Court File No. BK-31-2747949

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

IN THE MATTER OF THE BANKRUPTCY OF GROSS CAPITAL INC., OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

FACTUM OF MARK GROSS

(Motion returnable March 2, 2023)

February 22, 2023

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PART I - OVERVIEW

1. This factum is filed by Mark Gross ("**Mark**"): (i) in response to the motion brought by KSV Advisory Inc., in its capacity as the trustee in bankruptcy (the "**Trustee**") of Gross Capital Inc. ("**GCI**") demanding, among other things, that Mark cause Gross Medical Opportunities Fund LP ("**GMOF LP**") to transfer money from the Sale Proceeds (defined below) to the Trustee on account of an unsecured debt the Trustee claims is owing by GMOF LP and other entities; and; (ii) in support of Mark's cross-motion to have the Trustee, its counsel and the inspectors replaced as a result of their abuse of process and breach of professional standards by threatening criminal sanctions against Mark in order to coerce him to cause GMOF LP to pay a portion of the Sales Proceeds to the Trustee.

2. In April 2021, Mark caused GCI to be assigned into bankruptcy. At that time, Mark was an officer and director of GCI. As part of GCI's assignment into bankruptcy, Mark was the "officer executing the assignment" (the "**Designated Officer**") as per section 159 of the *Bankruptcy and Insolvency Act* ("**BIA**"). The Designated Officer has the obligations specifically set out in section 158 of the BIA, which largely pertain to assisting a trustee with understanding the bankrupt company and locating its property.

3. The Trustee and its counsel have threatened Mark with criminal proceedings because he has not, at their demand, cause GMOF LP to transfer some of the Sales Proceeds to the Trustee on account of an alleged unsecured debt.

4. The basis for the Trustee and its counsel threatening criminal proceedings is an alleged breach of section 158 of the BIA. However, a breach of section 158 may only be an offence under section 198(2) if the breach occurs "without reasonable excuse", which

does not apply in this case. Moreover, section 158 does not give the Trustee or its counsel the ability or power to: (i) direct the actions of the Designated Officer with respect the business and affairs of other companies; (ii) direct or force the Designated Officer to transfer monies belonging to other companies to the Trustee because the Trustee asserts that there is a debt owing; or (iii) force the Designated Officer to ignore or breach his fiduciary duties he owes to other companies or persons.

5. Both the Trustee and its counsel are subject to certain rules of professional conduct. Those rules prohibit the Trustee and its counsel from threatening criminal or quasi-criminal sanctions in order to gain an advantage in a civil matter. Yet, that is exactly what they have done and are continuing to do by this motion.

6. The Trustee and its counsel are continuing to threaten Mark with criminal sanctions if he does not cause GMOF LP to transfer money to them. Mark has simply and properly raised issues as to whether the amount demanded is in fact owing and, if amounts are owing, how much is owing and by whom. Mark has previously asked that this matter be referred to the Court or an arbitrator for determination so that he can ensure that he is abiding by the fiduciary duties that he owes to GMOF LP and its related entities. The Trustee and its counsel rebuffed these requests and instead continued their threats to commence criminal proceedings against Mark and launched this motion to do so.

7. The conduct of the Trustee and its counsel in threatening criminal proceedings in order to secure payment of an unsecured debt is an abuse of process and a breach of their respective professional obligations. The Trustee, its counsel and the inspectors have

repeatedly ignored the following issues and history of this matter, and have instead charged ahead with their ill-conceived threats of criminal sanctions against Mark:

(a) Mark's role as the Designated Officer of GCI does not give the Trustee, its counsel or the inspectors any power or authority to direct him to cause GMOF LP or any other entity to make payments to the Trustee;

(b) The unconsolidated financial statements show that GMOF LP only owes GCI $335,357, not the $453,240 that the Trustee is demanding in this motion;

(c) Mark has repeatedly advised the Trustee and its counsel that the demand loan was never to be demanded by GCI until the investors of the Fund (defined below) were assured at least the return of their capital, and that this was advised to some of the Fund's investors, and therefore the principle of promissory estoppel applies;

(d) Mark had, months before this motion was commenced, suggested that the issue of the amount to be paid by GMOF LP and related entities and promissory estoppel be put to this Honourable Court or an arbitrator for an expedited resolution, which decision Mark could then abide by without infringing his fiduciary duties to GMOF LP and the other entities. That reasonable suggestion was rejected by the Trustee, its counsel and the inspectors;

