

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thow (Re) (Exemptions from Seizure)*,
2010 BCSC 1561

Date: 20101117
Docket: B051318
Registry: Vancouver

**In the Supreme Court of British Columbia
in Bankruptcy and Insolvency**

**In the matter of the Bankruptcy of
Ian Gregory Thow**

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment from Chambers

Counsel for Bankrupt:

D.J.A. Reid

Counsel for Wolrige Mahon Limited, Trustee in
Bankruptcy:

J.I. McLean

Place and Date of Hearing:

Vancouver, B.C.
October 12, 2010

Place and Date of Judgment:

Vancouver, B.C.
November 17, 2010

[1] Applying pursuant to ss. 37 and 67(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B/3 (B.I.A.), and s. 71 of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78 and the associated Regulations under that Act, Mr. Thow applies for an order reversing the decision of the Trustee to deny payments to him in respect of his statutory exemptions under the *Court Order Enforcement Act* and an order directing the Trustee to pay him \$17,000 in respect of those statutory exemptions.

BACKGROUND

[2] On July 21, 2005, Mr. Thow filed a Notice of Intention to make a proposal naming Wolrige Mahon Limited as the Trustee under the Proposal (“Trustee”).

[3] On July 28, 2005, Wolrige Mahon obtained an order appointing it Interim Receiver of all of the property and assets of Mr. Thow, including the ability to take possession of all of the assets of Mr. Thow.

[4] In an August 22, 2005 Statement of Affairs, Mr. Thow listed his assets as at July 21, 2005 and included in those assets his home in Saanichton, British Columbia (“Residence”).

[5] Mr. Thow has stated that he left British Columbia for Seattle, Washington sometime in “mid to late August of 2005”. In an April 21, 2009 Affidavit, Mr. Thow stated: “I left Canada for the United States in August 2005, and didn’t return to Canada until March 10th, 2009.” In an August 25, 2009 Examination of Mr. Thow before the Court, Mr. Thow was asked the following questions and gave the following answers:

- Q. When did you leave Victoria, where you lived, to go to Seattle on a permanent basis?
- A. I can’t give you the precise date, but it was – in my testimony it was sometime in mid to late August.
- Q. I’m asking you if you left Victoria permanently before the meeting of creditors was scheduled on September the 12th 2005?
- A. I left sometime in mid to late August of 2005

[6] On August 26, 2005, the Trustee brought an application authorizing it as Interim Receiver to enter into possession of the Residence including forced entry if necessary so that appraisers, real estate agents and prospective purchasers would have access to the Residence and so that an inventory of all personal property of Mr. Thow could be undertaken.

[7] On September 7, 2005, Mr. Thow filed a voluntary Bankruptcy Petition in the United States Bankruptcy Court for the Western District of Washington. In that filing, Mr. Thow gave as his address as 215 First Avenue West, Seattle, Washington. In that filing, Mr. Thow stated that he had been domiciled or had a residence, principal place of business or principal assets in the Western District of Washington for 180 days prior to the filing.

[8] The Trustee filed a Notice of Motion seeking the arrest of Mr. Thow. In support of that application, Michael T. Cheevers swore an affidavit stating that he was informed that Mr. Thow had crossed into the United States on the morning of September 8, 2005. On September 9, 2009, an order was made that a warrant for the arrest of Mr. Thow be issued pursuant to s. 168 of the *B.I.A.*. An application was made in 2009 by Mr. Thow to vacate the September 9, 2005 Warrant. In his affidavit filed in support of that application, Mr. Thow stated that he had left for the United States in August, 2005.

[9] At a September 12, 2005 meeting of the creditors called to vote on the Proposal of Mr. Thow, the creditors did not accept his Proposal. As a result, Mr. Thow was deemed to have made an assignment in bankruptcy.

APPLICABLE PROVISIONS OF THE *B.I.A.*

[10] The applicable provisions of the *B.I.A.* are as follows:

2 In this Act, ...

“date of the bankruptcy”, in respect of a person, means the date of

(a) the granting of a bankruptcy order against the person, ... or

(c) the event that causes an assignment by the person to be deemed;

“date of the initial bankruptcy event”, in respect of a person, means the earliest of the day on which any one of the following is made, filed or commenced, as the case may be: ...

- (b) a proposal by or in respect of the person,
 - (c) a notice of intention by the person,
 - (d) the first application for a bankruptcy order against the person, in any case
 - (i) referred to in paragraph ... 57(a) ..., or
 - (ii) in which a notice of intention to make a proposal has been filed under section 50.4 or a proposal has been filed under section 62 in respect of the person and the person files an assignment before the court has approved the proposal,
 - (e) the application in respect of which a bankruptcy order is made, in the case of an application other than one referred to in paragraph (d)
- ...

37. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.

57. Where the creditors refuse a proposal in respect of an insolvent person,

- (a) the insolvent person is deemed to have thereupon made an assignment; ...

67. (1) The property of a bankrupt divisible among his creditors shall not comprise ...

