TAB 14

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Receiver's statement

246. (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

TAB 15

Business Corporations Act, R.S.A. 2000, c. B-9

Duties of receiver and receiver-manager

100 A receiver or receiver-manager shall

(a) immediately notify the Registrar of the receiver's or receiver-manager's appointment or discharge,

(b) take into the receiver's or receiver-manager's custody and control the property of the corporation in accordance with the Court order or instrument under which the receiver or receiver-manager is appointed,

(c) open and maintain a bank account in the receiver's or receiver-manager's name as receiver or receiver-manager of the corporation for the money of the corporation coming under the receiver's or receiver-manager's control,

(d) keep detailed accounts of all transactions carried out by the receiver or receiver-manager as receiver or receiver-manager,

(e) keep accounts of the receiver's or receiver-manager's administration that must be available during usual business hours for inspection by the directors of the corporation,

(f) prepare at least once in every 6-month period after the date of the receiver's or receiver-manager's appointment financial statements of the receiver's or receiver-manager's administration as far as is practicable in the form required by section 155, and, subject to any order of the Court, file a copy of them with the Registrar within 60 days after the end of each 6-month period, and

(g) on completion of the receiver's or receiver-manager's duties,

(i) render a final account of the receiver's or receiver-manager's administration in the form adopted for interim accounts under clause (f),

(ii) send a copy of the final report to the Registrar who shall file it, and

(iii) send a copy of the final report to each director of the corporation.

TAB 16

1995 CarswellOnt 43, 30 C.B.R. (3d) 100, 3 O.T.C. 23

Mortgage Insurance Co. of Canada v. Innisfil Landfill Corp.

MORTGAGE INSURANCE COMPANY OF CANADA v. INNISFIL LANDFILL CORPORATION

Ontario Court of Justice (General Division — Commercial List)

Farley J.

Heard: November 16, 1994
Judgment: January 12, 1995
Docket: Docs. 52941/90, B38/92

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Counsel: *J.L. McDougall, Q.C.*, and *N.J. Emblem*, for Price Waterhouse Limited, receiver and manager of Innisfil Landfill Corporation.

R. Lindgren, for Hodgsons.

Linda McCaffrey, Q.C., for Attorney General.

M. Green, for County of Simcoe.

C. Findlay, for Town of Innisfil.

K. Thomson, for Mortgage Insurance Company of Canada.

J. Coop, for Ministry of Environment and Energy.

Subject: Corporate and Commercial; Insolvency

Receivers --- Conduct and liability of receiver — Duties.

Receivers — Powers — Court-appointed receiver entitled to give report and not required to swear affidavit.

A court-appointed receiver-manager, as an officer of the court, is not required to provide a sworn affidavit with its report. Only in unusual circumstances will other parties be allowed to examine the receiver-manager on any report.

Statutes considered:

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Environmental Protection Act, R.S.O. 1990, c. E.19.

Ontario Water Resources Act, R.S.O. 1990, c. O.40 —

s. 53

Planning Act, R.S.O. 1990, c. P.13.

Motion by receiver-manager for directions and advice; Cross-motion by Attorney General to quash report.

***Farley J.*:**

Endorsement on Cross-motion and Motion

Endorsement on Cross-motion by Ministry of the Attorney General

1 Ms. McCaffrey says that she does not know the nature of the relief being sought — and that, in failing to specify, the Receiver has breached the Rules and the Practice Direction. Over and above that she complains that there is no sworn affidavit from the Receiver.

2 Mr. Thomson, for Mortgage Insurance Company of Canada, ("MICC"), characterized the relief sought as being as plain as the nose on one's face. I agree — but then perhaps the difficulty with that metaphor is that it requires one to take a look in the mirror. The objecting parties would have a difficult time in attempting to peer into the looking glass when they are doing an imitation of an ostrich. Alice in Wonderland in comparison looks like a normal regime.

3 The question in issue was put squarely and fairly in Mr. McDougall's letter of September 23, 1994 to Ms. McCaffrey, a copy of which other counsel have in the Compendium relating to Price Waterhouse Limited's ("PWL") obligations as Receiver and Manager ("R/M") relating to the forcemain and pumping station required by the Director's (Wilfred Ng) letter of September 16, 1994 in light of PWL's lack of funds in this receivership and what the Ministry of Environment and Energy's ("MOEE") position was towards that problem.

4 As to the Practice Direction, I am puzzled by counsel's reluctance to sign the Request Form since the time was cleared for what they understood would be a directions question. I am afraid that the litigation system would be badly served if, as a regular matter, opposing parties had to be served with a complete record before agreeing to dates.

5 As to the question of there not being any affidavit of the Receiver to cross-examine on, I am somewhat puzzled by this. I do not understand that a Receiver, being an officer of the Court and being appointed by Court Order is required to give his reports by affidavit. I note that there is a jurisprudence to the effect that it would have to be at least unusual circumstances for there to be any ability of other parties to examine (cross-examine in effect) the Receiver on any report. However, I do acknowledge that in, perhaps what some might characterize as a tearing down of an institution in the rush of counsel "to get to the truth of the matter" (at least as perceived by counsel), Receivers have sometimes obliged by making themselves available for such examination. Perhaps the watchword should be the three Cs of the Commercial List — cooperation, communication and common sense. Certainly, I have not seen any great need for (cross-)examination when the Receiver is willing to clarify or amplify his material when such is truly needed.

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6 Motion by the Ministry of the Attorney General ("AG") to quash is dismissed.

Motion of Receiver ("PWL") for Directions

7 As Mr. McDougall said this morning, he put the R/M's request for advice and directions into as plain English as he was capable. This is as follows:

> (a) Whether, having in mind the settlement reached on July 26, 1994, it is sufficient for Price Waterhouse Limited, ("PWL"), to install the Leachate Collection System alone before applying to the Court for a discharge and termination of the receivership;
>
> (b) If it is the Court's view that PWL is obliged to install a pumping station and forcemain system, how is such an installation to be financed?

8 I do not think that I had any difficulty in understanding this request for directions (of course the proof of that pudding will be in the eating and how the R/M reacts to my advice and directions herein). I must say, however, that I was more than somewhat dismayed to hear the reaction of those truly opposing the R/M since either they did not understand the request or they refused to try to understand it. The "answers" they came back with did not fit or even resemble the "questions". Perhaps it is that these parties have been fighting each other for too long. In this regard, I must reiterate my concern for the sake of public health and safety. People like the Hodgsons should not have become pawns in this game of chess. I share the Joint Board's concern (see Joint Board's May 14, 1994 clarification):

> Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation.

