Estate/Court File No.: 31-2675288

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 2505243 ONTARIO LIMITED OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

BOOK OF AUTHORITIES OF 2505243 ONTARIO LIMITED

(returnable September 29, 2020)

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TO: **THE SERVICE LIST**

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TAB 1

1979 CarswellOnt 183
Ontario Supreme Court, In Bankruptcy

389179 Ontario Ltd., Re

1979 CarswellOnt 183, 29 C.B.R. (N.S.) 221

RE 389179 ONTARIO LIMITED

Steele J.

Judgment: March 7, 1979
Docket: Toronto File No. 07798

Counsel: *M. B. Page, Q.C.*, for petitioning creditor.
M. H. Greenglass, for debtor.

Subject: Corporate and Commercial; Insolvency
Headnote
Bankruptcy --- Proposal — Effect of proposal — Effect on other legal processes
Petition — For receiving order — Stay — Proposal filed — The Bankruptcy Act, ss. 25, 49.
The filing of a proposal does not automatically stay a petition in bankruptcy under the provisions of s. 49 of the Bankruptcy Act. Section 25 of the Act gives a discretion to the court as to whether there should or should not be a stay.
Held:
Where an interim receiver had been appointed, and a proposal was filed on the eve of the hearing of the petition for a receiving order, the petition should not be stayed.
Annotation

Section 49(1)of the Bankruptcy Act, R.S.C. 1970, c. B-3, provides that:

49.(1) Upon the filing of a proposal ... no creditor ... shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy ... until the proposal has been refused, unless with the leave of the court ...

It appears that the filing of a petition for a receiving order does not fall within the words of the section dealing with proceedings "for the recovery of a claim provable in bankruptcy".

This has been clearly set out in the recent decision of the Newfoundland Court of Appeal in the case of *Re Prov. Refining Co.*, 14 Nfld. & P.E.I.R. 308, 27 C.B.R. (N.S.) 192, affirmed *(*sub nom. *Prov. Refining Co. v. Atlantic Trading (Delaware) Corpn.))* [1978] 2 S.C.R. 836, 21 N.R. 178. The same ruling was previously made in Ontario by Houlden J. (as he then was) in the case of *Re Beauport Investors Ltd.*, 17th May 1974 (not reported). In that case a proposal was filed on the very day when the petition for a receiving order was to be heard and, upon considering the terms of the proposal, the learned bankruptcy judge considered the proposal without merit and made a receiving order.

C. H. Morawetz, Q.C.

Application for stay of petition for receiving order because of filing of proposal.

Steele J. **(Endorsement on the record):**

1 As I understand the position there is a petition that has been filed and which is being opposed. It has been set to commence the hearing tomorrow morning, 8th March.

2 A proposal has been served and is filed today. I am of the opinion that under the authority of *Re Prov. Refining Co.*, 14 Nfld. & P.E.I.R. 308, 27 C.B.R. (N.S.) 192, affirmed *(*sub nom. *Prov. Refining Co. v. Atlantic Trading (Delaware) Corpn.)* [1978] 2 S.C.R. 836, 21 N.R. 178, the filing of a proposal does not automatically stay a petition in bankruptcy under the provisions of s. 49 of the Bankruptcy Act, R.S.C. 1970, c. B-3. I am of the opinion that s. 25 of the Act gives a discretion to the court as to whether there should be a stay or not.

3 In the present case an interim receiver has been appointed, and the proposal has been filed on the eve of the hearing. The proposal as made by the alleged debtor is unlike the case of *Re Lingen Trailer & Mfg. Co.* (1969), 13 C.B.R. (N.S.) 197 (Ont.). At this stage I am not aware whether the principal debt is in dispute. I think it would be improper under the circumstances to stay the petition, and I therefore rule that the matter will proceed tomorrow morning.

Stay refused.

TAB 2

1979 CarswellOnt 177
Ontario Supreme Court, In Bankruptcy

Abalone Holdings Ltd., Re

1979 CarswellOnt 177, 29 C.B.R. (N.S.) 174

RE ABALONE HOLDINGS LIMITED (No. 2)

Anderson J.

Heard: January 29, 1979
Judgment: January 31, 1979
Docket: No. 06891

Counsel: *M. B. Page, Q.C.*, for petitioning creditor.
G. S. Gringorten, for debtor.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — General

Petition — For receiving order — Necessity for establishing debt owed to petitioning creditor — Necessity to prove fully and strictly act of bankruptcy — Petition dismissed.