- (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;

but it shall comprise

- (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the Income Tax Act in respect of the calendar year – or the fiscal year of the bankrupt if it is different from the calendar year – in which the bankrupt became a bankrupt ...

APPLICABLE PROVISIONS OF THE COURT ORDER ENFORCEMENT ACT

[11] The applicable provisions of the *Court Order Enforcement Act* are as follows:

71 (1) Subject to subsections (2) to (4) of this section and section 71.2, the following goods and chattels of a debtor, at the option of the debtor, are exempt from forced seizure or sale by any process at law or in equity: ...

- (c) one motor vehicle that is of a value not exceeding a prescribed amount; ...

71.1 (1) ... the principal residence of a debtor is exempt from forced seizure or sale by any process at law or in equity if the value of the debtor's equity in the principal residence does not exceed a prescribed amount. ...

71.2 (1) If the value of the property referred to in section 71 (1) or 71.1 (1) exceeds the prescribed amount of the exemption for the property, that property is subject to seizure and sale under this Act.

(2) If property to which subsection (1) applies is sold under this Act, a sheriff or other officer must, unless otherwise provided by law or by the agreement of all interested parties, distribute any of the proceeds of the sale as follows:

(a) pay firstly to a secured creditor the amount owed by the debtor to the secured creditor if the secured creditor

(i) has, at the time of seizure, a financing statement registered under the *Personal Property Security Act*, or

(ii) has a charge registered under the *Land Title Act*,

(b) pay secondly to the debtor an amount not exceeding the prescribed amount of the exemption.

(3) The sum received by the debtor under subsection (2) (b) is exempt from attachment.

COURT ORDER ENFORCEMENT EXEMPTION REGULATION 28/98

[12] *Court Order Enforcement Regulation 28/98* provides in part:

1 In this regulation:

“Act” means the Court Order Enforcement Act;

2 For the purposes of section 71 (1) of the Act, the prescribed amounts of exemption are as follows: ...

(b) \$5 000 for one motor vehicle if the debtor is not a maintenance debtor; ...

3 For the purposes of section 71.1 (1) of the Act, the prescribed amount of equity is as follows:

(a) \$12 000 if the debtor is a person whose principal residence is located within the boundaries of the Capital Regional District or the Greater Vancouver Regional District; ...

WHAT EXEMPTIONS ARE CLAIMED BY MR. THOW?

[13] In an undated assignment stated to be as at August 11, 2009, Mr. Thow assigned to Harper Grey LLP “... all my right, title, interest and claim in and to any and all exemptions as accorded to me pursuant to the provisions of the British Columbia *Court Order Enforcement Act* and regulations related thereto.” It was further provided that any amount received was to be dealt with by Harper Grey LLP

as: "... a retainer in respect of my legal representation and may be drawn upon from time to time in payment of accounts rendered for services provided to me by such firm".

[14] I am satisfied that Mr. Thow can assign the exempt property or the sale proceeds from the exempt property without the disposition constituting a settlement. Accordingly, any sums available to Mr. Thow are to be paid by the Trustee to Harper Grey LLP.

(A) The Smart Car

[15] Mr. Thow had transferred this vehicle to his father well in advance of the bankruptcy. The Trustee took the position that the transfer was a settlement as it was made for no consideration and at time when Mr. Thow was insolvent. The father of Mr. Thow voluntarily returned the car to the Trustee well after the date of the bankruptcy. The vehicle was sold by the Trustee on November 29, 2005 for \$15,000.

[16] In a May 15, 2009 letter to Mr. Thow, counsel for the Trustee responded to the inquiry of Mr. Thow regarding obtaining \$5,000 from the Trustee relating to his exemption claim concerning recovery of the Smart Car. The position of the Trustee is set out in that letter:

The trustee has not realized on any vehicles owned by Ian Thow which had any equity after encumbrances were paid. The Smart Car was a gift to your father and was realized upon as a fraudulent conveyance by the trustee.

[17] In an August 11, 2009 letter to the Trustee from the solicitor for Mr. Thow, counsel for Mr. Thow stated in part:

With respect to the Smart Car, if the trustee realized on this vehicle then Mr. Thow is entitled to the \$5,000 exemption, regardless of whether it was fraudulently conveyed to his father (which is in any event irrelevant as you obviously reached the conclusion the car formed part of the bankrupt's estate (subject to applicable exemptions)).

[18] The September 8, 2009 response from counsel for the Trustee stated in part:

Mr. Thow transferred the Smart Car prior to his bankruptcy and thus had no interest in it. The fact that the transfer is void as against the Trustee

does not make it void as against Mr. Thow and he is not able to claim an exemption in it.

[19] The submission of the Trustee regarding the Smart Car is two-fold. First, s. 71(1) of the *Court Order Enforcement Act* relates to goods and chattels “of a debtor” and, because the vehicle belonged to the father of Mr. Thow at the date of bankruptcy, the \$5,000 exemption does not apply. Second, the fact that the transfer of the vehicle was voidable at the instance of the Trustee did not render the vehicle “the property of the debtor” at the date of bankruptcy.