9 Allow me to note several items:

10 (a) The Settlement Agreement of July 26, 1994 provides:

> 1. PWL will remain as Receiver and Manager until the Leachate Collection System as described in the Development and Operations Report dated September, 1991 by Henderson, Paddon & Associates Limited is installed and operational.
>
> 2. PWL will cause the Leachate Collection System to be installed as soon as possible, the cost of such installation to be billed to the MOEE for payment out of the balance of the security fund established for the site.
>
> 3. [PWL also agreed to do capping measures as agreed on April 25, 1994 meeting.]

11 Thus the Settlement Agreement requires PWL to complete the Leachate Collection System and the capping. Not to do so would be a breach of the settlement by PWL (unless it had just legal cause). During the period of installing the Leachate Collection System to the stage of it being operational, PWL has also agreed to remain as Receiver and Manager. One however could see PWL as the operational phase neared reality obtaining a court date for a discharge and termination of the receivership. Under the wording of the Settlement Agreement it would appear that this motion would be heard at the same time as the adjourned MOEE motion and the Hodgsons' motion given the reference in para. 5 of the Settlement Agreement to a (singular) date to be agreed upon and fixed by the Registrar of this List.

12 (b) I was also referred to the Joint Board's decision of April 5, 1994 [reported at 13 C.E.L.R. (N.S.) 170 (Ont. Joint Bd.)], its clarification of May 13, 1994 and the Director's decision of September 16, 1994 (and attachments). I

understand the draft decision of July 4, 1994 circulated amongst the parties to have been materially the same for all intents. I thought it quite helpful for Mr. Coop to give me a "précis" of the immediate history and jurisdiction.

13 I further understand that PWL's position is that there are no "funds" in the receivership, at least monies of the magnitude needed to carry out the subject work — neither the Leachate Collection System which I recall is in the neighbourhood of $800,000 nor a fortiori the forcemain and pumping station, estimated at some $2.5 million. While apparently the AG and the MOEE dispute this impecuniosity of the receivership and reserve under the settlement the right to inspect the R/M's accounts on reasonable notice, it is also clear that the MOEE agreed because of the alleged impecuniosity that the Leachate Collection System would be billed to the security fund (but subject to a motion for reimbursement). Thus, it would appear to be reasonable to assume that the same funding problem still exists in the receivership absent any new information which has thus far not been forthcoming.

April 5, 1994 Order

14 (a) p. 36 — If [PWL as R/M] cannot or will not comply with such an order then it can approach the Court and seek a termination of the receivership.

15 (b) p. 48 (i) Given the proximity of private property and significant natural features, [PWL as R/M] and/or the Ministry should implement proper leachate mitigation immediately. (ii) Duplicate of p. 36 cited above.

16 (c) p. 49 — The Director has a legislated mandate to uphold the purpose and provisions of the EPA (*Environmental Protection Act*) and the OWRA (*Ontario Water Resources Act*). If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed.

17 (d) p. 50 — The Joint Board "deferred" (this apparently means "delegated") the obligation to the Director to determine detailed requirements for a leachate collection and management system. Under 1d [PWL as R/M] and the MOEE were to report back to the Joint Board within 90 days as to progress on condition 1a, b and c. [This would imply that this report should have been by early July which would in turn imply that the Director would have given his decision prior to that time.]

May 13, 1994 Clarification

18 (e) The Board's [April 4, 1994] Order requires the implementation of a leachate management system and creates responsibility on the part of the Receiver and Manager of the Innisfil Landfill (Price Waterhouse Limited) to comply with this Order. The Board draws the attention of the parties to the following passage of s. A(4) of its April 5, 1994 Reasons for Rulings and Order [at pp. 220-221]:

> A(4) The [PWL as R/M] responsibility to comply with the relevant regulatory environment and legislation is confirmed by the cited authorities and paragraph 19 of the Court Order. Given the context of the receivership and the Certificates regulating the operation of the site, other responsibilities also exist. These responsibilities involve the development, approval and timely introduction of proper leachate management and the prompt pursuit of an EPA hearing for the expanded use of the site. In the Board's opinion, the proponent's responsibilities should be viewed within this context. After considering paragraphs 3 and 19 of the Court Order, the Board believes it is reasonable and appropriate to issue an Order that is consistent with the goals and provisions of the relevant legislation and regulatory regime (eg. EPA ss. 2 and 39, OWRA s. 26(1)). If the proponent cannot or will not comply with such an order then it can approach the Court and seek the termination of the receivership.

Price Waterhouse Limited, in its role as Receiver and Manager of the Innisfil Landfill, is required to implement the Board's April 5, 1994 Order. However, the Board believes that better leachate management should be promptly implemented even if Price Waterhouse Limited discontinues its involvement with the site. The Board's Reasons for

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Rulings contained the following relevant comment [at p. 221]:

> If the proponent does not promptly install the necessary leachate management system, the MOEE has a responsibility to ensure it is installed. Nearby property owners and the natural environment should not suffer due to prolonged arguments about who should pay for mitigation ....

Director's Decision September 16, 1994

19 (f) p. 7 — PWL will require a s. 53 OWRA approval to construct the forcemain. It should apply to receive that approval and whatever further and other approvals may be required (e.g. *Planning Act*, etc.). In the interim, there may be a need to dispose of the collected leachate through alternative means [trucked leachate to the Barrie WPCP agreed as acceptable interim solution].

20 (g) [Regarding PWL's counsel's inquiry of July 5, 1994 concerning the Ministry's responsibilities in this matter and the effect of the receivership order], the Director repeats his July 15, 1994 letter. This includes:

> again, as to the extent of, and reasons for, PWL's alleged financial inability to perform the work ordered by the Joint Board, those allegations did not prevent the Board from imposing liability upon PWL. Nor do I have a discretion to change the Board's Order based on these allegations. I suggest that the issue of financial liability is one which will be addressed on the motion to Commercial Court, and you should make your submissions there.

21 [The reference to this motion would appear to be the (adjourned by settlement of July 26, 1994) motion of PWL.]

Comments

22 In discussing this advice and direction I would wish to stress that I do not consider this to be an appeal of the Board's Order (including the deferred portion to the Director which apparently forms part of the Board's Order) nor a judicial review thereof. Nothing which I say herein should be taken or interpreted as such. I wish merely to provide PWL with its requested advice and directions as it is entitled to receive from this Court. To the extent that PWL has inside or outside the receivership incurred liability by virtue of operation of the environmental legislation or a decision of the Joint Board, I make no comment save the following. Some of the Board's language in its Order is so clear that it would be difficult to imagine that there could be other than a straightforward ordinary interpretation; in certain other areas there may be some question of precise intent (in this I mean no disrespect to the Board, as I am sympathetic enough as to the question of how to interpret [court] decisions including my own).

23 Given the various "invitations" contained in the foregoing, it would not appear that the Board was advancing the proposition that PWL could not apply to the Court for a discharge and termination of the receivership until any fixed time (either calendar of fulfilment of condition — e.g. completion and operation of the collection system or of the forcemain and pumping station). Thus, it would appear that the Settlement Agreement obligations are the only barriers to such a court application. This would appear to answer Mr. McDougall's question(a).