Bankruptcy is for clear-cut situations where the liabilities are clearly established and the act of bankruptcy similarly established by sound and convincing evidence, and the court must be generally satisfied that a receiving order is the appropriate remedy.

Held:

Where it appeared on the evidence that the account as between the petitioner and the debtor was not settled and there was a potential and if not actual dispute as to the amount, and there was no clear-cut evidence as to the act of bankruptcy alleged in the petition, the evidence in support of the petition did not meet the tests as laid down in the case of in *Re Selkirk*, infra, and therefore the petition should be dismissed.

Petition for receiving order.

***Anderson J.* (orally):**

1 This is a petition for a receiving order filed on 30th October 1978. On the same date an interim receiver was appointed. The petition alleges as an act of bankruptcy that the debtor has ceased to meet its liabilities generally as they become due and that it has failed to pay its obligations to the petitioner and to some other of its creditors. The notice of dispute denies an indebtedness, denies that the debtor has ceased to meet its liabilities generally, alleges that the petition was filed towards the collection of a debt, alleges that the debt said to be owing by the debtor to the petitioner is the subject matter of a lawsuit between the petitioner and his supplier and alleges that subject to a proper accounting it believes that some or all of the indebtedness being claimed by the petitioning creditor may have been paid by the debtor directly to the supplier.

2 The petitioning creditor carries on business as a vendor of books and magazines partly on his own account and partly as an agent for a concern known as Intercity News. He apparently acted also as a collection agent of a company called Euro-Journals.

3 The debtor is a corporation which carries on business under the trade name and style of Galaxy Books and operates a bookstore where books and magazines are sold. Books and magazines were supplied to that store by, no doubt among others, the petitioning creditor, and it was in that course of dealing that the debt which is the subject matter of the petition arose. The debtor's business was managed until about the last week of September by one Stoynoff, who was apparently also a principal

shareholder of the corporation. The evidence indicates that with the disappearance of Mr. Stoynoff a substantial proportion of the firm's working capital disappeared also, and a situation of at least temporary financial embarrassment followed.

4 The allegation of a failure to meet liabilities generally depends on the proof of indebtedness of four creditors. First is a solicitor, Mr. Meyer, second Intercity News, third the petitioning creditor himself, and fourth the firm which I have referred to as Euro-Journals.

5 The claim of Mr. Meyer was for $200 for services said to have been rendered to the debtor company in 1976. An account was rendered in August 1977, and in January 1978 a claim was issued out of the Small Claims Court in Toronto for recovery of that amount. There does not appear at any time to have been any contact between Mr. Meyer and his client with respect to the recovery of this amount, save for the mailing of a copy of the account with a covering letter to the solicitors who succeeded him in acting for the debtor company. He does not appear to have been in contact with the accountant, Krandel, who according to the evidence was the accountant for the debtor company and with whom Mr. Meyer had previously been in contact and from whom he had previously received instructions on behalf of the debtor company. Without in any way being critical of Mr. Meyer, I am bound to say that the course followed with respect to the rendering of this account and the efforts to collect it appear to me to be somewhat unusual, and I am disposed to attach little weight to that claim in considering the alleged act of bankruptcy.

6 The claim of Intercity News or on behalf of Intercity News is subject to several uncertainties. The position taken by the petitioning creditor was that in his capacity as agent selling the products of Intercity News he became responsible for the goods sold, insofar as payment was concerned, although the billing was done directly by Intercity News to the customer. No documentary evidence of the relationship between Intercity News and the petitioning creditor was provided. A number of petty cash vouchers, which comprise Ex. 14, were said by the petitioning creditor in his evidence to have been applied to the Intercity account, although the evidence which he gave in that regard appears to be in conflict with the internal evidence provided by the documents themselves, which would indicate that they related to the sale of books.

7 With respect to the claim of Euro-Journals, it is not entirely clear to me why the petitioning creditor was so concerned with that account. He does not appear to have acted as an agent for sales but was apparently acting as an agent for collections. In any event, on the evidence which was adduced it would appear that that account was not yet due for payment on the date on which the petition for the receiving order was filed. I do not see any evidence of any legal obligation of the petitioning creditor in respect of that account.

8 The evidence of Wilson disclosed a method of accounting which I found confused and confusing. I am not sure that he knows precisely how much he is owed. The appearance of the ledger sheets, which comprise Ex. 7, is not reassuring. On the evidence, which I will discuss in a moment, I conclude that the account was not settled as between debtor and creditor and that there was a potential if not an actual dispute as to the amount.