[20] In this regard, the Trustee relies on the decision in *Goertz v. Goertz* (1996), 37 C.B.R. (3d) 1 (Sask. C.A.), where Sherstobitoff J.A. on behalf of the Court stated:

We agree with the concise summary of the principle in L.W. Houlden and C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, (3d ed.), v. 1 (Scarborough: Carswell, 1995) at 4-3:

A settlement, which falls within s. 91, is not void but only voidable. It only becomes void when bankruptcy occurs. It is not void as of the date of the making of the conveyance or the date when the court makes the order declaring it to be a settlement; it is the bankruptcy which is the triggering event: *Buckham v. Holythuysen* (1986), 61 C.B.R. (N.S.) 300, 1 B.C.L.R. (2d) 202 (C.A.). See *Camgoz (Trustee of) v. Sun Life Assurance Co. of Can.* (1988), 70 C.B.R. (N.S.) 131, 70 Sask. R. 70, affirmed 72 C.B.R. (N.S.) 319 (Sask. C.A.).

If the settlement is only void at the moment of bankruptcy, then from the time of the impeached transfer to the assignment in bankruptcy, the bankrupt had no interest in the lands.

A bankrupt may claim an exemption at any time prior to discharge: *Re Kreutzweiser* (1966), 10 C.B.R. (N.S.) 217 (Ont. S.C.). However, that claim is determined as of the time of the assignment: *Re Neuls and Neuls; Touche Ross Limited v. First City Trust Company et al.*, [(1985), 56 C.B.R. (n.s.) 132, 37 Sask. R. 60]. In this case, the bankrupt had no interest in the land in question at the time of the assignment. Accordingly, it could not be his homestead, was not exempt from seizure, and was property divisible amongst his creditors.

(at paras. 15-17)

[21] In support of his application to receive the exemption and \$5,000 from the sale proceeds from the sale of the Smart Car, Mr. Thow submits:

(a) where property exempt from execution becomes part of the estate of a bankrupt in the possession of the trustee, the trustee may not exercise

available distribution powers over it by reason of s. 67(1)(b) of the *B.I.A.*: *Ramgotra (Trustee of) v. North American Life Assurance Co.* (1996), 37 C.B.R. (3d) 141 (S.C.C.);

- (b) if a transaction amounts to a settlement and a trustee successfully attacks the transaction, the property falls back into the estate of the bankrupt in the possession of the trustee. However, if the property is exempt, the trustee is prohibited from distributing the sale proceeds from the asset as the asset is not subject to division amongst the creditors of the bankrupt.

[22] In this regard, Mr. Thow relies on the decision in *Royal Bank of Canada v. North American Life Assurance Co.*, [1996] 1 S.C.R. 325, where Gonthier J. on behalf of the Court stated:

During the property-passing stage of bankruptcy, the trustee is empowered under s. 91 of the Act to set aside certain settlements which have reduced the size of the estate. Thus, s. 91 outlines the circumstances in which a settlement will be voidable at the behest of the trustee in bankruptcy. If a settlement is declared void against the trustee, then the settled property reverts back to the bankrupt's estate, and falls into the possession of the trustee in bankruptcy. (at para. 46)

Unlike provisions of the Act such as ss. 71(2), 91 or 68, s. 67(1) tells us nothing about the property-passing stage of bankruptcy. Instead, it relates to the estate-administration stage by defining which property in the estate is available to satisfy the claims of creditors. It effectively constitutes a direction to the trustee regarding the disposition of property. Thus, property which is divisible among creditors is defined very broadly in s. 67(1) as:

- (c) all property wherever situated of the bankrupt at the date of his bankruptcy or that may be acquired by or devolve on him before his discharge, and
- (d) such powers in or over or in respect of the property as might have been exercised by the bankrupt for his own benefit.

However, the trustee is barred from dividing two categories of property among creditors: property held by the bankrupt in trust for another person (s. 67(1)(a)), and property rendered exempt from execution or seizure under provincial legislation (s. 67(1)(b)). While such property becomes part of the bankrupt's estate in the possession of the trustee, the trustee may not exercise his or her estate distribution powers over it by reason of s. 67.