(e) Despite this request, Mark, on behalf GMOF LP, thereafter advised the Trustee that GMOF LP would forthwith pay the amount identified in the unconsolidated financial statement as owing by GMOF LP and asked for payment instructions. The Trustee never responded and instead brought this motion threatening criminal sanctions (despite having rejected Mark's earlier proposal to have the matter brought before the Court);

(f) GMOF LP is not liable for the debts for any other entity and can only use the Sales Proceeds to pay for debts owed by it;the Sales Proceeds cannot be used to pay the debts owed by other entities, even if they are related. Thereafter, it will determine whether there are funds that may be distributed to the Fund, which the Fund can then use to pay for debts properly owed by it and then make distributions to the unitholders;

(g) Given the issues facing GMOF LP and the Fund, it is not clear whether or not there will be sufficient funds to pay all of their creditors. The consolidated financial statements the Trustee relies upon in support of its claims state that GCI is a related party to the Fund and GMOF LP, and therefore the claims of GCI may be subordinated to the claims of other creditors as a result of section 137(1) of the BIA.

(h) As noted, a breach of section 158 is only an offence under section 198(2) if the breach occurred "without reasonable excuse". Thus, even if a breach occurred, which is not admitted, it is clear that no offence has been committed as Mark has a reasonable excuse to not accede to the

unreasonable demands of the Trustee and its counsel, and it was reasonable to suggest that the matter be determined by the Court. Therefore, there is no reasonable prospect of a successful conviction, making the on-going threat of criminal proceedings a continuing abuse of process.

8. It is abundantly clear that there is no basis to suggest that Mark committed an offence under the BIA. The continued threats of criminal sanctions by the Trustee and its counsel, including the commencement of this motion, to recover an unsecured debt is not only ill-conceived, but it is a violation of their respective rules of professional conduct and an abuse of process. Accordingly, the Trustee and its counsel, and the inspectors to the extent that they authorized or directed such abuses, must be removed and replaced. This is particularly important given that the primary activities remaining in the estate may be litigation, including potentially claims against Mark. In light of their abuse of process and breach of their respective rules of professional conduct, it is clear that they have not acted in an unbiased manner or otherwise met the standards of conduct imposed on them and therefore any litigation and the remaining administration of the GCI estate must be done by a new trustee and counsel, and inspectors.

PART II - THE FACTS

A. The Gross Medical Opportunity Fund

9. GMOF LP is a limited partnership that, together with its general partner Gross Medical Opportunity Fund GP Inc. ("**GMOF GP**"), was involved in the funding, acquisition and management of medical buildings. Among the limited partners of GMOF LP is the Gross Medical Opportunity Fund ("**Fund**"), a trust fund that holds the majority of the

beneficial units of GMOF LP.[1] (The Fund, GMOF LP and GMOF GP are collectively referred to as "**GMOF**".) Each of GMOF LP, GMOF GP and the Fund are separate and distinct entities from GCI (the entity over which the Trustee was appointed).

10. Mark and Sheldon Gross ("**Sheldon**") are the sole trustees of the Fund and manage GMOF LP as a result of their positions as officers and directors of GMOF GP.[2]

11. In March 2022, GMOF LP sold certain of the properties that it owned. It now has to address the proper distribution of the Sale Proceeds from those sales (the "**Sale Proceeds**"). The Sale Proceeds, which equal approximately $1.2 million, are being held in trust for GMOF LP by Fogler Rubinoff LLP and have not yet been distributed to any limited partners, including the Fund.[3]

12. The most recent financial statements for both GMOF LP, GMOF GP and the Fund were prepared for the year of 2019 and were audited by Segal LLP.[4]

B. GCI – Gross Capital Inc.

13. Under Mark's direction, GCI filed for bankruptcy on June 25, 2021. Therefore, Mark was the "officer executing the assignment" as defined in section 159 of the BIA. KSV Advisory Inc. was appointed as the trustee in bankruptcy.[5]

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[1] Affidavit of Mark Gross ("**Gross Affidavit**"), para. 3; Responding and Cross Motion Record ("**RMR**"), Tab 2, p.11-12.
[2] Gross Affidavit, para. 2; RMR, Tab 2, p. 11.
[3] Gross Affidavit, para. 4; RMR, Tab 2, p. 12.
[4] GMOF LP 2019 Financial Statements, Exhibit A to Gross Affidavit; RMR, Tab 2-A, p. 23-46; GMOF GP 2019 Financial Statements, Exhibit B to Gross Affidavit; RMR, Tab 2-B, p. 47-64.
[5] Gross Affidavit, para. 7; RMR, Tab 2, p. 12-13.