24 As to (b), as I have answered (a) in the way which I have I do not see that if PWL were successful in its discharge and termination motion that it would be obliged to install the forcemain and pumping station in the direct physical or physical supervisory sense. The Board would appear to have concluded that if PWL cannot or will not comply with the Board's Order, it should approach the Court and seek a termination of the receivership. It would seem a necessary implication of a successful motion in Court that PWL after termination of the receivership would not be required to directly or supervisorily physically install the forcemain and pumping station.

25 Rather if PWL does not so install the system (apparently with or without a termination of the receivership)

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the Board expects the MOEE to install (directly or supervisorily physical) the system.

26 That leaves the question of funding to be answered. We have seen the funding arrangement for the collection system under the Settlement Agreement. What of the rest? It would seem that if PWL continues as R/M it would be obliged to not only physically install but also to fund the work because of the Order of the Board. If the MOEE installed physically the work, then one would assume that the MOEE would initially fund it but it may well pursue PWL for reimbursement (either because it feels there are "excess" receivership funds which should have been available or because PWL has a continuing obligation under the environmental legislation or the Board Order notwithstanding the termination of the receivership).

27 That last aspect would appear to be a somewhat open question. There are parts of the Board's Order which impose an obligation on PWL but it is to me at least somewhat unclear as to whether this liability affixes to PWL (i) in its general entity capacity (and is thereby ongoing no matter what happens to the receivership) or (ii) in its R/M capacity. In this latter position, there also seem to be two paths — (A) that a termination of the receivership and a discharge of PWL as R/M would relieve it from any ongoing responsibility not then accrued or (B) responsibility is to be fixed upon it as a result of it having been R/M at the time of the Board Order, which responsibility is not in the Board's view (and within what it sees as its jurisdiction) terminated by a Court termination of the receivership and a discharge of PWL as R/M.

28 While it appears clear that the Court Order appointing PWL as R/M contemplated in para. 11 that PWL's liability as R/M would be limited to net cash proceeds of the receivership, it may be that the Board in the proper exercise of its jurisdiction or the environmental (or other) legislation affecting the situation may impose a greater liability upon PWL. It would seem to me that PWL may find it helpful to ask for a further clarification from the Joint Board. It may be that once my endorsement has been typed up it would be of some assistance in pinpointing the areas of concern.

29 As discussed in the hearing one should clearly differentiate between the liability to do something and the liability to provide funding for it. Then there is the difference between a primary responsibility and a secondary one which comes into play if the person with the primary fails to do something on a timely basis. This later aspect also carries with it the principle of reimbursement.

30 I believe the Board is as concerned as I am that the squabbling between the MOEE/AG and PWL continues at a faster and greater rate than the physical implementation of the required systems needed for public health and safety. Cooperative efforts are far more productive; non-cooperative efforts merely raise the suspicions of the innocent party as to all future dealings (but then some always claim to be innocent and the other side non-innocent notwithstanding the overwhelming objective evidence to the contrary). I am, however, delighted to hear that notwithstanding this blowup both the MOEE/AG and PWL report that implementation of the Settlement Agreement is proceeding in a bona fide way with due dispatch.

31 In conclusion, I would merely observe that it is most helpful if the obligations of receiver/managers are spelled out (so that they can be easily known by the receiver/manager) in order that there be no unpleasant surprises of unexpected liabilities, especially if there is no realistic way to fund same. While that may be the hard result in a particular case, no doubt the law of economics (as well as fair play) will take over and there will be an absence of willing potential receiver/managers available to go into situations where they are needed. Who then will be available? Who then will be appropriately qualified? It is, of course, one thing to have a system or regime which works well — but only on paper and another which works well in practice.

32 It should be remembered that "once bitten, infinitely shy".

33 Costs: PWL awarded $1,500 payable forthwith by MOEE/AG. I see no reason why Ms. McCaffrey could not

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have more cooperativelyattempted to discuss and answer to the extent feasible and reasonable the aspects of Mr. McDougall's letter of September 23, 1994.

34 Postscript: The Board referred to paras. 3 and 19 of the Court Order. I presume this is the Order of Granger J. dated August 13, 1990. If so, I have some difficulty in relating para. 3 which appears to deal with PWL being able to examine persons under oath to be linked with PWL's responsibility under the Board's Order but I may be missing something quite obvious. As to para. 19, at first blush this would appear to relate directly to the Court Order being a *non-impedance* of the MOEE in carrying out its duties and not directly impose liability or responsibility upon PWL although I note that of course PWL as Receiver and Manager may well have some liability by virtue of its activities and the legislation referred to of the EPA and the OWRA. Again, I note that I may be missing something obvious.

Order accordingly.

END OF DOCUMENT

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TAB 17

C
2007 CarswellAlta 489, 2007 ABQB 249, [2007] A.W.L.D. 2012, 32 C.B.R. (5th) 74

Big Sky Living Inc., Re

In the Matter of The Insolvency of Big Sky Living Inc.

Alberta Court of Queen's Bench

D. Lee J.

Heard: April 10, 2007
Judgment: April 16, 2007
Docket: Edmonton BK03-97916

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Counsel: Roger C. Stephen for Applicants, Peter Leduc, Norman Seguin

J.H. Hockin for KPMG Receiver of Big Sky Living Inc., HSBC Bank Canada

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency

Debtors and creditors --- Receivers — Actions by and against receiver — Practice and procedure — General principles

Cross-examination — PL and NS applied for order requiring receiver to attend for cross-examination on its filed report — Application adjourned pending further submissions — Applicants failed to provide affidavit in support, and in oral submissions failed to give particulars as to questionable conduct receiver was allegedly involved in — Cross-examination of receiver, who is officer of court, is exceptional circumstance, and receivers should not be subject to harassment for doing their job, particularly if parties against whom receivership is ordered against are using examination as fishing expedition, or are allowed to establish basis of potential lawsuits against receiver at cost of petitioning party who instituted receivership — Applicants were given time-limited opportunity to put in writing particulars of wrongdoing alleged in receivership, or alternatively, applicants could provide court with specific questions for receiver which could be answered by way of written interrogatories or through cross-examination.

Cases considered by *D. Lee J.*:

Big Sky Living Inc., Re (2007), 2007 ABQB 20, 2007 CarswellAlta 25, 28 C.B.R. (5th) 1 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 ABQB 423, 2004 CarswellAlta 810 (Alta. Q.B.) — referred to

Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society (2004), 2004 CarswellAlta 557, 2004 ABQB 337 (Alta. Q.B.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2007), 29 C.B.R. (5th) 45, 2007 CarswellOnt 1115, 2007 ONCA 135 (Ont. C.A.) — considered

APPLICATION for order requiring receiver to attend for cross-examination on its report.

