Winding-up and Restructuring Act.*[9]

This judgment is important in practice because it permits any person licensed as a trustee and acting in any of the aforementioned functions to benefit from the "trustee in bankruptcy" exception and to be dispensed from the requirement to obtain a clearance certificate when such person distributes the property of an insolvent person.

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[1] S.C.M. 500-11-046426-140, *Revised transcript of the reasons for judgment rendered from the bench on June 25, 2015* by the Honourable Danielle Turcotte, J.S.C.
[2] R.S.C. (1985), c. B-3.
[3] R.S.C. (1985), c. 1 (5th Supp.).
[4] CQLR, c. A-6.002.
[5] Paragraph 19 of the judgment.
[6] Paragraph 22 of the judgment.
[7] See s. 14 TAA.
[8] R.S.C. (1985), c. C-¬36.
[9] R.S.C. (1985), c. W-11.

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