C. Demands Made by the Trustee Against Mark

14. In early 2022, the Trustee first raised its position that the Fund or GMOF LP may owe money to GCI. In response, Tyr LLP, counsel for Mark and GMOF, sent a letter dated March 22, 2022, to the Trustee's counsel advising that the amounts claimed were not in fact owing now as GCI had never intended that those amounts would be repaid until the Fund's unitholders were assured of the return of their capital.[6]

15. On April 11, 2022, the Trustee, via its counsel, responded to that letter, by addressing a letter to Mark and made a formal demand for payment of $678,864.94 (the "**April 11 Letter**").[7] The Trustee asserted that $453,240 was owing in respect of an unsecured, non-interest-bearing demand obligation and that $189,904 was owing in respect of an unsecured, 9% *per annum* interest-bearing demand loan. Both of those numbers appear in GMOF's Consolidated Financial Statements, which consolidated the financial statements for the Fund, GMOF LP and the co-tenancies (and perhaps GMOF GP). None of those entities are parties to these proceedings.[8]

16. In the April 11 Letter, the Trustee referred to the Sales Proceeds being held in trust by Fogler Rubinoff LLP. The April 11 Letter concluded by demanding that that Mark instruct Fogler Rubinoff LLP, GMOF LP's own lawyers, to release $678,864.94 to the Trustee from the Sale Proceeds.[9] By that letter, the Trustee and its lawyers were trying to coerce Mark into giving certain instructions to GMOF LP's own lawyers for the Trustee's own purposes.

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[6] Letter dated March 2, 2022, Exhibit D to Gross Affidavit; RMR, Tab 2-D, p. 92-93.
[7] Letter dated April 11, 2022, Exhibit E to Gross Affidavit; RMR, Tab 2-E, p. 94-95.
[8] 2019 Consolidated GMOF Financial Statements, Exhibit C to Gross Affidavit; RMR, Tab 2-C, p. 65-91.
[9] Letter dated April 11, 2022, Exhibit E to Gross Affidavit; RMR, Tab 2-E, p. 94-95.

17. On April 18, 2022, Mark, through counsel, responded and again explained why GMOF LP and the Fund did not owe $687,864.94 to GCI ("**April 18 Letter**") and why some of the amounts were not owing now.[10]

18. On April 22, 2022, the Trustee responded with a letter from its counsel.[11] This time, the Trustee and its counsel went further than simply demanding the payment from the Sale Proceeds or the repayment of an unsecured debt. They claimed that Mark owed a duty under the BIA, other than his duties to GMOF LP, that required him to deliver a portion of the Sales Proceeds directly to the Trustee, claimed that Mark was lying, and threatened to have Mark to have to "explain his conduct… to the Court": [*emphasis added*]

> The Trustee does not look favourably on false statements being made to it on behalf of the principal of the Bankrupt, and reminds your clients of their duties under the BIA. For greater certainty, the demand made in the Trustee's April 11 Letter stands, as does the Payment Deadline of April 30, 2022 stated therein. Should the Known Indebtedness not be received by the Trustee by the Payment Deadline, Mr. Gross will be called upon under oath to explain his conduct in respect of this matter to the Court.[12]

19. The threat that he would "be called upon under oath to explain his conduct", following the reference to Mark's "duties under the BIA", is a clear threat that the Trustee and its counsel would use of the offence provisions of the BIA in order to coerce Mark into causing GMOF LP to transfer part of the Sales Proceeds to the Trustee.

[10] Letter dated April 18, 2022, Exhibit F to Gross Affidavit; RMR, Tab 2-F, p. 96-98.
[11] Letter dated April 22, 2022, Exhibit G to Gross Affidavit; RMR, Tab 2-G, pp. 99-100.
[12] Letter dated April 22, 2022, Exhibit G to Gross Affidavit; RMR, Tab 2-G, p. 100.