Thus, it can be seen that ss. 91 and 67 relate to two different stages of bankruptcy. Section 91 dictates that certain settled property will fall back into

the estate of the bankrupt in the possession of the trustee, while s. 67 is directed at the exercise of administrative powers over the estate by the trustee. Where a settlement is void against the trustee under s. 91, then in normal circumstances, the trustee is empowered to administer the settled asset, and use it to satisfy the claims of creditors. However, in the special case where the asset is exempt under s. 67(1)(b), then the trustee is prohibited from exercising his or her distribution powers because the asset is not subject to division among creditors. This two-stage analysis is similar to the one adopted by Henry J. of the Ontario Supreme Court in *Re Pearson* (1977), 23 C.B.R. (N.S.) 44. That case was concerned with the issue of whether a trustee in bankruptcy could revoke the designation of a beneficiary under a life insurance plan, and substitute the estate as beneficiary. Although the plan itself was exempt from the BIA, the trustee sought to defeat the exemption by exercising a “power” under s. 47(d) [now s. 67(1)(d)]. Henry J. dismissed the trustee’s application, and in doing so characterized the effect of the exemption provisions of the Act as follows, at pp. 48-49:

What comes into the hands of the trustee on the occurrence of the bankruptcy are the rights and interests of the insured in the insurance money and in the contract as they stood at the date of the bankruptcy. When that event occurred, those rights and interests were, by s. 170 of The Insurance Act, exempt from execution or seizure. In my opinion, so far as the creditors of the bankrupt are concerned, that situation crystallized at the time the bankruptcy occurred, and that property by virtue of s. 47(b) [now s. 67(1)(b)] of the Bankruptcy Act was impressed with its character of not being divisible among the creditors, for all the purposes of the bankruptcy.

I adopt this as a correct statement of the law. Therefore, while an asset which is exempt under provincial law passes into the possession of the trustee at the time of bankruptcy, the exemption itself bars the trustee from dividing the asset among creditors where s. 67(1)(b) is operative.

Relating this to the circumstances in the case at bar, at the time of Dr. Ramgotra’s bankruptcy application, his property interest in the RRIF passed to and vested in the trustee in bankruptcy by operation of s. 71(2) BIA. Mrs. Ramgotra’s future contingent interest as the designated beneficiary under the RRIF was not captured by s. 71(2), since it had been settled on her prior to bankruptcy. It was open to the trustee in bankruptcy to apply to have this settlement set aside under s. 91(2) BIA. As I noted above, the settlement was void under s. 91(2) and, consequently, Mrs. Ramgotra’s future contingent interest passed to and vested in the trustee. The trustee in bankruptcy possessed the complete set of property interests associated with the RRIF. But the trustee could not divide the RRIF among creditors because its exempt status under s. 67(1)(b) BIA continued regardless of s. 91. In other words, the role of s. 91 is to bring settled property back into the estate of the bankrupt in the possession of the trustee. Therefore, while s. 91 could be employed to bring Dr. Ramgotra’s RRIF fully into the possession of the trustee in bankruptcy, it has no bearing on the issue of whether or not the RRIF is exempt under s. 67(1)(b).

(at para. 48-50)

[23] In *Royal Bank*, the Saskatchewan Courts had dealt with a transfer of funds from a RRSP to a RRIF and the subsequent designation of the wife of the transferor as the designated beneficiary under the RRIF. The trustee in bankruptcy applied for a declaration that the transfer of the RRSP funds into the RRIF was void. That application was dismissed at trial. The appeal was also dismissed by the Saskatchewan Court of Appeal. In dismissing the appeal, Gonthier J. on behalf of the Court stated that, even though the beneficiary designation was a settlement and void against the Trustee in Bankruptcy, the RRIF remained exempt from the claims of the creditors.

[24] *Royal Bank* establishes the principle that a trustee is empowered to set aside certain settlements which have reduced the size of an estate and, if a settlement is declared void against the trustee or if there is a voluntary return of the asset to the trustee, the settled property falls into the possession of the trustee in bankruptcy. However, if the property which falls into the possession of a trustee is exempt property, the property is not available for distribution to satisfy the claims of the creditors of the bankrupt.

[25] While the Trustee relied on the decision in *Goertz, supra*, the attention of the Court was not drawn to the decision of *Monteith (Trustee of) v. Monteith* (2004), 6 C.B.R. (5th) 47 (Sask. C.A.) where the Court commented on its previous decision in *Goertz* in light of the decision of the Supreme Court in *Royal Bank* and concluded that *Goertz* must be read in light of the decision (at para. 28), and that the analysis regarding the effect of ss. 67(1)(b) and (c) "... must be taken as qualifying *Goertz* on this point" (at para. 29).

[26] Once the Smart Car was recovered from the father of Mr. Thow, it was vested in the Trustee as did all other property of Mr. Thow. However, the vesting was subject to the provisions of s. 67(1)(b) of the *B.I.A.* Once the Smart Car was recovered and went into the possession of the Trustee, the only part of the \$15,000 sale proceeds that might be available for distribution to the creditors of Mr. Thow was any amount in excess of \$5,000. Accordingly, unless the Trustee can establish

that the exemption set out in the provincial legislation does not apply, the sum of \$5,000 must be paid by the Trustee to Harper Grey LLP.