9 The course of dealings between the petitioning creditor and the debtor company appears to have been haphazard. Payments were normally made in cash, as the cash was available, and were made applicable to invoices without regard to chronological age or any other logical sequence. Consignment goods were from time to time left longer than the nominal period of 30 days for which the consignment was supposed to be outstanding. There is no evidence of any concern on the part of the petitioning creditor with respect to the debt owing to him until the latter part of October, very shortly before the launching of the petition.

10 There is a direct conflict of evidence between the petitioning creditor on the one hand and the witness Demers, an employee of the debtor company, and Krandel, the accountant of the debtor company, on the other. Wilson's evidence was to the effect that the name of Krandel was first mentioned to him by Demers on 26th or 27th October and that previous to that he had no knowledge of him or of his role in the affairs of the debtor company. He says that he had conversation with Krandel with respect to a meeting to discuss the account.

11 Demers, on the other hand, says that Wilson did know about Krandel. Krandel says that he suggested to Wilson during the week of 23rd October that there be a meeting to discuss the account, and Wilson said that he would let him know but never did. According to the evidence of Krandel the next thing that happened was that Wilson went back to Demers in an attempt

to collect direct from her, following which he was told that he could take whatever proceedings he deemed appropriate. On this conflicting evidence I prefer that of Demers and Krandel and I find, as a fact, that such a meeting was suggested and was never followed up by the petitioning creditor.

12 According to the evidence of Krandel the trade accounts of the debtor company were at the time of the petition paid in the ordinary course. He says that consequent upon the temporary financial embarrassment created by the disappearance of the liquid reserves of the company with Mr. Stoynoff, and when the state of affairs came to his attention, he arranged financing which would have been adequate to make good the vanished reserves and to maintain the financial position of the company. His evidence in that regard is not challenged on cross-examination or by any conflicting testimony.

13 In my review of the evidence I have not overlooked that an N.S.F. cheque was issued by the debtor company, nor have I overlooked the evidence of the witness Krandel on his cross-examination that he, as accountant, was owed on account of professional services a substantial amount of money amounting to some $5,000 or $6,000.

14 In considering the evidence and the question of whether the petition should be granted or refused I have had regard for the jurisprudence which indicates:

> ... that in every case when a petition for a receiving order is presented to the Court the petitioner should be required to prove fully and strictly the act or acts of bankruptcy said by him to have been committed by a debtor and evidence that falls short of such full proof or is not of the best character should not be accepted as sufficient to support a receiving order.

15 The language which I have quoted is that of the late Laidlaw J.A. speaking for the Court of Appeal in *Re Selkirk*, [1961] O.R. 391, 2 C.B.R. (N.S.) 113 at 113-14, 27 D.L.R. (2d) 615.

16 In my view the evidence in support of the petition in this case does not have that quality and does not meet those tests, and I am not satisfied on the evidence that the act of bankruptcy alleged in the petition occurred. Even if I were satisfied that proof had been made of the alleged act of bankruptcy, I would not grant the order. I am in some doubt that (save for the claim of the witness Meyer) the claims as asserted on behalf of the petitioning creditor and the debts established by him in his evidence may in effect be the claim of a single creditor without the presence of those unusual circumstances which upon such a petition warrant the making of a receiving order. I am in some doubt that resort was had to this court instead of to a conventional action. I am in some doubt that the court has the whole story either from the petitioning creditor or from the debtor. I have some feeling that the dispute which is involved in this petition may be part of a larger web of disputes involving these and other parties. It seems to me, for example, that the status of the account of Intercity News and its position in the scheme of things could have been clarified for the court, either by the petitioning creditor or by the debtor, by calling some witness from that company.

17 The Bankruptcy Act, R.S.C. 1970, c. B-3, clearly bestows a discretion on the court to refuse a petition even if the essential elements are made out. In my view bankruptcy is for clear-cut situations where the liabilities are clearly established and the act of bankruptcy similarly established by sound and convincing evidence and the court can be generally satisfied that a receiving order is the appropriate remedy. That is not the position in which I find myself in this case. As I have said, if I were prepared to find that the facts alleged in the petition had been made out, which I am not, I would exercise my discretion and refuse to make a receiving order.

18 The petition will be dismissed, and the appointment of the interim receiver will be vacated.

19 As for the doubts which assail me in this case and which affect my exercise of discretion, I have not been greatly assisted by the debtor. I think, for example, that Krandel, whose evidence about the debt to him was somewhat anomalous with the position of a debtor resisting the petition, might have offered some explanation as to how that state of affairs came about and how it could be reconciled to a dispute of the petition. I think likewise that some doubts could have been resolved by the introduction into evidence by the debtor of some intelligible financial data concerning its position.