20. On May 1, 2022, GMOF LP's counsel sent another letter to the Trustee's counsel, asking for a meeting that Mark would attend and personally explain why the amounts claimed by the Trustee were not owing and answer questions.[13]

21. That meeting took place on May 10, 2022, during which Mark explained to the Trustee why GMOF LP does not owe the amount of $678,864.94 as demanded, and that if anything is payable now by GMOF LP, it could only be $355,357.[14] In particular:

(a) It was explained that the financial statements relied on by the Trustee were the Consolidated Financial Statements and, therefore, did not identify what entity was responsible for what portion of the consolidated debt reported in the statements. The total $678,864.94 unsecured debt listed on the Consolidated Financial Statements included amounts that might be owed by GMOF LP, GMOF GP, or the co-tenancies GMOF invested in, as well as any amounts owed by the Fund itself. However, GMOF LP is not liable for the debts of the Fund or GMOF LP or the co-tenancies, and vice versa.[15]

(b) It was explained that the unconsolidated 2019 GMOF LP Statements show that only $355,357 is "owing" to GCI from GMOF LP. These unconsolidated statements are the only accurate source of information regarding how much GMOF LP itself owes to GCI. Tellingly, the Trustee, which has control of all of GCI's books and records, has never provided any additional documents

[13] Letter dated May 1, 2022, Exhibit H to Gross Affidavit; RMR, Tab 2-H, pp. 101-103.
[14] Gross Affidavit, para. 15; RMR, Tab 2, p. 15.
[15] Gross Affidavit, para. 16; RMR, Tab 2, p. 15.

to justify its position that GMOF LP owes GCI any amount other than $355,357.[16]

(c) It was also explained that, as a former director and officer of GCI, Mark knew that the demand obligation was never intended to be called upon by GCI until the Fund's unitholders were at least assured of the return of their capital, and that this was known and relied upon by GMOF and explained to some (but not all) of the Fund's unitholders. The amount that GCI had advanced to GMOF LP was with respect to legacy costs in order to set up a previous trust. These costs were then rolled into the creation of GMOF LP. Because the intention was for Mark and Sheldon to ultimately make profits from the management fees charged to the Fund, and the amounts loaned by GCI were in effect a sunk cost to set up this new venture, GCI agreed not to demand payment until the unitholder's capital was repaid. This mutual understanding between GMOF and GCI was not documented since there was no need to – given the fact that Mark and Sheldon were the ones that were managing both GCI and GMOF, they knew of the representation by GCI and the reliance on it by GMOF.[17] In legal terms, this was a promissory estoppel on which GMOF and its unitholders are entitled to rely upon. Having knowledge of the promissory estoppel, Mark was not free to ignore the rights of GMOF LP and related entities that might arise therefore whether the Trustee and its counsel threated Mark or not. This is

[16] Gross Affidavit, para. 17; RMR, Tab 2, pp. 15-16.
[17] Gross Affidavit, para. 18; RMR, Tab 2, p. 16.

particularly the case that the Unitholders will be suffering losses and will not receive all of their capital back.[18]

22. Following that meeting, on May 31, 2022, Mark's counsel sent a letter to the Trustee's counsel[19] providing more information and clarification to the Trustee, and again explained that Mark's knowledge of GCI's intention regarding when the amounts would be demanded created a promissory estoppel that prevented the Trustee from making or enforcing a demand against GMOF LP until the Fund's unitholders were assured the return of their capital.[20] It was also noted in that letter that the Trustee had already rejected Mark's proposed resolution that the dispute be referred to an adjudicator under an expedited process and that GMOF would abide by and not appeal such decision. By that letter, GMOF also proposed a monetary settlement to resolve the issue instead of having it adjudicated. Furthermore, to ensure that there was no perception or concern that Mark would receive a personal benefit, the May 31 letter offered that Mark would postpone the recovery of any amounts that he personally invested in the Fund until its unitholders were assured the recovery of their capital.

23. This proposal was again rejected by the Trustee. As detailed more extensively below, despite Mark's explanations, the Trustee and GCI's inspectors continued to refuse to accept that only $355,357 was owing from GMOF LP despite the clear information in the unconsolidated financial statements and despite the lack of any other evidence that

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[18] Gross Affidavit, para. 19; RMR, Tab 2, p. 17.
[19] Letter dated May 31, 2022, Exhibit J to Gross Affidavit; RMR, Tab 2-J, pp. 107-110. It should be noted that the reference in the letter to GMOF LP's unconsolidated financial statements to 2021 is incorrect and the reference should be to 2019 unconsolidated financial statements. No unconsolidated financial statements were made for GMOF LP after 2019.
[20] There is no evidence that any creditors of GCI ever reviewed or relied upon the financial statements at issue.