***D. Lee J.*:**

1 The Applicants Peter Leduc and Norman Seguin seek an order requiring Tim Reid of KMPG Inc. to attend at the law offices of their solicitor Roger C. Stephens to be cross-examined on the the report of the Receiver dated and filed January 12, 2007. I originally dealt with this matter on January 9, 2007 when Mr. Leduc and Mr. Seguin applied for the following relief:

1. An Order suspending the sale of the unsold lands which remain the subject matter of this Receivership, namely, twenty-three lots (the "Lands") to Ashton Homes Ltd. ("Ashton") pending further Order of this Court;

2. An Order requiring the Receiver to provide an accounting and report to this Court respecting all sales of the lands governed by this receivership and the parties' performance under the purchase and sale agreement between the Receiver and Ashton;

3. An Order requiring the Receiver of Big Sky Living Inc., KPMG Inc., to obtain an appraisal of the Lands;

4. An Order requiring the Lands to be listed and sold on the open market to the highest bidder.

2 I declined to granted any of the relief sought in the January 9, 2007 motion, and any attempt to cross-examine the Receiver would have to await his Report. This is discussed in my written Reasons dated January 11, 2007, now reported at 2007 ABQB 20 (Alta. Q.B.).

3 Following the issuance of the Receiver's latest report, the Applicants Mr. Leduc and Mr. Seguin through their counsel Mr. Stephens submitted that the report "raises many questions with respecting the conduct of the receivership, and in particular the continued sale of lands at prices established in 2001, despite the protests of the Applicants". No Affidavit in support of this motion to cross-examine the Receiver is made either by Mr. Leduc or Mr. Seguin. The Receiver's latest report dated January 12, 2007 is quite extensive. In oral submissions Mr. Stephens is not able to give the Court many, if any, particulars as to the questionable conduct that he says the receiver is involved in.

4 Cross-examination of a Receiver, who is an officer of the Court, is an exceptional circumstance, and Receivers should not be subject to harassment for doing their job, particularly given that most Receivers in doing their jobs usually offend the parties against who the receivership is ordered. This is particularly so if the parties against whom the receivership is ordered against are using the examination of the Receiver as a fishing expedition, or to allow them to establish the basis of potential lawsuits against the Receiver, at the cost of the petitioning party in this case the HongKong Bank who instituted the receivership.

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5 The law in this area was described in my written Reasons for Judgment in *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, 2004 ABQB 337 (Alta. Q.B.) and 2004 ABQB 423 (Alta. Q.B.). More recent cases from the Ontario Courts have confirmed the circumstances in which an examination of a Receiver is appropriate.

6 In *Ravelston Corp., Re*, 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]) Cumming, J. of the Ontario Superior Court of Justice (Commerical List) stated the following criteria at paragraphs 37 and 38: —

> 37 The Receiver had declined to volunteer for an out-of-court examination. A court-appointed receiver is not generally subject to cross-examination on the contents of its reports. There are exceptional situations. See for example *Confectionately Yours, Inc., Re* (2001), 25 C.B.R. (4th) 24 at para. 2 (Ont. Super. Ct.), var'd on other grounds, (2002), 219 D.L.R. (4th) 72 (Ont. C.A.), leave to appeal to S.C.C. ref'd, [2002] S.C.C.A. No. 460; *Mortgage Insurance Co. of Canada v. Innisfil Landfill Corporation* (1995), 30 C.B.R. (3d) 100 at para. 5 (Ont. Gen. Div.); *Re. Anvil Range Mining Corp.* (2001), 21 C.B.R. (4th) 194 at para. 4 (Ont. Super Ct.); *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 506 at para. 18 (Q.B.); and *Edmonton Region Community Board for Persons with Developmental Disabilities v. Aboriginal Partners & Youth Society*, [2004] A.J. No. 710 at paras. 17-22 (Q.B.)
>
> 38 In *Bell Canada International Inc., Re*, [2003] O.J. No. 4738 at para 8 (Super. Ct.), Farley J. of this Court stated:
>
>> [A] court officer may be (cross) examined in unusual circumstances. It would seem to me that unusual circumstances would include the situation where the officer of the court refused to cooperate in clarifying a part of his report or in not expanding upon any element in the report as may be reasonably requested. Frequently, such can be accomplished by questions and answers in writing or an interview (depending on the circumstances it may be desirable to have a recording made, or a summary memo). The reasonability of a request must take into account the objectivity and neutrality of the officer of the court (see *Re Confederation Treasury Services Ltd.* (1995), 37 C.B.R. (3d) 237 (Ont. Gen. Div.)) where I described the necessity for such and the caution that woe betide any officer of the court who did not observe his duty to be neutral and objective). *Bakemates [Re Confectionately Yours]* clarifies that an officer of the court when dealing with the question of his fees and disbursements is to be treated as an ordinary litigant as having an understandable self interest in the outcome; therefore fees and disbursements are to be supported by an affidavit and the officer of the court is in that respect open to cross examination.

7 The Ontario Court of Appeal in 2007 ONCA 135 (Ont. C.A.) concluded that there was not reason to interfere with the motion Judge's decision in *Ravelston Corp., Re*.

Conclusion

8 As matters presently stand, Mr. Stephens has not been able to show the Court any cogent or compelling reason why the Receiver should be subject to a cross-examination. However, I am prepared to give Mr. Stephens a further opportunity to put in writing the particulars of the wrongdoing that he is alleging in this Receivership. I am also prepared to give Mr. Stephens the opportunity, in the alternative, to provide the Court with specific questions for the Receiver, which the Receiver could answer by way of written interrogatories or through cross-examination.

9 This list of questions however must have a demonstrably valid basis and purpose, in accordance with the principles described above.

10 Any cross-examination of the Receiver, or any questions that I direct the Receiver to answer, will also have to be dealt with in a procedurally fair manner, and the costs involved in having the Receiver answer these questions or

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be cross-examined, has to be dealt with.

11 Mr. Stephens will have until April 24, 2007 to produce particulars as to the improprieties he believes exists in this Receivership, as well as to provide a list of questions, and the reasons the questions need to be asked and answered. Mr. Hockin will have until May 8, 2007 to respond to the arguments put forward by Mr. Stephens, to advise which questions, if any, are acceptable, and the objection that he has to the Receiver answering the remainder of the questions proposed.

Order accordingly.

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TAB 18

Indexed as:
R. v. Collins

Between
Her Majesty the Queen, respondent, and
Ralph Collins, appellant

[2001] O.J. No. 3894

150 O.A.C. 220

160 C.C.C. (3d) 85

51 W.C.B. (2d) 290

Docket No. C32825

Ontario Court of Appeal
Toronto, Ontario

Charron, Sharpe and Simmons JJ.A.

