Court File No.: CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N :

ONTARIO SECURITIES COMMISSION

Applicant

- and -

GO-TO DEVELOPMENTS HOLDINGS INC., OSCAR FURTADO, FURTADO HOLDINGS INC., GO-TO DEVELOPMENTS ACQUISITIONS INC., GO-TO GLENDALE AVENUE INC., GO-TO GLENDALE AVENUE LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK LP, GO-TO MAJOR MACKENZIE SOUTH BLOCK II INC., GO-TO MAJOR MACKENZIE SOUTH BLOCK II LP, GO-TO NIAGARA FALLS CHIPPAWA INC., GO-TO NIAGARA FALLS CHIPPAWA LP, GO-TO NIAGARA FALLS EAGLE VALLEY INC., GO-TO NIAGARA FALLS EAGLE VALLEY LP, GO-TO SPADINA ADELAIDE SQUARE INC., GO-TO SPADINA ADELAIDE SQUARE LP, GO-TO STONEY CREEK ELFRIDA INC., GO-TO STONEY CREEK ELFRIDA LP, GO-TO ST. CATHARINES BEARD INC., GO-TO ST. CATHARINES BEARD LP, GO-TO VAUGHAN ISLINGTON AVENUE INC., GO-TO VAUGHAN ISLINGTON AVENUE LP, AURORA ROAD LIMITED PARTNERSHIP and 2506039 ONTARIO LIMITED

Respondents

BOOK OF AUTHORITIES

(Returnable October 31, 2023)

October 25, 2023

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ABBREVIATED BOOK OF AUTHORITIES

Tab No.	Decision (not available on CanLII)
1.	Houlden, W. Lloyd & Morawetz, B. Geoffrey, Bankruptcy and Insolvency Law of Canada, 4th ed. (Toronto: Thomson Reuters, 2023) (loose-leaf updated October 2023, release 10)
2.	McCrie v Gray (1940), 22 CBR 390 (Ont SC (TD))

Tab 1

Bankruptcy and Insolvency Law of Canada, 4th Edition § 6:262

Bankruptcy and Insolvency Law of Canada, 4th Edition
The Honourable Mr. Justice Lloyd W. Houlden, Mr. Justice Geoffrey B. Morawetz, Dr. Janis P. Sarra

Part I. The Bankruptcy and Insolvency Act

Chapter 6. Part V Administration of Estates

VI. Section 135

§ 6:262. Evidence in Support of Proof of Claim or Proof of Security

If the trustee is not satisfied with the proof of claim or proof of security, the trustee may require further evidence in support of the proof: s. 135(1); Re Light's Travel Service Ltd. (1985), 56 C.B.R. (N.S.) 175 (B.C. S.C.).

The trustee's right and duty when examining a proof of claim is to require satisfactory evidence that the debt is a valid debt. No judgment recovered against the bankrupt, no covenant given by, or account stated with the bankrupt deprives the trustee of this right. The trustee is entitled to go behind such forms to get the truth; the trustee need not show fraud or collusion to set aside such documents: Re Van Laun; Ex parte Chatterton, [1907] 2 K.B. 23, 76 L.J.K.B. 644, 97 L.T. 69 (C.A.).

In Re Canada Asian Centre Development Inc. (2003), 39 C.B.R. (4th) 35, 2003 CarswellBC 270, 2003 BCSC 41, 10 B.C.L.R. (4th) 161, Burnyeat J. of the British Columbia Supreme Court was of the view that, despite the comments in cases such as Re Van Laun; Ex parte Chatterton, [1907] 2 K.B. 23, 76 L.J.K.B. 644, 97 L.T. 69 (C.A.), a judgment of a court of competent jurisdiction should almost invariably satisfy a trustee regarding the legitimacy of a debt or security if, in awarding judgment, the court has considered the merits of the claim. If it were otherwise, the trustee would be substituting its opinion regarding the matter decided by the judgment and thus displacing the authority given to the Court of Appeal.