20 As a result of my views of the debtor's performance in that regard I am not prepared to make any order as to costs. The petition will be dismissed.

Petition dismissed.

End of Document

TAB 3

1969 CarswellOnt 79
Ontario Supreme Court, In Bankruptcy

Lingen Trailer & Manufacturing Co., Re

1969 CarswellOnt 79, 13 C.B.R. (N.S.) 197

Re Lingen Trailer and Manufacturing Company Limited

Houlden J.

Judgment: November 6, 1969

Counsel: *D. E. Baird*, for petitioning creditor.
C. H. Morawetz, Q.C., for debtor.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Proposal — Meeting of creditors to consider

Petition for receiving order — Proposal subsequently filed before receiving order made — Proposal not accepted by creditors — Whether assignment deemed to have been made on date proposal was filed or whether receiving order to be made on petition — The Bankruptcy Act, R.S.C. 1952, c. 14, s. 32B as enacted by 1966-67, c. 32, s. 7.

A petition for a receiving order was filed on 2nd September 1969. On 17th September 1969 a proposal was filed by the debtor which stayed any further proceedings on the petition. On 31st October a meeting of creditors was held to consider the proposal, but the creditors refused to accept the proposal. Section 32B of the Act provided that if the creditors refuse to accept a proposal by an insolvent person, the debtor shall be deemed to have made an assignment on the date the proposal was so filed.

Held, an order should be made annulling the "deemed" assignment, and a receiving order should be made on the petition which was filed on 2nd September 1969. Since the first meeting of creditors had already been held, there should be an order that the meeting of creditors so held be deemed to have been the first meeting of creditors in the bankruptcy, and the appointment of inspectors at the meeting so held be confirmed.

Annotation

When enacting s. 32B of the Bankruptcy Act in 1966, Parliament obviously did not envisage the situation where a proposal was filed subsequent to the filing of a petition for a receiving order but before a receiving order was made. If the creditors do not accept the proposal and the date of bankruptcy were the date of the filing of the proposal (in accordance with the wording of s. 32B), serious hardship could result to the creditors. If the bankruptcy adjudication is made on the petition for a receiving order, the date of bankruptcy dates back to the filing of the petition, and this earlier date of bankruptcy might bring in certain preferences occurring within three months before bankruptcy, which would not be caught if the date of bankruptcy were a later date, namely the date of the filing of the proposal. Undoubtedly the Court, in its inherent jurisdiction, has power to make the bankruptcy adjudication on the petition for the receiving order, notwithstanding the subsequent filing of the proposal, if the proposal is not accepted by the creditors.

***Houlden J.* (orally):**

1 A petition in bankruptcy was filed against Lingen Trailer and Manufacturing Company Limited on 2nd September 1969. On 17th October 1969, a proposal was filed by the debtor which, of course, stayed any further proceedings on the petition. On 31st October 1969, a meeting of creditors was held to consider the proposal and the creditors refused to accept the proposal.

2 Under the provisions of s. 32B of the Bankruptcy Act the debtor was deemed to have made an assignment on the date the proposal was filed, that is, 17th October 1969. The official receiver, in accordance with the provisions of the Bankruptcy Act,

immediately convened the first meeting of creditors in the bank ruptcy and at this meeting the appointment of W. H. Anthony as trustee was affirmed and three inspectors were appointed.

3 Counsel for the petitioning creditor has pointed out that this can result in a hardship to creditors because of the dating back provisions of the Bankruptcy Act, (s. 41(4)) and I agree with this submission. It may be most important in this bankruptcy that it be deemed to have commenced on 2nd September 1969, when the petition was filed.

4 There will therefore be an order annulling the deemed assignment. A receiving order will be made on the petition which was filed on 2nd September 1969. W. H. Anthony will be appointed trustee of the bankrupt estate and will furnish security to the official receiver in an amount to be fixed by him. As the first meeting of creditors has already been held, there will be an order that the meeting of creditors held on 31st October 1969 shall be deemed to have been the first meeting of creditors in this bankruptcy. The appointment of the inspectors at the meeting held on 31st October 1969 will be confirmed. The petitioning creditor will be entitled to its costs of the petition, the order appointing the interim receiver and this order.

End of Document

TAB 4

1977 CarswellNfld 6
Newfoundland Supreme Court, Court of Appeal

Provincial Refining Co. v. Newfoundland Refining Co.

