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on

Insolvency Law

February 2009

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FRASER MILNER CASGRAIN LLP

APPLICATION OF THE SUPERINTENDENT OF BANKRUPTCY'S LEVY CARVED BACK

Section 147 of the *Bankruptcy and Insolvency Act* ("BIA") provides that the Superintendent's Levy is applied to defray the supervisory expenses of the Superintendent, will be charged on dividend payments made by the trustee.

The Office of the Superintendent issued Directive No. 10 on December 19, 1997, which intended to specify the operation of s. 147 of the BIA. The purpose of the Directive was to ensure greater transparency and uniformity in the trustee's presentations and to ensure that the body of creditors was not penalized in any way by bearing the costs of the trustee's liquidation of encumbered assets on behalf of a secured creditor. The Directive outlined that the levy was payable on all payments by a trustee to a secured creditor, except in certain circumstances outlined in the Directive.

In 2007, two Trustees in Bankruptcy and a secured creditor sought the advice and direction of the court concerning the payment of the levy and the validity of the Directive. The issue was whether the Directive was a valid interpretation of the BIA. Topolniski J. found that Directive 10 would be *intra vires* or validly made under the Superintendent's powers only where it is consistent with, and properly interprets, the BIA. If it was not, the Superintendent had exceeded his authority in issuing the Directive and it would be *ultra vires* or invalid. In her analysis of the Directive, she found the following:

1. Production by a secured creditor of proof of security is not a precondition to redemption of security under s. 128(3) of the BIA by payment in full of the debt. Directive 10 says that it is and to that extent, the Directive was *ultra vires*.
2. There is no requirement in the BIA that in order to constitute a redemption by the trustee, encumbered

assets must be sold at a net price that equals or better the total of the secured creditor's claim or value of the security as set out in the proof of security. The Directive imposes such a requirement, thereby potentially affecting secured parties and to that extent the Directive was *ultra vires*.

3. The requirement of the Directive that the levy be paid in the event of non-compliance with s.13.4, even where the trustee acts as agent, receiver or mandatory, arises from misinterpretation of the BIA by the Superintendent. To that extent, the Directive was *ultra vires*.

Topolniski J. then found that under a redemption, where the full value of the security was paid to the secured creditor, the levy was not applicable. As well, she found that payments made from a trust fund to lien claimants was not subject to the levy.

The Superintendent was granted leave to appeal by the Court of Appeal for the following three issues:

- (a) what is the correct interpretation of s. 128(3) of the BIA regarding redemption?
- (b) is all of Directive 10 *ultra vires*, or just the impugned parts? and
- (c) is the holder of a builders' lien automatically a "secured creditor" of an insolvent person?

It will be interesting to see the decision of the Court of Appeal.

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