To obtain information concerning a claim, the trustee may, with the permission of the inspectors, conduct examinations and obtain production of documents under s. 163(1): see § 7:30 “Examination by Trustee under Section 163(1)”. If the trustee disallows the claim and the creditor appeals, both the trustee and the creditor can use the examinations as evidence on the appeal: Re Christie Grant Ltd., 1 C.B.R. 489, [1921] 3 W.W.R. 264 (Man. K.B.); Re Dumfermline Trading Co., 3 C.B.R. 178, [1922] 2 W.W.R. 1274, 66 D.L.R. 813, 16 Sask. L.R. 71 (Q.B.).

End of Document

Tab 2

McCrie (Re)

Ontario Judgments

Ontario Supreme Court - High Court of Justice

In Bankruptcy

Urquhart J.

December 19, 1940.

[1940] O.J. No. 291 | 22 C.B.R. 390

IN THE MATTER OF the bankruptcy of Robert Newton McCrie and Edward William Gray, debtors

(49 paras.)

Counsel

G.M. Willoughby, K.C., for the trustee. A.A. MacDonald, K.C., for Robert David McCrie, a creditor.

URQUHART J.

1 This is an appeal by a creditor, Robert David McCrie, from the notice served on him on or about the 19th day of October, 1940, of disallowing of his claim against the estate of the debtor.

2 In or about the month of September, 1939, the debtors contemplated entering into a partnership for the retail sale, in the city of Sarnia, of textiles under the name of Gray & McCrie. The creditor is the father of one of the firm. The members of the firm about that time applied to the father to loan the firm certain moneys and also to guarantee the indebtedness of the firm to the bank, which the creditor agreed to do, and an elaborate agreement, filed as an exhibit herein and dated the 9th day of November, 1939, was drawn up specifying what each party was to do and making very certain the terms of the advances and guarantee. No exception or objection is taken to the validity of this document.

3 The debtors carried on business in Sarnia until May 28, 1940, and the creditor advanced a considerable amount of money and also guaranteed the indebtedness of the firm to the Bank of Montreal to the extent of $2500. After a time things were not going well and the parties decided to make a change, and about the last mentioned date one of the debtors, McCrie, and his uncle, one McFadden, went to Petrolia and rented a store there. At that time the other debtor, Gray, intended to get another store. At the time they thought that they had enough merchandise on had to supply two stores, one for each of the partners. Gray was going to have his store at Forest and McCrie at Petrolia, both in the county of Lambton. Subsequently Gray found that he could not get his location and then it was decided between the partners that the debtor McCrie should take all the goods of the partnership to Petrolia and see what he could do with them there. The lease of the Petrolia store was not taken in the name of the firm but of the individual debtor, McCrie, and the applicant creditor was made a party to the lease but as I think in the capacity of guarantor.

4 The object of going to Petrolia was that McCrie was to carry on at Petrolia and pay the back debts of the partnership. The business there was carried on in his name only. Instead of being able to pay back debts things went from bad to worse and finally bankruptcy ensued on the 14th day of August last.

5 The creditor has made a very substantial claim against the estate and it has been fully itemized and made an exhibit to his affidavit filed herein.

6 On the 19th October, 1940, the trustee prepared and served a notice of disallowance. The notice reads as follows:

> "Take notice that as trustee of the above estate, we have this day disallowed your claim against such estate on the following grounds, namely, that it does not constitute a properly substantiated and valid claim against the assets of the debtors herein."

Then the notice goes on as usual to say that appeal must be made in thirty days or the notice of disallowance shall stand.

7 One of the grounds of appeal is that this notice of disallowance is ineffective in that it does not give to the creditor the grounds of rejection of the proof. It is well that I should deal with that matter first.

8 Disallowance of claims comes under section 127 of The Bankruptcy Act. Sub-sections (1) (2) and (3) are the appropriate sub-sections, reading as follows:

> "127. The trustee shall examine every proof and the grounds of the debt, and may require further evidence in support of it.
>
> (2) If he considers the claimant is not entitled to rank on the estate, or not entitled to rank for the full amount of his claim, or if directed by a resolution passed at any meeting of creditors or inspectors, he may disallow the claim in whole or in part, and in such cases shall give to the claimant a notice of disallowance.
>
> (3) The said notice may be given either by serving the claimant with a copy there personally or by mailing such copy in the registered prepaid letter, addressed to the claimant at his last known address, or at the address shown in or by the claimant's proof."