[27] The Trustee makes a number of further arguments as to why the proceeds from the sale of the Smart Car are not available under the exemptions set out in the *Court Order Enforcement Act*. After noting that s. 71(1) of the *Court Order Enforcement Act* exempts goods and chattels “from forced seizure or sale”, the Trustee raises the question whether a sale by a trustee can be considered as a “forced seizure or sale by any process of law or in equity” so as to qualify the sale proceeds as being exempt under s. 71.1(1) of the *Court Order Enforcement Act*. In *Royal Bank of Canada v. Nguyen* (2004), 33 B.C.L.R. (4th) 131 (S.C.), the issue before the Court was whether the respondents having themselves sold property in the context of foreclosure proceedings initiated by the petitioner were entitled to the principal residence exemption under the *Court Order Enforcement Act*. Even though the decision did not deal with bankruptcy proceedings, I adopt the following statement made by Masuhara J. in dealing with the question of whether what has occurred in this bankruptcy is a “forced seizure or sale by any process of law or in equity”:

... in my view, it would not be in keeping with the spirit and purpose of the *Act* if a restrictive or technical interpretation were applied to ss. 71.1-71.2. When faced with an impending “forced” sale, it would be unduly technical to preclude debtors who are able to retain conduct of the sale (and thereby mitigate their losses) from claiming the principal residence exemption. I think a fair and liberal interpretation gives better effect to the *Act*’s goal of allowing debtors to retain some funds upon which they can maintain and re-establish themselves, which has positive effects not only on individual debtors but also on British Columbian society and economy as a whole. (at para. 56)

[28] The Trustee also submits that the Smart Car is not property which was exempt from “execution or seizure under any laws applicable in the Province” as it was not seized and sold under provincial or any execution proceedings. To adopt the interpretation recommended by the Trustee would render ineffective s. 67(1) of the *B.I.A.* Even though British Columbia and other provincial and territorial legislation have no specific reference to s. 67(1) of the *B.I.A.*, I am satisfied that the following provincial and territorial exemptions are validly incorporated by s. 67 of the

B.I.A. despite that absence: Nunavut (“exempt from seizure under a writ of execution”); Alberta (“exempt from writ proceedings”; Saskatchewan (“from seizure by virtue of writs of execution”); Manitoba (“free from seizure by all writs of executions issued by any court in the province”); Ontario (“exempt from seizure under any writ issued out of any court”); Quebec (“exempt from seizure”); New Brunswick (“exemption from levy or sale under execution”); Prince Edward Island (“exempt from seizure under a writ of execution”); Nova Scotia (“exempt from seizure under execution”); Newfoundland (“exempt from enforcement proceedings”); Yukon Territory (“exempt from seizure under any writ of execution”); and Northwest Territories (“exempt from seizure under a writ of execution”).

[29] There is no requirement that the Smart Car be subject to execution or seizure under provincial law. Rather, the exemption created by s. 67(1)(b) of the *B.I.A.* establishes exemptions in bankruptcy in accordance with provincial legislation as if the property had or could be seized and sold, not only if it had actually been seized and sold. If the interpretation was otherwise, it would be impossible for any property of a bankrupt to be exempt.

[30] The Trustee also raises the question of whether what has occurred brings into effect the distribution contemplated by s. 71.2(2) of the *Court Order Enforcement Act* as this is not a distribution by “a sheriff or other officer”. This submission again misconstrues the reference to provincial legislation in s. 67(1) of the *B.I.A.* There is nothing in the *B.I.A.* which requires for the funds to be distributed pursuant to the *Court Order Enforcement Act*. Rather, funds that are available to the Trustee must be distributed pursuant to the provisions of the *B.I.A.* In any event, I adopt this further statement in *Nguyen, supra*:

Section 71.2(2) then provides that the proceeds of sale must be distributed by “a sheriff or other officer” if the property is sold “under this *Act*”. The point raised by the Bank is whether voluntary sales can be said to be property sold “under this *Act*”. The Bank suggests that property sold “under this *Act*” is property sold pursuant to the statutory procedure in ss. 92-112 of the *Act*.

In my view, such a narrow interpretation is neither in line with the statutory purpose, nor is it practical. In s. 71.2(2), the *Act* sets out the procedure that applies when property is sold pursuant to ss. 92-112. However, it cannot be that an exemption to which a debtor is otherwise entitled is lost solely because a certain process of sale was not followed. The kernel of the *Act* is

to provide the exemption to debtors. It creates a process for obtaining an order for sale, but that process is incidental rather than critical to the entitlement to the exemption.

The fact that the sale was conducted by the debtor and the proceeds not distributed by a sheriff or other officer does not bar the debtor's entitlement to the principal residence exemption.

(at paras. 59-61)

[31] The Trustee also raises the issue of whether the exemption applies to a vehicle having a value in excess of \$5,000. Section 71(1)(c) of the *Court Order Enforcement Act* deals with the exemption for "one motor vehicle that is of a value not exceeding a prescribed amount (\$5,000)". This question has been raised in decisions from other provinces although there is no consistent approach.