GMOF LP is obligated to pay the full $453,240 demanded. The Trustee and its counsel only indirectly acknowledged their error with respect to the separate $189,904 they claimed was owing, which amount was owing directly from the co-tenancies and not from GMOF LP. Nonetheless, they continued to demand that Mark cause GMOF LP or the Fund to pay $453,240 to GCI, which is not owing by GMOF LP.[21]

24. To avoid litigation, through counsel, Mark advised the Trustee that he was seeking feedback from the unitholders directly as to how to proceed. Following that process, through counsel, Mark advised the Trustee that GMOF LP was willing to pay $305,357 to the Trustee, as a compromise to avoid litigation. However, the Trustee and the inspectors again rejected that proposal.[22]

D. The Trustee and Aird & Berlis Again Breach Their Professional Obligations

25. After the Trustee was advised that GMOF LP would be willing to pay $305,357 to settle the matter, the Trustee and its counsel again accused Mark of violating his obligations under the BIA as the "designated officer" of GCI and suggested that he had committed an "offence".[23]

26. In particular, on August 31, 2022, the Trustee elevated its threats against Mark and filed the Notice of Motion in this motion asking for advice and direction from the Court as to whether they should accuse Mark of an offence, thereby clearly threatening Mark that they would proceed to have offence proceedings initiated against him if he did not cause GMOF LP to pay over the amounts they claimed. Indeed, paragraph (k)(iii) of the

[21] Gross Affidavit, para. 22; RMR, Tab 2, pp. 18.
[22] Email dated August 23, 2022, Exhibit L to Gross Affidavit; RMR, Tab 2-L, pp. 112-115.
[23] Gross Affidavit, para. 25; RMR, Tab 2, p. 18.

Notice of Motion states that if Mark directed $453,240 to be released from the GMOF LP's funds, the motion would be deferred – clearly showing that they were using the threat of an offence to gain an advantage in what is purely a civil matter.

27. In other words, the Trustee and its counsel threatened criminal sanctions against Mark for the purposes of coercing him to cause GMOF LP to transfer funds to the Trustee that Mark did not believe in good faith the Trustee was entitled to.

28. The continued threats by the Trustee and its counsel were more shocking given that Mark had previously suggested months before that the dispute be referred to the Court or an adjudicator for determination on an expedited basis.[24]

29. After receiving the Notice of Motion, GMOF LP again tried to end the matter by advising that GMOF LP would forthwith pay the full amount of the debt shown in GMOF LP's unconsolidated financial statements.[25] Again, this offer was rejected, and the Trustee's and its counsel's threats of criminal sanctions continued as they scheduled a case conference to proceed with their motion and then filed evidentiary materials.[26]

30. There is no question that Mark takes his obligations as the designated officer very seriously – there was no prior compliant by the Trustee that Mark had failed to comply with the obligations related to such role.[27]

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[24] Gross Affidavit, para. 26; RMR, Tab 2, p. 19.
[25] Letter dated September 21, 2022, Exhibit M to Gross Affidavit; RMR, Tab 2-M, pp. 116-140.
[26] Gross Affidavit, para. 27; RMR, Tab 2, p. 19.
[27] Gross Affidavit, para. 28; RMR, Tab 2, p. 19.

PART III - ISSUES

31. The issues on this motion and cross-motion are as follows:

(a) **Amount Owing By GMOF LP** – The only amounts that are owing by GMOF LP to GCI is the amount of $355,357, which amount GMOF LP had agreed to pay, and not the higher amount claimed by the Trustee. There is no other evidence of which entity owes any further amount, and accordingly the Trustee's motion must be dismissed; and

(b) **Abuse of Process and Professional Obligations** – The threats by the Trustee and its counsel to commence criminal proceedings against Mark if he did not cause GMOF LP to deliver funds to the Trustee for the repayment of an unsecured debt is an abuse of process of their professional obligations. Replacement of the Trustee, its counsel and the inspectors is required.