9 There is nothing in these sections which defines what form the notice of disallowance shall take, or which compels the trustee to give the grounds of rejection. The corresponding provision in the English rules is different. Rule 23: "The trustee shall examine every proof and the grounds of the debt and in writing admit or reject it in whole or in part or require further evidence in support of it. If he rejects a proof he shall state in writing to the creditor the grounds for rejection."

10 In referring to this section, Halsbury, 7th. Ed., Vol. 2, pp. 311, says: "The trustee must examine every proof and the grounds of the debt ... and in writing admit or reject it in whole or in part. In the case of rejection the grounds thereof must be stated in writing to the creditor and if they are unreasonable or vexatious the trustee may be liable to the creditor for the costs of an appeal from the rejection."

11 It is probable that if the grounds are not specified in a notice of disallowance under the English rules that the disallowance would not be null and void. In one case the court ordered the trustee to give particulars of the grounds of rejection. Re Huntly (1917) 87 L.J. K.B., 590.

12 However, though there is nothing in our Act which seems to require the trustee to give to the creditor

the grounds for rejection, I think that it is good practice for the trustee to do so, and particularly it is only fair to the creditor that he should know what the grounds of rejection are and that they are solid and substantial grounds.

13 The notice of disallowance in this case is a particularly iniquitous one, in view of the fact that if the creditor who has claimed for the sum of $6242.38 has his claim allowed, he would be in the position of bearing two-thirds of the costs of the litigation, even though he was successful, and if the trustee, as is general, obtains his costs out of the estate and the estate was ordered to pay the costs of the creditor.

14 Not only did the trustee give no reason for rejection but it did not, as I think it was its duty to do, ask the creditor for production of vouchers, receipts or other documents substantiating his claim, nor make any inquiries. If it had, many of the items disputed would have been admitted.

15 I think I must lay down the rule, which is to be Followed by trustees, that notices of disallowance must set forth, so far as is humanly possible, the grounds of rejection and must follow at least some semblance of investigation by the trustee. In this case it looks suspiciously as if the trustee had engaged in a fishing expedition and it seems to me that such proceedings ought not to be countenanced. I am unable, however, to reject the notice of disallowance on this ground and I feel that I can deal with the matter properly in my disposition of the costs.

16 At the hearing the trustee conceded that certain items in the statement of account could not be successfully contested. For convenience, I have numbered all the items in the statement of account and the following are so conceded: items (1) to (9) amounting to $2533.13; items (11) to (20) totalling $457.49; items (28) and (29) $39.89, making a total of $3030.51, so that about one-half of the creditors' claim has been conceded and the creditor has been put to the expense of preparation for a contest in respect of these items unreasonably by the trustee. Items (31) and (34) obviously pertain to the Sarnia store and should be allowed, the total now being $3050.80.

17 On the other side, items (23) (25) (38) and (40) amounting in all to $77.15 have been abandoned by the creditor as not being chargeable against the estate.

18 The remaining items may be divided into two classes. First, item (10). In respect of this item the creditor alleges and the fact is that he is liable as surety upon a note given by the debtor firm to the Bank of Montreal, Sarnia. Upon this item the bank has yet made no claim against him but he is apprehensive that a claim will be made and undoubtedly a claim will be made and he will probably have to pay same. Neither has the Bank of Montreal filed a claim of its own against the estate.

19 Secondly, the remaining items may be grouped under one head, that is, they are items referable to claims against the business after the business was moved to Petrolia. Just exactly what line of objection to those the trustee advances I am unable clearly to say. The gist of it, as I understand it, is that the trustee alleges that the business became the individual business of McCrie after the removal to Petrolia and that the bankruptcy is in respect to the joint business and that only claims against the joint business should be allowed, and that the claim should rank against the debtor McCrie's separate estate, if any.