1977 CarswellNfld 6, 14 Nfld. & P.E.I.R. 308, 27 C.B.R. (N.S.) 192, 33 A.P.R. 308

RE PROVINCIAL REFINING COMPANY LIMITED; RE NEWFOUNDLAND REFINING COMPANY LIMITED

Furlong C.J.N., Morgan J.A. and Noel J.

Heard: April 5, 1977
Judgment: September 1, 1977
Docket: St. John's 1976 Nos. 336 and 337

Counsel: *L. A. Kitz, Q.C.*, and *A. L. Bonnell*, for Provincial Refining Company Limited and Newfoundland Refining Company Limited.
J. R. Chalker, Q.C., for Atlantic Trading (Delaware) Corporation.

Subject: Corporate and Commercial; Insolvency

Headnote

Bankruptcy --- Bankruptcy petitions for receiving orders — Hearing of petition — Defences — Dispute of debt
Bankruptcy --- Proposal — Effect of proposal — Effect on other legal processes
Petition — Petitions for bankruptcy — Receiving orders — Disputed on grounds no acts of bankruptcy committed and not indebted to the petitioners for $1,000 — Proposals filed during hearing of dispute — No stay of proceedings created — The Bankruptcy Act, s. 49 — Not applicable to a petition in bankruptcy.
Petitions for bankruptcy were disputed by the debtors on the grounds that they had not committed acts of bankruptcy and that they were not indebted to the petitioners in the amount of $1,000. During the hearing of the dispute, the debtors filed proposals pursuant to the Bankruptcy Act and argued that the bankruptcy proceedings were stayed by the filing of the proposals.

Held:

The receiving orders should be granted. The debtors were not entitled to a stay of proceedings. Section 49 of the Bankruptcy Act, which provides that the filing of a proposal stays proceedings for the recovery of a claim provable in bankruptcy, does not operate as a stay of a petition in bankruptcy. A petition for bankruptcy is not a proceeding for the recovery of a claim provable in bankruptcy. The debtors were unable to prove that there was a bona fide dispute as to the debts alleged in the petitions. The evidence of the indebtedness to other creditors and the statements of the financial position of the debtors attached to the proposals warranted the finding that the debtors had ceased to meet their liabilities as they became due.

Appeal from the judgment of Mifflin C.J.T.D., granting petitions for bankruptcy receiving orders.

An appeal from the decision of the Court of Appeal for Newfoundland was dismissed by the Supreme Court of Canada on 26th April 1978.

***Furlong C.J.N.*:**

1 I have had the advantage of reading the judgment of Morgan J.A. which follows, and I agree with his conclusions and the reasons for them. I think that the learned trial judge was correct in making the receiving order and I see no reason for interfering with it.

2 This appeal is dismissed with costs.

***Morgan J.A.* (*Noel J.* concurring):**

3 These appeal are from receiving orders granted by Mifflin C.J.T.D. on 12th March 1976 against the debtor companies, Provincial Refining Company Limited ("PRC") and Newfoundland Refining Company Limited ("NRC"). The petitioning creditor in each case was Atlantic Trading (Delaware) Corporation ("Atlantic"), who filed petitions on 13th February 1976 in accordance with the provisions of s. 25 of the Bankruptcy Act, R.S.C. 1970, c. B-3.

4 The petition for a receiving order against PRC alleged, inter alia:

> That the debtor is justly and truly indebted to us in the sum of $21,744,901.33 represented by overdue bills of exchange accepted by Debtor and payable to Ataka America, Inc., of New York, New York (hereinafter called 'Ataka') for its purchases of crude oil, which bills of exchange were assigned for value by Ataka to us.
>
> That in addition the Debtor is justly and truly indebted to us in other substantial amounts due and to become due.
>
> That the Debtor within the six months next preceding the date of the filing of this petition has committed the following act of bankruptcy, namely, the Debtor has ceased to meet its liabilities generally as they become due.

5 Part of the additional amounts alleged due and to become due by PRC to Atlantic consisted of three debentures dated 8th November 1975, 15th December 1975 and 30th January 1976 in the amounts of $18,300,000, $25,000,000 and $6,320,000 respectively. These debentures were executed by PRC in favour of Ataka America, Inc. ("Ataka") and were assigned by Ataka to Atlantic together with all of the assets and liabilities of Ataka relating to transactions involving NRC and PRC. As of 10th March 1976 PRC owed some $27,000,000 under these debentures, which securities were valued by Atlantic at not more than an aggregate of $21,000,000, and the petition for a receiving order against PRC was, by order of the court, amended to include the balance of $6,000,000 as a debt due as provided by s. 25(2) of the Bankruptcy Act.