PART IV - LAW AND ARGUMENT

A. Amount Owing By GMOF LP

32. The Sales Proceeds belong to GMOF LP and are held in trust by its counsel. GMOF LP has not made any distributions or payments from the Sales Proceeds to the Fund or GMOF GP. Yet, the Trustee has made demand on Mark to cause the full $453,240 shown on the consolidated financial statements to be paid from the Sale Proceeds to the Trustee, despite the fact that such amounts are not owed by GMOF LP.

33. In making this demand, the Trustee and its counsel are wrongfully ignoring the separate entities that make up GMOF. As they know or ought to know, entities are not

liable to pay for the debts of other entities unless there is a legal basis to create such liability. The Trustee has not explained how GMOF LP is liable for the debts of the Fund or GMOF GP, or why GMOF LP owes the additional $97,883 ($453,240 less $355,357).

34. The Trustee solely relies upon the Fund's consolidated financial statements. However, Courts have recognized that the consolidated financial statements are not useful evidence to establish what entity actually owes which debt.[28] Similarly, in this case, the consolidated financial statements do not show which entity owes which amount to GCI. The only evidence that exists as to the amount that is owed by GMOF LP – the entity with the Sales Proceeds – are the unconsolidated financial statements of GMOF LP, which shows that only $355,357 is owing.

35. Regardless of the amount that is owing by GMOF LP, it is not appropriate for this Court to grant an order ordering that Mark cause GMOF LP to deliver the funds to the Trustee for the following reasons:

(a) The consolidated financial statements relied upon by the Trustee contain a going concern warning.[29] Accordingly, there may be a solvency issue that needs to be addressed as GMOF LP and the Fund wind down their operations before it can be determined what amounts can be paid to creditors and distributed to the Fund to pay its creditors and unitholders.

[28] *A.P. Toldo Holding Corporation v. The Queen*, 2013 TCC 416 (CanLII), at para. 19; *Pine Valley Mining Corporation (Re)*, 2008 BCSC 619 (CanLII), at para. 11; *Gestions Cholette Inc. v. The Queen*, 2020 TCC 75 (CanLII), at para. 67.
[29] 2019 Consolidated GMOF Financial Statements, Exhibit C to Gross Affidavit; RMR, Tab 2-C, p. 73.

(b) Note 1 of the consolidated financial statements states that those statements might not be appropriate if the Fund is not continuing in business and that further adjustments to various accounts may need to be made.[30] Accordingly, it is not even clear if the amounts shown on the consolidated statements show the actual amounts owing.

(c) The consolidated financial statements state that GCI is a related party to the Fund.[31] Accordingly, if the Fund or GMOF LP is wound up on an insolvent basis, the Trustee's claims may be postponed by operation of section 137 of the BIA, which provides that claims of related parties are presumed to be postponed until all other creditors are paid.

36. Furthermore, as noted above, the amounts are not currently payable as a result of promissory estoppel. While GCI was under the control of Mark and Sheldon, GCI formed the intention that it would not call on the amounts owing until the investors in GMOF were assured the return of their capital, and that intention was in effect communicated and understood by GMOF and was relied upon by GMOF and explained to some of GMOF's investors. Mark's evidence in this regard is uncontested. Accordingly, a promissory estoppel arose that prevents GCI from demanding the loan until GMOF investors are assured the return of their capital.[32] As the unitholders will be suffering losses on their investments, the amounts are not presently callable.

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[30] 2019 Consolidated GMOF Financial Statements, Exhibit C to Gross Affidavit; RMR, Tab 2-C, p. 74.
[31] 2019 Consolidated GMOF Financial Statements, Exhibit C to Gross Affidavit; RMR, Tab 2-C, p. 85.
[32] *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47 at para. 15-16.

B. Abuse of Process and Replacement

37. The actions of the Trustee, its counsel and the inspectors (to the extent the inspectors approved of the conduct of the Trustee and its counsel and the commencement of this motion) are an abuse of process warranting their removal and the appointment of a new trustee, counsel and inspectors.

i. The Trustee and its counsel engaged in abuse of process

38. In order to collect the debt it believed was owing, the Trustee could have commenced an action or motion to have the matter determined, or accepted Mark's proposal to have the matter referred to the Court or arbitrator for a speedy determination. It did not do so. Rather, it threatened to commence criminal proceedings against Mark if Mark simply did not cause GMOF LP to pay the amounts the Trustee demanded, and it effectively carried through on this threat by commencing this motion.