20 In regard to the first of these two, if the Bank of Montreal, makes a claim upon the estate and receives its dividend, it is obvious that the creditor, even though he must pay the balance, cannot succeed in a claim against the estate. For example, assuming that twenty cents on the dollar be paid, if the Bank of Montreal makes its claim and receives twenty per cent and then claims against the creditor for the remaining eighty percent, the creditor could not rank against the estate for the remainder and get

twenty per cent of the eighty per cent, because that would have the effect of this debt bearing a dividend of close to forty per cent, at any rate considerably more than other creditors' claims would bear. There cannot be two claims for the one debt. re Coughlin & Company, *4 C.B.R. 294*.

21 If, however, the Bank of Montreal, does not see fit to claim for its debt but compels payment of the debt from the surety the applicant creditor is subrogated to the rights of the Bank of Montreal and can make a claim therefor. Ex party Rushforth, 10 Ves. 409, is authority for the statement that if the solvent surety pays the debt he is entitled to be subrogated to the creditor's proof of claim against the estate of the insolvent principal debtor.

22 In this case, however, no claim has yet been made by the Bank of Montreal against either the creditor or the estate. It will probably make a claim on this creditor and therefore the claim of this creditor against the debtor comes under the category of contingent claims. These are provided for under the title of "Debts provable" in section 104, s.s. (3) of The Bankruptcy Act, which reads:

> "104 (3) The court shall value, at the time and in the summary manner prescribed by General Rules, all contingent claims and all such claims for unliquidated damages as are provable by this section, and after, but not before, such valuation, every such claim shall for all purposes of this Act, be deemed a proved debt to the amount of its valuation."

23 It has been held that the contingent liability of a surety, who has not been called upon to pay, is a debt provable in the bankruptcy of the principal debtor. (re Froment, *5 C.B.R. 765*). So that the creditor who has to face the claim from the Bank of Montreal is quite competent to prove his claim against the estate.

24 I have no knowledge of the financial standing of the creditor. It was said in argument that he has no money to pay this guarantee but that does not mean that he has no property which would be good for it. I would infer from the amount of money he was able to spend in assisting this venture that he would be well able to pay and particularly it is very unlikely that the bank would not have satisfied itself as to his financial solvency before the loan was made. Probably the claim of the bank is well secured with property of the creditor.

25 Therefore his claim in this regard, provided the Bank has not claimed, should be allowed and valued at the full amount of principal and interest due on the note, and I so declare.

26 Any order allowing the claim on the guarantee against the estate in the above sum plus interest the amount of which can easily be ascertained, is subject to this, that the Bank of Montreal has made no claim on the amount and that the creditor before he can rank in respect of such claim, must show to the satisfaction of the trustee that he has paid the Bank of Montreal either in cash or its equivalent.

27 The claim in respect of the $2500 and interest will therefore be allowed subject to the above but will be deferred as to payment until it is seen what develops and then only allowed to the extent of payment.

28 With regard to the items, amounting in all to $569.43, advanced while the business was carried on in Petrolia, these are sums which were actually advanced by the creditor to his son as loans. These advances were ear-marked by the creditor, the father, for specific purposes and were paid out by the son for those purposes. They include a number of things, namely, rent, transient traders license, alteration, public utilities, telephone, water rates, printing, and a loan of $100. which was advanced to pay for some goods supplied to the business. It seems to me that these items should properly be allowed as a claim against the joint estate rather than a claim against the individual estate (if any) of the debtor McCrie.

29 In the first place, some time after the partnership was commenced, the usual partnership declaration was made and filed in the county registry office of the county of Lambton as required by the Partnership Registration Act, R.S.O. Ch. 189. This declaration showed the partnership to consist of Gray & McCrie. The detail of the date of the commencement of the partnership in that does not fully correspond with the facts sworn to in evidence; but as all the advances prior to November 1939 are conceded, this discrepancy makes no difference. The declaration was filed on November 14, 1939, well within sixty days of the first day stated in evidence as the day of the first advance by the creditor.

30 The evidence discloses no dissolution of the partnership, and it seems to me that the partnership was not in fact dissolved.