Heard: April 9, 2001.
Judgment: October 5, 2001.

(83 paras.)

Criminal law -- Evidence and witnesses -- Admissibility, whether relevant and material -- Photographs, movies, videotapes -- Simulations -- Opinion evidence -- Expert evidence -- Qualifications and declaration that a witness is an

Appeal by Collins from his conviction of causing death by criminal negligence. The victim was a seven-year-old boy who was shot in the shoulder by a bullet fired by Collins. Collins had been firing shots from his rifle into a lake next to where the victim was sitting. The Crown alleged that the bullet ricocheted off the surface of the water, striking the victim. The sole issue on the appeal related to the admissibility of a simulated experiment conducted by police officers at the site of the shooting. Setting up Collins rifle at the approximate location where he would have been standing at time of the shooting, police fired 16 shots into the water at various distances in front of where the victim was positioned. All but one of the bullets ricocheted off the water and struck the large target placed in the area where the victim was sitting. The videotape of the experiment was played for the jury and the officer who conducted the experiment gave evidence concerning the simulation. Collins argued that the experiment evidence constituted expert opinion evidence in the nature of novel scientific evidence, and that the officer should have been qualified as an expert to conduct this type of experiment.

HELD: Appeal dismissed. Collins's characterization of the experiment testimony as expert opinion evidence in the nature of novel scientific evidence was misconceived. The evidence was neither

factual evidence, much like any other sworn testimony; in other cases, it is a combination of factual and opinion evidence. In either situation, its admissibility is governed by well-established rules of evidence. Indeed, in my view, the key to determining the admissibility of experiment evidence is to keep in mind this distinction between fact and opinion as it is understood in the law of evidence. I will briefly review the applicable principles of law.

17 In the law of evidence, an opinion means an "inference from observed fact": see R. v. Abbey (1982), 68 C.C.C. (2d) 394 at 409. As stated in Abbey, as a general rule, witnesses testify only as to observed facts and it is then up to the trier of fact to draw inferences from those facts. A lay witness will be permitted to give an opinion only with respect to matters that do not require special knowledge and in circumstances where it is virtually impossible to separate the facts from the inferences based on those facts. A witness testifying that "a person was drunk" is a common example of an opinion that can be provided by a lay witness. See R. v. Graat (1982), 2 C.C.C. (3d) 365 (S.C.C.) for a review of the law on non-expert opinion. Otherwise, opinion evidence will only be received with respect to matters calling for special knowledge beyond that of the trier of fact. In those cases, an expert in the field may be permitted to provide the judge and jury with an opinion, that is "a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate" (Abbey at 409). The law as to expert opinion evidence was authoritatively restated in Mohan, supra. Before expert opinion evidence can be admitted, the evidence: (a) must be relevant to an issue in the case; (b) it must be necessary to assist the trier of fact; (c) it must not be subject to any other exclusionary rule; and (d) it must be given by a properly qualified expert.

18 A witness' testimony as to observed facts is, of course, subject to the general principles governing the admissibility of any evidence: relevance and materiality. Relevance is established at law if, as a matter of logic and experience, the evidence tends to prove the proposition for which it is advanced. The evidence is material if it is directed at a matter in issue in the case.[1] Hence, evidence that is relevant to an issue in the case will generally be admitted. Indeed, it is a fundamental principle of our law of evidence that any information that has any tendency to prove a fact in issue should be admitted in evidence unless its exclusion is justified on some other grounds: see R. v. Corbett, [1988] 1 S.C.R. 670 at 715; Morris v. R., [1983] 2 S.C.R. 190 at 201; and R. v. Seaboyer, [1991] 2 S.C.R. 577 at 609.

19 The grounds that justify the exclusion of evidence that is otherwise relevant and material form the basis of many of our more specific rules of evidence. The rule against hearsay, the opinion rule and the similar fact rule are a few examples. Quite apart from these specific rules, evidence that is otherwise relevant and material may also be excluded by the exercise of the trial judge's general power to safeguard the fairness of the proceedings. Our law of evidence recognizes the general power of a judge to exclude relevant and material evidence where its probative value is outweighed by the prejudice caused by its admission, provided that where the evidence is tendered by the defence, it should not be excluded on that basis unless the prejudice substantially outweighs the value of the evidence: see Seaboyer, supra, at 390; and R. v. S.C.B. (1997), 119 C.C.C. (3d) 530 at 541 (Ont. C.A.). Prejudice in this context does not mean, of course, that the evidence will be detrimental to the other party's position. Rather, it is related to the detrimental effect that the evidence may have on the fairness and the integrity of the proceedings. For example, the evidence may not be worth receiving if its reliability is clearly outweighed by its potential to mislead or confuse the trier of fact. The evidence could also be excluded where its admission would involve an inordinate amount of time that is not commensurate with its value. See Mohan, supra, at 411.

20 These general principles apply to experiment evidence. A pre-trial experiment can be as simple as driving from one location to another to determine the time it takes to cover the distance in order to substantiate or disprove an alibi, or driving along a particular stretch of road to determine at what point a stop sign becomes visible. The evidence in such cases, provided that it is relevant to an issue in the case,

TAB 19

(Consolidated up to 163/2010)

ALBERTA REGULATION 124/2010

Judicature Act

ALBERTA RULES OF COURT

Evidence at application hearings

6.11(1) When making a decision about an application the Court may consider only the following evidence:

(a) affidavit evidence, including an affidavit by an expert;

(b) a transcript of questioning under this Part;

(c) the written or oral answers, or both, to questions under Part 5 that may be used under rule 5.31;

(d) an admissible record disclosed in an affidavit of records under rule 5.6;

(e) anything permitted by any other rule or by an enactment;

(f) evidence taken in any other action, but only if the party proposing to submit the evidence gives every other party written notice of that party's intention 5 days or more before the application is scheduled to be heard or considered and obtains the Court's permission to submit the evidence;

(g) with the Court's permission, oral evidence, which, if permitted, must be given in the same manner as at trial.

(2) An affidavit or other evidence that is used or referred to at a hearing and that has not previously been filed in the action must be filed as soon as practicable after the hearing.

TAB 20

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Receiver's statement

246. (1) A receiver shall, forthwith after taking possession or control, whichever occurs first, of property of an insolvent person or a bankrupt, prepare a statement containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's interim reports

(2) A receiver shall, in accordance with the General Rules, prepare further interim reports relating to the receivership, and shall provide copies thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

Receiver's final report and statement of accounts

(3) A receiver shall, forthwith after completion of duties as receiver, prepare a final report and a statement of accounts, in the prescribed form and containing the prescribed information relating to the receivership, and shall forthwith provide a copy thereof to the Superintendent and

(*a*) to the insolvent person or the trustee (in the case of a bankrupt); and

(*b*) to any creditor of the insolvent person or the bankrupt who requests a copy at any time up to six months after the end of the receivership.