6 The petition for a receiving order against NRC alleged, inter alia:

> That the Debtor is justly and truly indebted to us in the sum of $4,000,000 represented by overdue promissory notes made by Debtor to the order of Ataka America, Inc., of New York, New York (hereinafter called 'Ataka'), for its purchases of crude oil, which promissory notes were assigned for value by Ataka to us.
>
> That in addition the Debtor is justly and truly indebted to us in other substantial amounts due and to become due.
>
> That the Debtor within the six months next preceding the date of the filing of this petition has committed the following act of bankruptcy, namely, the Debtor has ceased to meet its liabilities generally as they become due.

7 In their notice of cause against the petition, both PRC and NRC denied any indebtedness to the petitioning creditor and further denied that they had committed the act of bankruptcy as alleged.

8 NRC is the registered owner of all the shares in PRC, and, as the matters were interrelated, the proceedings were consolidated by consent of parties.

9 On the final day of the hearing, namely, 12th March 1976, the trial judge was informed that the debtors had lodged proposals with a licensed trustee and that these proposals had been filed with the official receiver of the bankruptcy division pursuant to the provisions of s. 42(1) of the Bankruptcy Act. Copies of the proposals were given to the Chief Justice in his chambers. Although upon his return to the court he made reference to them, the proposals were not entered as exhibits, nor was any motion made in relation to them. However, the Chief Justice considered whether the filing of the proposals with the official receiver operated as a stay of proceedings under the petition and concluded that they did not. Referring to s. 49, he stated:

> In my view the operative words of s. 49 are proceedings for the recovery of a claim provable in bankruptcy. This is not a proceeding in my view for the recovery of a claim provable in bankruptcy. This is a petition by a creditor for bankruptcy

> itself. I do not think that s. 49 operates as a stay of proceedings in bankruptcy. In any event it would seem to me manifestly unjust at this stage of the proceedings to stay them. If a receiving order should result in these hearings a proposal is still possible. We will continue with the proceedings.

10 The Chief Justice again referred to the proposals when granting the receiving order, stating that they were admissions by PRC and NRC that they were unable to meet their obligations as they generally became due. Copies of the proposals were included in the list of exhibits filed in this court. After finding that both PRC and NRC were indebted to Atlantic in amounts exceeding $1,000, that they were unable to meet their liabilities as they became due, that there was no bona fide issue to be tried and that there were not sufficient reasons for adjourning the proceedings, the Chief Justice granted a receiving order in each case.

11 The grounds of appeal are the same in each case and may be summarized as:

12 (1) Upon the filing of the proposals, all proceedings should have been stayed under the provisions of s. 49(1).

13 (2) The ruling that the filing of the proposals did not stay the proceedings ought not to have been made without hearing argument.

14 (3) There was a bona fide issue to be tried, and a stay of proceedings should have been granted pursuant to s. 25(10).

15 (4) The petitioner did not prove the existence of a debt exceeding $1,000 or that an act of bankruptcy had been committed in the six months preceding the filing of the petition.

16 As to the first ground of appeal, counsel for the debtors contended that a petition for a receiving order against a debtor falls within the category of "other proceedings for the recovery of a claim provable in bankruptcy" within the meaning of s. 49(1) of the Bankruptcy Act, and that such petition is automatically stayed under that section upon the filing of a proposal under s.42(1) of the Act. Counsel relied on *Re Côté* (1922), 3 C.B.R. 468 (Que.), and *Re Lingen Trailer & Mfg. Co. Ltd.* (1969), 13 C.B.R. (N.S.) 197 (Ont.).

17 Section 49(1) provides:

> 49.(1) Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property or shall commence or continue any action, execution or other proceedings for the recovery of a claim provable in bankruptcy until the trustee has been discharged or until the proposal has been refused, unless with the leave of the court and on such terms as the court may impose.

18 Under s. 2 of the Act, "claim provable in bankruptcy" or "provable claim" or "claim provable" is defined as including "any claim or liability provable in proceedings under this Act by a preferred, secured or unsecured creditor".

19 Section 25 lays down the procedure to be followed by a petitioning creditor or creditors and provides in part:

> (10) Where the debtor appears on the petition and denies the truth of the facts alleged in the petition, the court may, instead of dismissing the petition, stay all proceedings on the petition on such terms as it may see fit to impose on the petitioner as to costs or on the debtor to prevent alienation of his property and for such time as may be required for trial of the issue relating to the disputed facts.
>
> (11) The court may for other sufficient reason make an order staying the proceedings under a petition, either altogether or for a limited time, on such terms and subject to such conditions as the court may think just.