31 The circumstances in regard to the change of the business to Petrolia are set out fairly fully in the early part of this judgment, and are to be found at pages 8 and 11, inclusive, of the evidence of Robert D. McCrie. It is obvious that there was no intention of dissolving the partnership, but that the object of the change was to pay the back debts. It was also evident from that testimony that the partners still considered -- and this creditor still considered -- the partnership to be subsisting. No dissolution of partnership was registered under section 6 of the Act. In Bank of Toronto v. Nixon, *4 O.A.R. 346*, at p. 351, Morrison, J.A., says: "It is true that the retiring of a member of a firm would operate in law as a dissolution of the partnership, but among commercial men, the retirement of a member of a firm or the addition of a new member is not considered a complete dissolution of the firm, and we may fairly assume that the framers of the Act had in view that state of things, and so provided for the registration of a new declaration when such an alteration of change took place and to estop a retiring partner from setting up that he ceased to be a partner, if he omitted to file such a declaration."

32 By section 7 of the same Act, it is provided that until a new declaration is made and filed, no person who signed the original declaration shall be deemed to have ceased to be a partner, so that in the eye of the law and in the eye of the public the partnership liability remained that of Gray & McCrie, although the Petrolia store was actually carried on under McCrie's name and the lease was in his name and not in the name of the firm.

33 One of the objects of the Act is to enable persons dealing with a firm to know who is liable for goods sold or moneys advanced. In this case the creditor, who was the father of one of the debtors, would have actual notice that there had been a change of conditions as he would know that the lease was taken in his son's name and also that his son was carrying on the business in his own name; but he would also know that there had been no dissolution and also he would know the purpose as above outlined of the taking of the goods to Petrolia.

34 With these considerations in mind, and in view of the strict wording of section 7, it seems to me that Gray and therefore the firm continued to be liable for the advances made by the creditor for what was virtually a continuance of the same business for the purpose of liquidating in an orderly manner. Any new goods that were purchased were mixed with the goods that came from Sarnia, and it is impracticable to sort out what belongs to each phase of the business.

35 I have been unable to find any case in which a similar situation to the present occurs. The case of In re T. Wesley Merrick, *14 C.B.R. 331*, has many features of similarity, but it is of little help because in that case there was an actual change in the partnership and a novation between the creditor and the continuing partner. Those considerations do not apply here as the partnership was not actually dissolved. That being so, one partner would continue to be an agent for the other, and if money were needed to

carry on the business of the partnership for the purposes outlined in the evidence above, the active partner would have power to borrow same, and the debt would be that of the partnership. There is no doubt that the money was used in connection with the business.

36 The appropriate sections in regard to claims on joint and separate estates are sections 122, 59 and 80:

> "122. In the case of partners the joint estate shall be applicable in the first instance in payment of their joint debts, and the separate estate of each partner shall be applicable in the first instance in payment of his separate debts.
>
> (2) If there is a surplus of the separate estate it shall be dealt with as part of the joint estate.
>
> (3) If there is a surplus of the joint estate, it shall be dealt with as part of the respective separate estates in proportion to the right and interest of each partner in the joint estate.
>
> 59. If any debtor who has made an authorized assignment or against whom a receiving order has been made, owes or owed debts both individually and as a member of one or more different co-partnerships, the claims shall rank first upon the estate by which the debts they represent were contracted, and shall only rank upon the other or others after all the creditors of such other estate or estates have been paid in full.
>
> 80. Where one partner of a firm is adjudged bankrupt, or makes an authorized assignment, a creditor to whom the bankrupt is indebted jointly with the other partners of the firm, or any of them, shall not receive any dividend out of the separate property of the bankrupt or authorized assignor until all the separate creditors have received the full amount of their respective debts."

37 A number of creditors have claimed against the separate estate of McCrie only. Two or three of these, namely, doctors and the Sarnia Hospital, are obviously creditors against the separate estate and are by the above sections precluded form ranking on the joint estate until the creditors of that estate are paid in full. The trade creditors, however, I would think in the absence of further evidence are properly creditors of the joint estate in view of the circumstances and the provisions of section 7 of The Partnership Registration Act. They are not before the court, and of course new evidence may alter that opinion as far as they are concerned.