1992, c. 27, s. 89.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368

126. For the purposes of subsection 246(2) of the Act, interim reports relating to a receivership must be prepared by the receiver at least once every six months and must include

(*a*) the interim statement of receipts and disbursements, in prescribed form;

(*b*) the statement of all property of which the receiver has taken possession or control that has not yet been sold or realized; and

(*c*) information about the anticipated completion of the receivership.

SOR/98-240, s. 1.

TAB 21

Personal Property Security Act, R.S.A. 2000, c. P-7

Receiver

65(1) A security agreement may provide for the appointment of a receiver and, except as provided in this or any other Act, the receiver's rights and duties.

(2) A receiver shall

(a) take the collateral into the receiver's custody and control in accordance with the security agreement or order under which the receiver is appointed, but unless appointed a receiver-manager or unless the Court orders otherwise, shall not carry on the business of the debtor,

(b) where the debtor is a corporation, immediately notify the Registrar of Corporations of the receiver's appointment or discharge,

(c) open and maintain a bank account in the receiver's name as receiver for the deposit of all money coming under the receiver's control as a receiver,

(d) keep detailed records, in accordance with accepted accounting practices, of all receipts, expenditures and transactions involving collateral or other property of the debtor,

(e) prepare at least once in every 6-month period after the date of the receiver's appointment financial statements of the receiver's administration that, as far as is practical, are in the form required by section 155 of the *Business Corporations Act,* and

(f) on completion of the receiver's duties, render a final account of the receiver's administration in the form referred to in clause (e), and, where the debtor is a corporation, send copies of the final account to the debtor, the directors of the debtor and to the Registrar of Corporations.

(3) The debtor, and where the debtor is a corporation, a director of the debtor, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to make available for inspection the records referred to in subsection (2)(d) during regular business hours at the place of business of the receiver in the Province.

(4) The debtor, and where the debtor is a corporation, a director of the debtor, a sheriff, civil enforcement agency, a person with an interest in the collateral in the custody or control of the receiver, or the authorized representative of any of them, may, by a demand in writing given to the receiver, require the receiver to provide copies of the financial statements referred to in subsection (2)(e) or the final account referred to in subsection (2)(f) or make available those financial statements or that final account for inspection during regular business hours at the place of business of the receiver in the Province.

(5) The receiver shall comply with the demands referred to in subsection (3) or (4) not later than 10 days from the date of receipt of the demand.

(6) The receiver may require the payment in advance of a fee in the amount prescribed for each demand made under subsection (4), but the sheriff and the debtor, or in the case of an incorporated debtor, a director of the debtor, are entitled to inspect or to receive a copy of the financial statements and final account without charge.

(7) On the application of any interested person, the Court may

(a) appoint a receiver;

(b) remove, replace or discharge a receiver whether appointed by the Court or pursuant to a security agreement;

(c) give directions on any matter relating to the duties of a receiver;

(d) approve the accounts and fix the remuneration of a receiver;

(e) exercise with respect to a receiver appointed under a security agreement the jurisdiction it has with respect to a receiver appointed by the Court;

(f) notwithstanding anything contained in a security agreement or other document providing for the appointment of a receiver, make an order requiring a receiver or a person by or on behalf of whom the receiver is appointed, to make good any default in connection with the receiver's custody, management or disposition of the collateral of the debtor or to relieve that person from any default or failure to comply with this Part.

(8) The powers referred to in subsection (7) and in section 64 are in addition to any other powers the Court may exercise in its jurisdiction over receivers.

(9) Unless the Court orders otherwise, a receiver is required to comply with sections 60 and 61 only when the receiver disposes of collateral other than in the course of carrying on the business of the debtor.

1988 cP-4.05 s65;1990 c31 s52;1994 cC-10.5 s148

TAB 22

(Consolidated up to 163/2010)

ALBERTA REGULATION 124/2010

Judicature Act

ALBERTA RULES OF COURT

Division 7
Court-appointed Receiver

Court-appointed receiver

6.47 If a Court appoints a receiver other than under an enactment, the Court may, in addition to a procedural order,

(a) prescribe the compensation payable to the receiver and who is to pay it;

(b) require the receiver to provide security;

(c) require the receiver to file financial accounts and reports with the court clerk at the times and subject to the scrutiny ordered by the Court;

(d) order payment to or disallow all or part of a payment to the receiver;

(e) order a hearing to be held with respect to any matter for which the receiver was appointed or is responsible;

(f) make any other order or direction that the circumstances require

TAB 23

(Consolidated up to 163/2010)

ALBERTA REGULATION 124/2010

Judicature Act

ALBERTA RULES OF COURT

...

Purpose and intention of these rules

1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.

(2) In particular, these rules are intended to be used

(a) to identify the real issues in dispute,

(b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

(4) The intention of these rules is that the Court, when exercising a discretion to grant a remedy or impose a sanction, will grant or impose a remedy or sanction proportional to the reason for granting or imposing it.

...

Procedural orders

1.4(1) To implement and advance the purpose and intention of these rules described in rule 1.2 the Court may, subject to any specific provision of these rules, make any order with respect to practice or procedure, or both, in an action, application or proceeding before the Court.

(2) Without limiting subrule (1), and in addition to any specific authority the Court has under these rules, the Court may, unless specifically limited by these rules, do one or more of the following:

(a) grant, refuse or dismiss an application or proceeding;

(b) set aside any process exercised or purportedly exercised under these rules that is

(i) contrary to law,

(ii) an abuse of process, or

(iii) for an improper purpose;

(c) give orders or directions or make a ruling with respect to an action, application or proceeding, or a related matter;

(d) make a ruling with respect to how or if these rules apply in particular circumstances or to the operation, practice or procedure under these rules;

(e) impose terms, conditions and time limits;

(f) give consent, permission or approval;

(g) give advice, including making proposals, providing guidance, making suggestions and making recommendations;

(h) adjourn or stay all or any part of an action, application or proceeding, extend the time for doing anything in the proceeding, or stay the effect of a judgment or order;

(i) determine whether a judge is or is not seized with an action, application or proceeding;

(j) include any information in a judgment or order that the Court considers necessary.

(3)A decision of the Court affecting practice or procedure in an action, application or proceeding that is not a written order, direction or ruling must be

(a) recorded in the court file of the action by the court clerk, or

(b) endorsed by the court clerk on a commencement document, filed pleading or filed document or on a document to be filed.

...

Changes to these rules

1.6(1) The judges of the Court of Queen's Bench and the Court of Appeal may alter and amend any of these rules or make additional rules.
(2) The Rules of Court Committee under the *Judicature Act* is, for the assistance of readers of these rules, authorized to delete, amend or create new information notes or overview summaries, or both.