20 It is noted that a stay of proceedings under these subsections is permissive and not mandatory.

21 The case of *Re Lingen Trailer & Mfg. Co. Ltd.*, supra, is one in which a petition in bankruptcy was filed and, following a subsequent filing of a proposal, proceedings were stayed pending the decision of the creditors at a meeting to be held two

weeks from the date the proposal was filed. The proposal was rejected by the creditors, and under the provisions of s. 32B [en. 1966-67, c. 32, s. 7] of the Bankruptcy Act, R.S.C. 1952, c. 14 (now s. 39) the debtor was deemed to have made an assignment on the date the proposal was so filed. Application was then made to the court for an order annulling the deemed assignment and for the granting of a receiving order on the petition effective from the earlier date on which the petition was filed. The reasons why the proceedings on the petition were stayed following the filing of the proposal were not stated. In his reasons for judgment granting the application Houlden J., while recounting the facts, stated [p. 197]: "On 17th October 1969, a proposal was filed by the debtor *which, of course, stayed any further proceedings on the petition*." (The italics are mine.) The opinion expressed by Houlden J. in the *Re Lingen Trailer* case was unnecessary for the determination of the case before him and must therefore be regarded as obiter. With respect, I cannot accept the proposition that the filing of a proposal operates as an automatic stay of proceedings on a petition for a receiving order.

22 In my view, s. 49(1) is meant to prevent any creditor with a claim provable in bankruptcy from instituting or continuing any proceedings against a bankrupt or an insolvent who has filed a proposal which might otherwise gain him an advantage over other creditors without leave of the court. A petition is a proceeding for the benefit of all creditors. Furthermore, s. 25 of the Act deals specifically with stay of proceedings on a petition for a receiving order. The provisions of s. 49(1) are not in conflict with or in addition to s. 25 in this regard. They refer to cases in which a proposal has been filed or a debtor declared bankrupt and in which a creditor seeks to recover from the debtor a claim provable in bankruptcy. A petition for a receiving order is not such a claim, and it is governed by the provisions of s. 25.

23 In my opinion, *Re Côté*, supra, is merely illustrative of what the courts will consider "sufficient reason" within the meaning of s. 25(11) for the exercise of their discretion to stay such proceedings. In that case, Lemieux C.J.Q. entertained a motion to stay all further proceedings on a bankruptcy petition following the filing of a proposal by the debtor. The motion was granted not simply because a proposal had been filed but for the reasons stated by the learned Chief Justice [p. 469]:

> Whereas the principal creditors of said debtor have pronounced themselves in favour of said proposal of extension and the trustee has sent to the creditors the notice required by *The Bankruptcy Act* and the meeting of the creditors is to be held at the office of Mr. Lucien Charest (the trustee), November 21 instant.

24 In that case, the learned trial judge exercised his discretion to stay proceedings for the reasons specified.

25 In this case, however, the petition for a receiving order and the order appointing an interim receiver were filed on 13th February 1976. The hearing of the petition commenced on 8th March and concluded on 12th March 1976. The debtors lodged their proposals with a trustee on the last day of the hearing, namely, 12th March 1976, and the trustee apparently filed a copy thereof with the official receiver under s. 32(1) on the same date. Notice of the proposal in Form 36 as required by R. 57 was not sent to the registrar until 22nd March, some ten days after the receiving order had been made, and hence did not form part of the proceedings at the hearing. The trial judge was informally notified that a proposal had been filed, and a copy of the proposal was given to him. He decided, however, to continue with the proceedings. He held, and in my opinion quite properly, that it would have been "manifestly unjust" to stay proceedings at that stage.

26 As to the second ground of appeal, it was contended that the failure of the learned trial judge to hear argument as to the effect of the filing of the proposal constitutes a defect in procedure warranting the setting aside of the order.

27 The cases cited by counsel for the debtors in support of this contention dealt with the invalidity of proceedings where the trial judge announced his decision on the issue before him without calling on counsel to argue. Such is not the case here. The learned trial judge merely ruled that, despite the filing of a proposal with the official receiver, the proceedings before him should continue. Shortly thereafter he called on counsel for the debtors to argue on the evidence presented. Counsel had every opportunity to introduce a motion that the proposals be accepted in evidence and that argument be heard as to their merits, or during his argument on the issues before the court it was open to him to request that the court defer the granting of a receiving order until the proposals had been considered by the creditors. He did neither, and in my view he cannot now be heard to say that he was denied the right to be heard.