38 Through an affidavit recently filed on behalf of the trustee, my attention has been to an answer made in the statement of affairs of the debtor McCrie. In answer to the question: "Have any changes since taken place in the constitution of the firm?" the individual debtor McCrie in his statement of affairs says: "No, but it was arranged that I take over the business at May 31st 1940." Gray, in answer to the same question, makes an answer to the same effect. These answers are written down in the same hand, and I would infer that it was the handwriting of some official rather than that of the bankrupts themselves. In the joint statement filed the same question is answered in the negative, but later in the statement the following occurs in answer to tenancies: "For 7 1/2 months in Sarnia, the business conducted at 184 N. Christina St., rented from R.D. McCrie, father of Robert N. McCrie for $275. per month; firm owed $300. for rent. For months of June, July and August, 1940, at Petrolia, the rent was $35. which was paid for four months. After going to Petrolia no formal dissolution of partnership was made but Mr. McCrie Junior was the only one who attended to any business in Petrolia."

39 While at first blush the answer given by the individual debtors in their respective questionnaires might indicate a dissolution of partnership, the above explanation is to the contrary and also the evidence to which I have above referred shows clearly the nature of the transfer to Petrolia.

40 To sum up: the transaction between the partners whereby McCrie was to take the assets of the partnership to Petrolia did not operate to transfer the property into a separate estate, and the whole of the property as it existed at the date of the bankruptcy must be still considered as remaining part of the joint property and distributed among the partnership creditors.

41 As the father, the creditor in this case, advanced his moneys in respect of this business and of these assets, he must be considered a proper creditor of the partnership even though he had knowledge that the son was carrying on in his own name. The Partnership Registration Act makes that clear.

42 It is alleged, however, and there is some suggestion in the evidence to that effect, that the applicant creditor in respect of the Petrolia debts intended that his claims in respect of these should be subject to the claims of the other creditors. This suggestion arises from the answer given by the creditor at p. 11 of his examination when the following question was asked and answer made: "Q. Did you expect your son Bob to pay the debts owing to you? A. Yes, and to the other creditors too. I expected he would pay the other creditors first, for I was not asking mine at all."

43 I do not think the creditor in the above statement intended more than this, that the object of the carrying on of the Petrolia store was to liquidate the business and while the business was going on in that process he was content to wait for his money. I do not think that he intended at any time to put himself in the position in the event of bankruptcy which would be inferior to other creditors and which would have the effect of either postponing or waving his claim.

44 The claims for advance by the father, the creditor, against the joint estate in respect of these advances to the business, in Petrolia, will therefore have to be allowed.

45 One claim was omitted in the creditor's proof of debt, namely, a claim for $250. which is obviously in respect of the Sarnia business. This claim should be allowed and leave given to the creditor to file an amended proof together with or cheques to file an amended proof together with vouchers or cheques in support of the claim.

46 In regard to the presentation of this case, it was thought at first that I might have to direct an issue but the matter having been adjourned and the creditor examined in the meantime, all essential matters were brought out either in his examination or in the other material filed. Both parties conceded that an issue was unnecessary and agreed to argue the matter on the evidence and agreed to argue the matter on the evidence before the court.

47 With regard to costs: the creditor has been substantially successful. He was justified in making his claim as to guarantee as well as to the great bulk of his other claims and therefore he is entitled to his costs. Unfortunately he is in this position, that the biggest part of these costs will have to be paid by himself, and the best I can do for him is to direct that his costs of the application be paid out of the estate.

48 In regard to the trustee's costs: the trustee has been successful practically on all counts. Not only that, but it has, in my opinion, put the creditor to a lot of unnecessary and unjustifiable expense; it has not followed good business methods in dealing with this claim. It is therefore not fair that the estate, which means largely the creditor, should have to bear the trustee's costs. The creditor also by virtue of having to prepare to substantiate more than one-half of his claim, which was ultimately conceded, was further put to an expenses that a little investigation would have obviated. I am therefore making no order for the costs of the trustee under the circumstances.

49 The order will go as above outlined; costs of the creditor payable out of the joint estate; no other order as to costs.

URQUHART J.

ONTARIO SECURITIES COMMISSION Applicant	and	**GO-TO DEVELOPMENTS HOLDINGS INC., et al.** Respondents	Court File No.: CV-21-00673521-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE - COMMERCIAL LIST

Proceeding commenced at TORONTO

ABBREVIATED BOOK OF AUTHORITIES

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