TAB 24

1993 CarswellOnt 131, 25 C.R. (4th) 325, 160 N.R. 371, 85 C.C.C. (3d) 327, 16 O.R. (3d) 384 (note), 67 O.A.C. 321, [1993] 4 S.C.R. 475, 18 C.R.R. (2d) 242, J.E. 93-1896, 21 W.C.B. (2d) 379

R. v. Levogiannis

DIMITRIOS LEVOGIANNIS v. R.; ATTORNEY GENERAL OF CANADA, ATTORNEY GENERAL OF QUEBEC, ATTORNEY GENERAL OF MANITOBA and ATTORNEY GENERAL FOR ALBERTA (Intervenors)

Supreme Court of Canada

Lamer C.J.C., LaForest, L'Heureux-Dubé, Sopinka, Gonthier, Cory, McLachlin, Iacobucci and Major JJ.

Heard: June 15, 1993

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Subject: Criminal; Evidence

Criminal Law --- Evidence — Evidence at trial — Witnesses — Child witnesses — Absence of accused.

Charter of Rights and Freedoms — Life, liberty and security — Principles of fundamental justice — Section 486(2.1) of Criminal Code providing for young complainant in sexual abuse case to testify behind screen not violating accused's rights under s. 7 — Screen not restricting accused's ability to cross-examine — Section providing for very limited exception and for judicial discretion.

Charter of Rights and Freedoms — Full answer and defence — Section 486(2.1) of Criminal Code providing for young complainant in sexual abuse case to testify behind screen not violating accused's rights under s. 11(d) to be presumed innocent or to fair trial — Properly informed jury would not be swayed by use of screen.

The accused was charged with touching a child for a sexual purpose contrary to s. 151 of the *Criminal Code*. The Crown asked that the 12-year-old complainant be allowed to testify behind a screen pursuant to s. 486(2.1) of the Code. The Crown's motion was granted after a clinical psychologist testified that the complainant was experiencing a great deal of fear about testifying.

The accused challenged the constitutional validity of s. 486(2.1) on the grounds that it violated his right to a fair trial guaranteed by ss. 7 and 11(*d*) of the *Charter*. The trial judge held that the section did not infringe ss. 7 and 11(*d*). An appeal to the Court of Appeal was dismissed. The accused appealed further.

Held:

The appeal was dismissed.

The examination of whether an accused's rights are infringed encompasses multifaceted considerations, such as the rights of witnesses, in this case children, the rights of accused and the courts' duties to ascertain the truth. The goal

under s. 7 or 11(*d*) of the *Charter*. I will first deal with the appellant's concerns with regard to the infringement of his rights under s. 7 of the *Charter*.

Section 7 of the Charter

19 His liberty and security interest being at stake, the appellant argues that s. 486(2.1) offends the principles of fundamental justice protected by s. 7 of the *Charter*, since he is prevented, by the placement of the screen, from "facing his accuser". He further argues that the screening device undermines the integrity of the fact finding process by effectively disallowing full cross-examination.

20 The principles of fundamental justice provided by s. 7 must reflect a diversity of interests, including the rights of an accused, as well as the interests of society (*R. v. Seaboyer*, supra, at p. 603; *Cunningham v. Canada*, [1993] 2 S.C.R. 143; and *Rodriguez v. British Columbia (Attorney General)*, S.C.C., No. 23476, September30, 1993 [reported 24 C.R. (4th) 281]). While the objective of the judicial process is the attainment of truth, as this court has reiterated in *L. (D.O.)*, supra, the principles of fundamental justice require that the criminal process be a fair one. It must enable the trier of fact to "get at the truth and properly and fairly dispose of the case" while at the same time providing the accused with the opportunity to make a full defence (*R. v. Seaboyer*, supra, at p. 608).

21 In my view, the main objective pursued by the legislative enactmentpresently challenged is to better "get at the truth", by recognizingthat a young child abuse victim's evidence may, in certain circumstances, be facilitated if the child is able to focus his or her at tention on giving testimony, rather than experiencing difficulties in facing the accused. Section 486(2.1) of the *Criminal Code* recognizes that a child may react negatively to a face-to-face confrontation and, as a result, special procedures may be required to alleviate these concerns. Professor Nicholas Bala, in "Double Victims: Child Sexual Abuse and the Canadian Criminal Justice System", in W.S. Tarnopolsky, J. Whitman and M. Ouellette, eds., *Discrimination in the Law and the Administration of Justice* (1993), 232, writes in this connection (at p. 248):

> Parliament has recognized that victims of child sexual abuse may be traumatized by the process of testifying in court. Children are invariably more than simply nervous about being in court; they often are afraid of facing their assailant again. There have, for example, been cases involving children so frightened of the accused while testifying that they were physically ill on the witness stand and the prosecution had to be stopped, or so frightened that they were unable to answer questions.

22 The use of the words "full and candid account of the acts complained of" in s. 486(2.1) of the *Criminal Code* cannot express more clearly what this section purports to achieve. That this is a valid purpose is beyond doubt. The only question is whether the effect of s. 486(2.1) deprives an accused of his or her right to a full defence and fair trial. In my view, it does not.

23 One must recall that rules of evidence are not cast in stone, nor are they enacted in a vacuum. They evolve with time. As discussed at length in *L. (D.O.)*, supra, the recent trend in courts has been to remove barriers to the truth-seeking process (*R. v. Khan*, [1990] 2 S.C.R. 531; *R. v. W. (R.)*, supra; and *R. v. Marquard*, S.C.C., No. 22940, October 21, 1993 [reported 25 C.R. (4th) 1]). Recent Supreme Court of Canada decisions (*R. v. B. (K.G.)*, supra *R. v. Smith*, [1992] 2 S.C.R. 915; *R. v. Khan*, supra; and most recently in *L. (D.O.)*, supra), by relaxing certain rules of evidence, such as the hearsay rules, the use of videotaped evidence and out of court statements, have been a genuine attempt to bring the relevant and probative evidence before the trier of fact in order to foster the search for truth.

24 Parliament, on the other hand, is free to enact or amend legislation in order to reflect its policies and priorities, taking into account societal values which it considers important at a given time. It is clear that, in enacting s. 486(2.1) of the *Criminal Code*, Parliament was well aware of the plight of young victims of sexual abuse, as well as the need to curtail such abuse. This is perfectly legitimate. The only limit placed on Parliament is the obligation to

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TAB 25

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Court to appoint monitor

11.7 (1) When an order is made on the initial application in respect of a debtor company, the court shall at the same time appoint a person to monitor the business and financial affairs of the company. The person so appointed must be a trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*.

