

focus

on Financial Services



FRASER MILNER CASGRAIN LLP

Issue No. 61 November 2003

UPDATE ON 'ERRORS IN REGISTRATIONS'

Does a misspelled debtor name on a PPR registration invalidate that registration? Until a recent decision was released by the New Brunswick Court of Appeal, there was a balanced judicial division among Canadian jurisdictions on that question.

In Ontario and New Brunswick, courts had said that if a serial number was correctly stated on a registration, a misspelled debtor name would not invalidate the registration. Alberta and Saskatchewan courts, on the other hand, had cut the other way; a misspelled debtor name invalidated the registration, notwithstanding a correctly-stated serial number.

The New Brunswick Court of Appeal recently decided that the Alberta and Saskatchewan courts had it right. A misspelled debtor name on a registration should be seen as seriously misleading. **Now, only in Ontario will a PPR searcher need to go beyond a debtor-name search. In Alberta, Saskatchewan, and New Brunswick, such a search will be determinative of whether or not any valid registrations exist for that debtor.** This is an issue that will likely end up in the Supreme Court of Canada.

If you would like to discuss this New Brunswick decision, please contact **Stephanie Campbell** of our Calgary office at (403) 268-7186.

EQUITABLE SUBORDINATION - NOW YOU SEE IT, NOW YOU DON'T

The doctrine of equitable subordination is a concept which developed in the United States and was eventually incorporated into American bankruptcy law. Courts in the United States have said that in certain circumstances, **the court may subordinate the priority of a claimant's validly perfected security** where: (i) the claimant in question engaged in some kind of inequitable conduct; and (ii) the misconduct resulted in injury to a creditor of the bankrupt or conferred an unfair advantage to the claimant.

In Canada, courts have been reluctant to apply this doctrine. In the recent decision in *C.C. Petroleum Ltd. v. Allen*, the trial judge applied the doctrine of equitable subordination. The appeal court reversed the decision on that issue.

In this case, a general security agreement was granted to the wives of two principals of a company. The company then engaged in fraudulent conduct, including kiting cheques and having suppliers who were unaware of the insolvency continue to make regular gas deliveries to the company. The wives then made formal demand and appointed a receiver to enforce the general security agreement over the proceeds of sale of the gas. The trial judge said that **because of the fraud, the priority of the general security agreement should be postponed to the claim of the unsecured plaintiffs.**

On appeal, the Court of Appeal of Ontario upheld the trial judge's finding of fraud and the damages awarded by him. However, it ruled that because the fraud claim provided an avenue for full vindication of the plaintiff's claim against the wives, there was no reason for the court to subordinate the secured claims of the wives to the unsecured claim of the plaintiff. The Court of Appeal said that the law is uncertain and it is "open to question" as to whether the judge had the jurisdiction to grant the remedy. However, the Court of Appeal did not elaborate as to the circumstances under which it would be prepared to grant this remedy.

As a result of the decision in *C.C. Petroleum*, the question of whether the doctrine of equitable subordination is enforceable in Canada is still open to question.

If you would like to discuss the *C.C. Petroleum* case, or the doctrine of equitable subordination, please contact **Alex Ilchenko** of our Toronto office at (416) 863-4748.

WATCH OUT FOR CCRA SUPER-PRIORITY

The Ontario Court of Appeal has decided that **Canada Customs and Revenue Agency (CCRA) has super priority over a bank for unremitted GST due before the debtor became bankrupt.**

The bank held a general security agreement including security over its borrower's accounts receivable. On February 22, 2001, CCRA served the borrower with a Requirement to Pay \$133,099.36 in outstanding GST under the *Excise Tax Act* (ETA). The following day, the bank issued a petition for a receiving order under the *Bankruptcy and Insolvency Act* (BIA) in an effort to put the debtor into bankruptcy.

On February 27, 2001, CCRA sent a garnishment notice to eighteen account debtors of the borrower requiring the debtors to forward moneys to CCRA that otherwise would have been payable to the borrower. On March 8, 2001, the borrower was adjudged bankrupt and a receiving order was made against the borrower. Following the bankruptcy of the borrower, CCRA received all amounts owing to it while the bank still had more than \$1,000,000 owing to it under the loan.

The issue in the appeal was whether the garnishment notices, received by creditors of the borrower prior to the borrower's bankruptcy, gave CCRA priority over the borrower's secured creditors. The bank argued that, under the BIA, the effect of the receiving order against the borrower would be that CCRA would be prevented from garnishing amounts owing to the borrower; the BIA provides that a receiving order takes precedence over garnishments against the property of a bankrupt.

The Court of Appeal ultimately decided in favour of CCRA. The court said that under the clear wording of the ETA, the Crown became the owner of the funds payable to the borrower notwithstanding the bank's security interest. **The fact that the ETA was subject to the BIA did not give the bank priority; it meant that CCRA would not have priority over other creditors for any GST payment that became due after the receiving order was made.**

If you would like to discuss this case, please contact **Shayne Kukulowicz** of our Toronto office at (416) 863-4740.

WHAT IS NEW AT FMC?

Malcolm MacKillop and **Adrian Mediema** of our Toronto Employment Group recently co-authored the book, *LegalEase with Ease, Legal Terms for Human Resource Professionals* published by CCH Publication Limited. This is the only book of its kind that offers human resources professionals plain-language information regarding all areas of human resources and is a comprehensive source for finding clear definitions for over 400 legal terms used with the human resources profession.

Jamie Knight and **Pamela Leiper** of our Toronto Employment Group co-authored the *Canada Labour Code*, published by Thomson and Carswell. This authoritative text gives federally-regulated employers an expert summary of the highly specialized legislation, rules and policy that govern employers providing services in sectors governed by federal employment and labour legislation.

J.L. McDougall of our Toronto Litigation and **Meghan Thomas** of our Toronto Research Group co-authored the article "Product Liability - Recent Developments of Importance," which was published in *Lexpert/American Lawyer Media's 2003 Guide to the Leading 500 Lawyers in Canada*.

Bill Innes and **Michael Kray** co-authored with Brian Burke the article "New Developments And Selected Issues In the Liability of Directors and Officers of Charitable And Non-Profit Corporations" to be featured in *The Philanthropist* tax journal.

If you would like to speak with any of these people regarding their areas of practice or presentation topics, please contact them through our main number at Toronto: (416) 863-4511.