39. There can be no mistake that the Trustee and its counsel threatened criminal proceedings in order to gain an advantage in the payment of an alleged unsecured debt (or payment of the extra $97,883 that it claimed was owing by GMOF LP above the $355,357 amount GMOF LP agreed to pay). The Trustee and its counsel clearly stated in a letter to Mark and GMOF dated April 22, 2022, that if Mark causes GMOF LP to pay over the amounts demanded, that the issues regarding the offence do not need to be addressed.[33] This is clearly a threat of the commencement of criminal proceedings to gain an advantage in a purely civil matter.

[33] Letter dated April 22, 2022, Exhibit G to Gross Affidavit; RMR, Tab 2-G, p. 100.

40. Such conduct has been found by the Court of Appeal to be an abuse of process (discussed below). Moreover, it is expressly prohibited by the Rules of Professional Conduct ("**RPC**") governing the conduct of the Trustee's counsel. Section 3.2-5 of the RPC and the associated commentary makes this clear: [emphasis added]

> **3.2-5** A lawyer shall not, in an attempt to gain a benefit for a client, threaten, or advise a client to threaten, without reasonable and lawful justification:
> (a) to initiate or proceed with a charge for an offence, including an offence under
> (i) the Criminal Code or any other statute of Canada;
> (ii) a statute of a province or territory of Canada; or
> (iii) a municipal by-law; or
> (b) to make a complaint to a regulatory authority.
>
> **Commentary**
> [1] It is an abuse of the process of a court or, ordinarily, a regulatory authority to threaten to make or advance a charge or complaint in order to secure the satisfaction of a private grievance. **Even if a client has a legitimate entitlement to be paid monies, threats to take penal action are not appropriate.**

41. The Trustee is bound by similar obligations. The *Bankruptcy and Insolvency General Rules* (the "**General Rules**") contains a "Code of Ethics for Trustees" that requires the Trustee to govern itself in a manner that is not abusive.[34] **Section 34** requires that "every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act". **Section 36** provides that trustees shall "carry out their functions with competence, honesty, integrity and due care." **Section 38** provides that trustees "shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process." **Section 39** requires trustees to be "impartial". **Section 50** states that "[t]rustees shall not obtain,

[34] *Bankruptcy and Insolvency General Rules*, c. 368, sections 34 to 53.

solicit or conduct any engagement that would discredit their profession or jeopardize the integrity of the bankruptcy and insolvency process." **Section 52** of the General Rules notes that "[t]rustees, in the course of their professional engagements,[35] shall apply due care to ensure that the actions carried out by their employees, agents or mandataries or any persons hired by the trustees on a contract basis are carried out in accordance with the same professional standards that those trustees themselves are required to follow in relation to that professional engagement". Individually and taken together, these provisions show that trustees cannot threaten criminal proceedings to collect an unsecured debt.

42. The Ontario Court of Appeal has recognized that the threatening of criminal proceedings to secure an advantage elsewhere is an abuse of process. In *R. v. Johnson*,[36] the Ontario Court of Appeal agreed that a prosecutor committed an abuse of process where they had threatened criminal proceedings where the defence had engaged a private investigator. The Court in that case recognized that there was an abuse of process where the prosecutor had left a voicemail and sent a letter making the threat.

43. The Trustee is effectively an officer of the Court, and as such cannot engage in conduct that the Court of Appeal has recognized is an abuse of process. This Court has noted that "Sections 205(1), 206(1) and (2) of the Bankruptcy and Insolvency Act [which address how bankruptcy offences are addressed] subjects the trustee to stringent controls and regulations, including reporting obligations and cloak him/her with

[35] "Professional engagements" is defined in section 35 of the General Rules as "any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the [BIA]."
[36] *R. v. Johnson*, 2007 ONCA 419 at para. 18.

responsibilities like an officer of the court."[37] [emphasis added] As an officer of the Court, it is clear that the threat of criminal sanctions should not be used to gain an advantage in a civil matter such as the repayment of an unsecured debt.

44. In this case, the threats of commencing offence proceedings was not a one-time error in judgement or choice of words by the Trustee or its counsel. Rather, the threat was made more than once over a number of months and culminated in the commencement of this motion.

45. Further aggravating their abuse of process is the fact that the Trustee rejected Mark's proposal made months ago to have this matter referred to the Court – the Trustee rejected that proposal and then, when Mark did not accede to its demands, it commenced this motion continuing the threat of criminal proceedings. This same matter could have been dealt with months ago by referral of the dispute to this Court.