[32] In Alberta, a motor vehicle having a value of less than \$5,000 is exempt from seizure. Once a motor vehicle having value in excess of \$5,000 is sold by a trustee in bankruptcy, the proceeds will be used to pay secured claims against the vehicle, to pay \$5,000 to the bankrupt, to pay storages costs and the costs of seizure and sale and to pay any amount remaining to the trustee for the benefit of the Creditors: *Re Pearson* (1997), 46 C.B.R. (3d) 357 (Alta. Q.B.). Bielby J., as she then was, concluded that it was the intent of the legislation that the execution debtor's equity in a vehicle would be exempt to a maximum of \$5,000, even if that vehicle was worth more than that sum.

[33] Ontario decisions establish that a motor vehicle is exempt from seizure only if the value of the vehicle does not exceed \$5,000. If the vehicle has a greater value, there is no exemption: *Re Fields* (2002), 32 C.B.R. (4th) 216 (Ont. S.C.J.), affirmed (2004), 2 C.B.R. (5th) 179 (Ont. C.A.). In *Re Fields* (C.A.), Feldman J.A. on behalf of the Court described the issue relating to a car having a value of \$11,000 as follows:

From a policy point of view, the alternative argument that gives the most benefit to the judgment debtor is compelling. The purpose of the exemptions from execution is to allow a debtor to retain the basics of life while making the bulk of his or her assets available to satisfy judgment creditors. The legislature sets and revises from time to time both the type and the value of exempt assets with a view to allowing contemporary debtors to retain a

modest and dignified lifestyle, while still making funds and assets available to pay legitimate judgment creditors.

While some people of modest means may own an old car that has depreciated in value down to \$5,000 or less, in today's society many people who are able to do so, rather choose to finance an inexpensive model vehicle by making monthly payments to a secured lender. The alternate approach recognizes this reality by allowing the secured creditor to repossess the car, sell it and return up to \$5,000 of the debtor's equity to the debtor on an exempt basis. The trustee's interpretation would require the secured lender, who repossesses a car worth over \$5,000, to remit any amount over and above what was owed to the lender not back to the debtor, but to the sheriff to satisfy a writ of execution, thereby denying the debtor any benefit from his or her equity in the car.

(at paras. 12-13)

[34] In distinguishing the decision in *Re Pearson*, Feldman J.A. stated:

Although the same issue arose in the Alberta case of *Re Pearson* (1997), 203 A.R. 109 (Q.B.), respecting the interpretation of the comparable exemption provision in the Alberta *Civil Enforcement Act* (R.S.A. 1980, c. C-10.5) to s. 2.6, the wording of that Act is different from the Ontario Execution Act and therefore the analysis of the court in that case does not assist. After prescribing the exempt values in s. 88, s. 89(1) provides:

89(1) Where the enforcement debtor's equity in the property referred to in s. 88 exceeds the prescribed value of the exemption for that property, that property is subject to sale pursuant to writ proceedings.

Based on s. 89, the Alberta court was able to conclude that the exemption applied to the debtor's equity in the motor vehicle even if the value of the vehicle was higher than the prescribed value.

Although it would give the section the interpretation that makes the most common sense, would be most helpful to debtors and would fit with the intent and purpose of the philosophy of exemptions, the court cannot read into s. 4 a reference that is not there. Nor can it be justified either by implication or by analogy. Although it is likely that the failure of the legislature to amend s. 4 when it added s. 2.6 was an oversight, if it was, it is only the legislature and not the court that can make the correction.

Therefore, I conclude that reading the section as worded, because the value of the motor vehicle in this case is over \$5,000, it is not exempt under s. 2.6.

(at paras. 27-30)

[35] The section of the Ontario *Execution Act* describing chattels that are exempt from seizure includes the following definition which closely parallels the description set out in s. 71(1)(c) of the *Court Order Enforcement Act*: "(a) motor vehicle not exceeding ... \$5,000 in value".

[36] I am unable to distinguish the decision reached by the Ontario Court of Appeal when dealing with the question of whether the exemption provided by s. 71(1)(c) and Regulation 2(b) apply only if the value of a motor vehicle is less than \$5,000.

[37] I come to this conclusion despite the fact that the purpose of the *B.I.A.* and the *Court Order Enforcement Act* is to ensure the equitable distribution of the assets of a bankrupt or of a debtor while, at the same time, providing the “bare minimum” which an individual is entitled to maintain in order to facilitate his or her rehabilitation. I agree with the statement made by Feldman J.A. that the purpose of providing the exemptions from execution is to allow a debtor to retain the basics of life. The provisions of the *B.I.A.* establish a similar purpose. However, in the absence of a provision similar to s. 89(1) of the *Civil Enforcement Act* of Alberta, I am satisfied that the \$5,000 exemption is not available to Mr. Thow as the net sale proceeds of \$15,000 indicates that the vehicle was worth at least that amount. While I would favour the common sense approach which would take into account what would be most helpful to debtors and bankrupts, and would better fit the intended purpose of the philosophy of exemptions, I am bound by the clear wording of s. 71(1)(c) of the *Court Order Enforcement Act* and the prescribed amount of the exemptions set out in s. 2(b) of the *Court Order Enforcement Exemption Regulation*. Accordingly, that part of the application of Mr. Thow requesting the delivery of \$5,000 is dismissed.