28 As to the third and fourth grounds of appeal, the issue is, simply stated, whether or not the petitioner had established indebtedness to it by PRC and NRC in an amount in excess of $1,000 not subject to a bona fide dispute, and that PRC and NRC had committed an act of bankruptcy within six months next preceding the filing of the petition.

29 Counsel for the debtor contended that there was a bona fide dispute as to the rights and obligations of the petitioner and the debtors under an agency agreement, and that the proceedings under the petition should have been stayed pending determination of that dispute. In support of this argument counsel cited *Re Whistle Co. Ltd.*, 27 O.W.N. 491, 5 C.B.R. 495, [1925] 1 D.L.R. 1110, and *Re Coffey* (1933), 15 C.B.R. 53 (Ont.). These cases are authorities for the proposition that, where a petition for a receiving order is founded on alleged debts as to which there appears to be a bona fide dispute, the court will stay proceedings pending the settlement of that dispute by a civil court. Courts have long held that the bankruptcy court is not to be made a collection agency. This is not to say, however, that a mere denial of the debt is to be taken as constituting a bona fide dispute about its validity. Evidence must be adduced to establish to the court's satisfaction not only that the alleged dispute is bona fide but also that such dispute pertains to the debt or debts on which the petition is founded.

30 In this case the alleged dispute arises over the interpretation of an agency agreement made between Ataka and NRC, under the terms of which Ataka agreed, inter alia, to finance the purchase of crude oil for delivery to the debtors' refinery at Come-by-Chance. The amount and terms of any advances made by Ataka were entirely at its discretion, and in return for such advances NRC agreed to issue promissory notes to Ataka according to repayment terms and conditions to be agreed. PRC was not a party to this agreement. Crude oil, financed by Ataka, was duly delivered to the debtors' refinery at Come-by-Chance, for which Ataka received promissory notes from NRC in respect of some shipments and bills of exchange and debentures from PRC in respect of others. Certain notes and bills of exchange were rolled over, as there were insufficient funds in the debtors' bank accounts to meet them when they fell due. All the notes and bills of exchange were subsequently assigned to the petitioner, as was all the other indebtedness of the debtors to Ataka. Notice of the assignments was given to both PRC and NRC. Overdue bills of exchange drawn by Ataka to its own order, accepted by PRC and endorsed to Atlantic, were filed in evidence. These notes and bills of exchange evidenced indebtedness to the petitioner, as assignee of Ataka, of many millions of dollars. The validity of these notes and bills of exchange was not contested, nor was the fact that they had been dishonoured. Counsel for the debtors maintained, however, that the rights and obligations of the parties to the alleged agency agreement should first be decided by a court of competent jurisdiction before it could be determined whether or not either PRC or NRC owed any debt to Ataka or Atlantic. Such is not the case.

31 The bills of exchange, accepted by PRC, were drawn in New York and payable in New York. The law of the state of New York governing negotiable instruments, according to expert evidence tendered at the hearing, is essentially the same as the law of Canada. These bills were given as payment for shipments of crude oil and were in no way related to the alleged agency agreement, to which PRC was not even a party.

32 The promissory notes were issued by NRC to Ataka to cover the advances made by Ataka for the purchase of crude oil. There was no objection as to their form, nor was it denied that the notes were unpaid after maturity. The notes were unconditional promises to pay many millions of dollars at a specified time. They were not tied to any agreement, nor is there anything in the alleged agency agreement to qualify them. Any dispute, therefore, over the rights and obligations of the parties to the alleged agency agreement should not be taken as a bona fide dispute to the alleged debt as envisaged under s. 25(10).

33 Evidence of indebtedness to other creditors on the part of both debtors was adduced at the hearing. This evidence, apart entirely from the statement of the debtors' financial position attached to the proposal, warranted a finding that both PRC and NRC had ceased to meet their liabilities generally as they became due.

34 I would accordingly dismiss the appeal with costs.

Appeal dismissed.

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IN THE MATTER OF THE NOTICE OF INTENTION TO MAKE A PROPOSAL OF 2505243 ONTARIO LIMITED OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Estate/Court File No.: 31-2675288

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY
(COMMERCIAL LIST)

Proceeding commenced at TORONTO

BOOK OF AUTHORITIES OF 2505243 ONTARIO LIMITED

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