Restrictions on who may be monitor

(2) Except with the permission of the court and on any conditions that the court may impose, no trustee may be appointed as monitor in relation to a company

(*a*) if the trustee is or, at any time during the two preceding years, was

(i) a director, an officer or an employee of the company,

(ii) related to the company or to any director or officer of the company, or

(iii) the auditor, accountant or legal counsel, or a partner or an employee of the auditor, accountant or legal counsel, of the company; or

(*b*) if the trustee is

(i) the trustee under a trust indenture issued by the company or any person related to the company, or the holder of a power of attorney under an act constituting a hypothec within the meaning of the *Civil Code of Quebec* that is granted by the company or any person related to the company, or

(ii) related to the trustee, or the holder of a power of attorney, referred to in subparagraph (i).

Court may replace monitor

(3) On application by a creditor of the company, the court may, if it considers it appropriate in the circumstances, replace the monitor by appointing another trustee, within the meaning of subsection 2(1) of the *Bankruptcy and Insolvency Act*, to monitor the business and financial affairs of the company.

1997, c. 12, s. 124; 2005, c. 47, s. 129.

...

Duties and functions

23. (1) The monitor shall

(*a*) except as otherwise ordered by the court, when an order is made on the initial application in respect of a debtor company,

(i) publish, without delay after the order is made, once a week for two consecutive weeks, or as otherwise directed by the court, in one or more newspapers in Canada specified by the court, a notice containing the prescribed information, and

(ii) within five days after the day on which the order is made,

(A) make the order publicly available in the prescribed manner,

(B) send, in the prescribed manner, a notice to every known creditor who has a claim against the company of more than $1,000 advising them that the order is publicly available, and

(C) prepare a list, showing the names and addresses of those creditors and the estimated amounts of those claims, and make it publicly available in the prescribed manner;

(*b*) review the company's cash-flow statement as to its reasonableness and file a report with the court on the monitor's findings;

(*c*) make, or cause to be made, any appraisal or investigation the monitor considers necessary to determine with reasonable accuracy the state of the company's business and financial affairs and the cause of its financial difficulties or insolvency and file a report with the court on the monitor's findings;

(*d*) file a report with the court on the state of the company's business and financial affairs — containing the prescribed information, if any —

(i) without delay after ascertaining a material adverse change in the company's projected cash-flow or financial circumstances,

(ii) not later than 45 days, or any longer period that the court may specify, after the day on which each of the company's fiscal quarters ends, and

(iii) at any other time that the court may order;

(*d.1*) file a report with the court on the state of the company's business and financial affairs — containing the monitor's opinion as to the reasonableness of a decision, if any, to include in a compromise or arrangement a provision that sections 38 and 95 to 101 of the *Bankruptcy and Insolvency Act* do not apply in respect of the compromise or arrangement and containing the prescribed information, if any — at least seven days before the day on which the meeting of creditors referred to in section 4 or 5 is to be held;

(*e*) advise the company's creditors of the filing of the report referred to in any of paragraphs (*b*) to (*d.1*);

(*f*) file with the Superintendent of Bankruptcy, in the prescribed manner and at the prescribed time, a copy of the documents specified in the regulations;

(*f.1*) for the purpose of defraying the expenses of the Superintendent of Bankruptcy incurred in performing his or her functions under this Act, pay the prescribed levy at the prescribed time to the Superintendent for deposit with the Receiver General;

(*g*) attend court proceedings held under this Act that relate to the company, and meetings of the company's creditors, if the monitor considers that his or her attendance is necessary for the fulfilment of his or her duties or functions;

(*h*) if the monitor is of the opinion that it would be more beneficial to the company's creditors if proceedings in respect of the company were taken under the *Bankruptcy and Insolvency Act*, so advise the court without delay after coming to that opinion;

(*i*) advise the court on the reasonableness and fairness of any compromise or arrangement that is proposed between the company and its creditors;

(*j*) make the prescribed documents publicly available in the prescribed manner and at the prescribed time and provide the company's creditors with information as to how they may access those documents; and

(*k*) carry out any other functions in relation to the company that the court may direct.

Monitor not liable

(2) If the monitor acts in good faith and takes reasonable care in preparing the report referred to in any of paragraphs (1)(*b*) to (*d.1*), the monitor is not liable for loss or damage to any person resulting from that person's reliance on the report.

2005, c. 47, s. 131; 2007, c. 36, s. 72.

TAB 26

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Reports by trustee

27. (1) The trustee shall from time to time report,

(*a*) when required by the inspectors, to every creditor,

(*b*) when required by any specific creditor, to the creditor, and

(*c*) when required by the Superintendent, to the Superintendent or the creditors,

showing the condition of the bankrupt's estate, the moneys on hand, if any, and particulars of any property remaining unsold.

Disbursements

(2) The trustee is entitled to charge against the estate of the bankrupt, for the preparation and delivery of any report referred to in subsection (1), only his actual disbursements.

R.S., c. B-3, s. 13.

...

Trustee to prepare report

170. (1) The trustee shall, in the prescribed circumstances and at the prescribed times, prepare a report, in the prescribed form, with respect to

(*a*) the affairs of the bankrupt,

(*b*) the causes of his bankruptcy,

(*c*) the manner in which the bankrupt has performed the duties imposed on him under this Act or obeyed the orders of the court,

(*d*) the conduct of the bankrupt both before and after the date of the initial bankruptcy event,

(*e*) whether the bankrupt has been convicted of any offence under this Act, and

(*f*) any other fact, matter or circumstance that would justify the court in refusing an unconditional order of discharge,

and the report shall be accompanied by a resolution of the inspectors declaring whether or not they approve or disapprove of the report, and in the latter case the reasons of the disapproval shall be given.

Filing and service of report

(2) Where an application of a bankrupt for a discharge is pending, the trustee shall file the report prepared under subsection (1) in the court not less than two days, and forward a copy thereof to the Superintendent, to the bankrupt and to each creditor who requested a copy not less than ten days, before the day appointed for hearing the application, and in all other cases the trustee, before proceeding to the discharge, shall file the report in the court and forward a copy to the Superintendent.

Superintendent may file report

(3) The Superintendent may make such further or other report to the court as he deems expedient or as in his opinion ought to be before the court on the application referred to in subsection (2).

Representation by counsel

(4) The trustee or any creditor may attend the court and be heard in person or by counsel.

Evidence at hearing

(5) For the purposes of the application referred to in subsection (2), the report of the trustee is evidence of the statements therein contained.

Right of bankrupt to oppose statements in report

(6) Where a bankrupt intends to dispute any statement contained in the trustee's report prepared under subsection (1), the bankrupt shall at or before the time appointed for hearing the application for discharge give notice in writing to the trustee specifying the statements in the report that he proposes at the hearing to dispute.

Right of creditors to oppose

(7) A creditor who intends to oppose the discharge of a bankrupt on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition, stating the grounds thereof to the trustee and to the bankrupt at or before the time appointed for the hearing of the application for discharge.

R.S., 1985, c. B-3, s. 170; 1997, c. 12, s. 100; 2005, c. 47, s. 102.