(B) The Former Residence of Mr. Thow

[38] After paying the existing encumbrances and the real estate commission from the selling price of approximately \$4,900,000, the net proceeds from the sale of the Residence were \$1,238,000. In an August 11, 2009 letter to the Trustee, counsel for Mr. Thow made demand for the \$5,000 relating to the Smart Car and then set out the position of Mr. Thow regarding the Residence:

There is no question that the property was Mr. Thow’s principal residence on the date of his bankruptcy, namely, July 21, 2005. We are instructed that Mr. Thow did not vacate the residence until in or about mid-August 2005. We are not aware of any facts to the contrary.

We are puzzled by Mr. Brousson's statement that Mr. Thow "did not remain in the jurisdiction during the bankruptcy". We are aware of no law which requires Mr. Thow to remain in British Columbia in order to obtain the benefit of this statutory exemption. The law is clear: the entitlement to the exemption is to be determined as of the date of bankruptcy – see *Re Gruber* (1993), 22 C.B.R. (3d) 262. As such, Mr. Thow is entitled to the \$12,000 exemption under s. 3(a) of the Regulations.

Finally, Mr. Brousson's assertion that Mr. Thow's "standard of living far exceeded any bankrupt we have ever come across" is also irrelevant. The *Bankruptcy and Insolvency Act* does not permit the trustee to exercise discretion with respect to the statutory exemptions based on a perception of the bankrupt's standard of living.

[39] In a September 8, 2009 response, counsel for the Trustee stated in part:

Mr. Thow has given evidence that he was living in Seattle in August, 2005 and in his bankruptcy documentation in Seattle indicated that he had been residing in Seattle for the last six months. That bankruptcy documentation was dated September, 2005.

At the time the house in Saanichton sold it was no longer Mr. Thow's "personal residence" and therefore not subject to a claim for exemption.

In any event, Mr. Thow's own evidence indicates that post-bankruptcy he has received in excess of \$600,000. He is unable to account for a large portion of it and has not made any payment whatsoever to his creditors from his post-bankruptcy income in contravention of the guidelines of the Superintendent of Bankruptcy. The amount Mr. Thow ought to have paid vastly exceeds any claim for exemption

In addition, the Trustee has incurred substantial costs in examining Mr. Thow and pursuing his assets. The Trustee would set-off these costs as against any claim by Mr. Thow.

Accordingly, in the circumstances, the Estate will not be making any payment to Mr. Thow in respect of the claim for "exemptions".

[40] There is no definition of the term "principal residence" as used in s. 71.1(1) of the *Court Order Enforcement Act*. This is unlike the definitions of principal residence which are set out in s. 54 of the *Income Tax Act*, 1985, c. 1 (5th Supp.) ("ordinarily inhabited"), each of s. 1 of the *Homeowner Grant Act*, R.S.B.C. 1986, c. 194 and s. 1 of the *Land Tax Deferral Act*, R.S.B.C. 1996, c. 249 ("the usual place where an individual makes his or her home"), and ss. 4 and 14 of the *Property Transfer Tax Act*, R.S.B.C. 1996, c. 378 ("the usual place where an individual makes his or her home", "usually resided and used as his or her home").

[41] However, there have been a number of decisions dealing with the term “principal residence”. In *Re Clarke* (2000), 16 C.B.R. (4th) 66 (B.C.S.C.), Master McCallum dealt with whether the exemption was available to the bankrupts even though they did not occupy their property and had rented it for approximately six months. On the question of the need for actual occupation, Master McCallum concluded: “Had the legislature intended to require actual occupation as a condition of a principal residency, it could easily have done so.” (at para. 16). I adopt that statement.

[42] After stating that the question of a principal residence “... must be determined by examining all the facts and not merely considering actual occupation” (at para. 18), Master McCallum concluded:

Physical presence in a place is a good indicator of principal residence but not the sole indicator. Context, including intention, must be considered.

(at para. 21)

[43] That decision has been followed in subsequent decisions. In *Re Currie* (2000), 4 R.F.L. (5th) 200 (Alta. Q.B.), Bielby J., as she then was, concluded:

One need not be present in a residence every day to have it meet the requirements of a principal residence, and could conceivably be absent from it for extended periods of time. However, a realistic expectation of returning to that residence at some time is implicit in the definition. This requirement was described as early as 1910 by Lamont, J. in *Re Hetherington* (1990), 3 Sask. L.R. 232, 14 W.L.R. 29 at 532-33:

The purpose of the Exemption Ordinance being to preserve to the debtor and his family a home in which they can dwell without risk of disturbance from creditors, it follows that to secure the protection of the Ordinance there must be actual occupancy of the place as a home... where the execution debtor or his family is not living on the homestead claimed as exempt at the time of the seizure, it is prima facie not exempt, and the onus is on the claimant to show that the land is still within the protection of the Exemption Ordinance. To do this he must show that the place is still his actual and bona fide residence, and that his absence therefrom has only been of a temporary nature. In other words, he must satisfy the Court that he has not abandoned the place as his home...

(at para. 24)

[44] Master Funduk in *V.W.W. v. Decore & Co.*, [2000] A.J. No. 1522 (Alta. Q.B.) cited with approval the test set out in *Re Clarke, supra*, and stated: “The fact that the Plaintiff occasionally sojourns to the United States, occasionally stays with her guardian and occasionally has relatives stay with her does not detract from the fact that this house is the Plaintiff’s “home base”, i.e., her principal residence.” (at para. 4). Master Breitzkreuz in *Cziborr v. Hamilton* (2009), 59 C.B.R. (5th) 63 (Alta. Q.B.) cited both *Re Clarke* and *Re Currie* with approval and stated: “What is key, however, is a realistic expectation of returning at some point in time.” (at para. 10).

[45] The reasoning in *Re Clarke* was also cited with approval in *R. v. Bui*, [2010] B.C.J. No. 1052 (C.A.), which dealt with the question of whether there should be forfeiture of a principal residence that had been used for the production of marijuana. After noting that s. 19.1(4)(a) of the *Controlled Drugs and Substances Act*, R.S.C. 1996, c. 19, dealt with the “principal residence at the time the charge was laid and continues to be the member’s principal residence”, Frankel J.A., on behalf of the Court, stated at para. 38:

While it is not necessary in this case to engage in a detailed discussion of the indicia of “principal residence” – a term not defined in the CDSA – I agree with ... the judgment of Master McCallum in *Clark [sic] (Re)* ..., a case concerning the exemption from forced seizure and sale provided for with respect to the “principal residence of a debtor” by s. 71.1 of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78....

[46] Mr. Thow claims the exemption. The onus is on him to show that he had a realistic expectation of returning to the Residence, or that his absence was only of a temporary nature, or that he had not abandoned the Residence as his principal residence, or that the Residence remained his “home base”. Regarding the question of the onus, see: *Re Clark* (1998), 3 C.B.R. (4th) 252 (Alta. Q.B.); and *Sitter v. Battlefords Credit Union Ltd.* (1998), 6 C.B.R. (4th) 116 (Sask. Q.B.). I am satisfied that Mr. Thow has not met the onus imposed upon him.

[47] In this regard, Mr. Thow swore in an affidavit that he left Canada for the United States in August 2005. When asked when he left Victoria “permanently”, he stated: “I left sometime in mid to late August, 2005”. In his voluntary Bankruptcy

Petition in the United States, he gave a Seattle, Washington address and stated that he had been domiciled or had a residence, principal place of business or principal assets in Washington State for at least 180 days prior to the filing. In those circumstances, it is clear that the Residence was not his principal residence from and after mid-August 2005. The question which then arises is whether the Residence was his principal residence at the date of his bankruptcy.

[48] The date for determination of the exemption claims is the date of bankruptcy: *Re Gruber* (1993), 22 C.B.R. (3d) 262 (Alta. Q.B.); *Holthuysen v. Holthuysen* (1987), 63 C.B.R. (n.s.) 169 (Alta. C.A.); and *Pannell Kerr MacGillivray Inc. v. Beer* (1988), 69 C.B.R. (n.s.) 203 (Man. Q.B.). In *Gruber*, Forsyth J. stated:

... case authority is clear that the effective date for determination of the status of the exemption occurs on the date of bankruptcy. At that date the Bankrupt's property was severed into two estates; one estate that vests with the Trustee and is divisible amongst the Bankrupt's creditors, and one that remains with the Bankrupt because it is exempt under the provincial law.

(at para. 12)

[49] The "date of bankruptcy" is defined in s. 2 of the *B.I.A.* as including "the event that causes an assignment by the person to be deemed". At the first meeting of creditors on September 12, 2005, the creditors of Mr. Thow rejected the Proposal. Section 57(a) of the *B.I.A.* provides: "Where the creditors refuse a proposal in respect of an insolvent person, (a) the insolvent person is deemed to have thereupon made an assignment;"

[50] Pursuant to s. 2 of the *B.I.A.*, the date of the bankruptcy is the date when the Proposal of Mr. Thow was rejected by his creditors. The vote on that date to refuse the Proposal was "the event that causes an assignment by the person to be deemed. The combination of ss. 2 and 57(a) of the *B.I.A.* allows me to conclude that the date of bankruptcy in respect of Mr. Thow and his assets was September 12, 2005.

[51] By his own admission, Mr. Thow had left the Residence and British Columbia in mid-August. Accordingly, I am satisfied that the exemption relating to his principal

residence was no longer available to Mr. Thow on September 12, 2005. That part of the application of Mr. Thow requesting the delivery to him of \$12,000 is dismissed.

COSTS

[52] The Trustee will be entitled to its costs against Mr. Thow on a Party and Party (Scale B) basis.

"Burnyeat J."

The Honourable Mr. Justice Burnyeat