46. In light of the (i) professional obligations and code of conduct governing the Trustee and its lawyer; and (ii) the wrongful nature of threatening criminal proceedings to obtain an advantage in an civil matter, it is clear that the Trustee and its counsel have breached their professional obligations and committed an abuse of process.

ii. There is no basis to suggest that an offence actually occurred

47. The nature of the conduct of the Trustee and its counsel is further exacerbated by the fact that there is no basis under section 158 or 198(2) of the BIA to suggest that Mark is guilty of an offence under the BIA.

[37] *R v. Gerstein*, 2014 ONSC 1617, para. 163.

48. Since Mark was the officer who assigned GCI into bankruptcy, section 159 of the BIA provides that he was the "officer executing the assignment" (referred to herein as the Designated Officer), and thus has the duties of a bankrupt set out in section 158.

49. The obligations under section 158 simply do not apply in this case. Generally, the duties under section 158 pertain to delivery of the bankrupt's property to the Trustee, attending for an examination under oath regarding the causes of the bankruptcy and the disposition of property, attending the first meeting of creditors, aiding in the realization of the bankrupt's property, examining proofs of claim, and doing all such acts in relation to the property as the may be reasonably required by the trustee.

50. Nothing in section 158 of the BIA provides that Mark (i) must follow all directions the Trustee gives him; (ii) must exercise his authority over other entities that are not under the Trustee's control in a manner directed by the Trustee; (iii) must turn over money belonging to other entities to the Trustee if the Trustee demands; (iv) must use his authority over another entity to pay amounts the Trustee alleges is owing notwithstanding Mark's views as to the correctness of the Trustee's position; or (v) cannot raise defences to claims made by the Trustee. Accordingly, there is no reasonable prospect that Trustee can make out that a breach of section 158 or an offence has occurred.

51. Moreover, section 198(2) of the BIA, which provides that the failure to comply with section 158 of the BIA may be an offence, is subject to the important condition that the breach must have occurred "without reasonable cause". It is abundantly clear that Mark had "reasonable cause" to not accede to the Trustee's demands that he deliver the Sales Proceeds to the Trustee in the amount demanded by the Trustee. It was imminently

reasonable for Mark to suggest that the dispute be referred to the Court or arbitration for determination. Mark was simply trying to ensure that he abided by his fiduciary duties to GMOF LP and the Fund, and that the issue of who had the better right to the Sales Proceeds was determined properly and fairly, particularly where the Trustee's sole evidence was merely consolidated financial statements that were inconsistent with unconsolidated financial statements. There is no evidence that Mark was trying to benefit himself and had even offered to postpone any entitlements he might have had. In light of the "without reasonable cause" condition of section 198(2), it is simply unreasonable for the Trustee and its counsel to be persisting in their efforts to claim that Mark committed an offence and should be put at risk of incarceration so the Trustee can receive an additional unsecured $97,883.

52. The conduct of the Trustee and its counsel demonstrates that they are raising the spectre of an offence to create leverage for the repayment of $97,883. Section 205(1) of the BIA obliges the Trustee to report to both the Court and the Superintendent where they believe that an offence has been committed.[38] They are not to bring an "advice and directions motion to determine whether there are grounds to believe that [the bankrupt] is guilty under the BIA", and offer to defer the matter if they get what they want. Further, there is no report from the Superintendent in Bankruptcy stating that it is of the view that an offence has been committed.

C. The Trustee, its counsel and the inspectors should be replaced

53. The nature of the abuse of process in this case is serious. By threatening

[38] *Bressi (Trustee of) v. 1418146 Ontario Inc.* 2003 CanLii 30988 (ONSC).

bankruptcy offence proceedings, which are criminal or quasi-criminal in nature[39] and which carry the possibility of incarceration, it is clear that the Trustee and its counsel, and the inspectors, are attempting to threaten Mark's liberty for the purposes of recovering an unsecured debt of $97,883. Given that incarceration is not available for the failure to pay a debt under Ontario or federal law, the actions of the Trustee and its counsel to attempt to turn a mere civil dispute over an unsecured claim into a criminal matter is an egregious abuse of process and such actions must be condemned by this Honourable Court. As noted above, the Court of Appeal for Ontario has recognized that improperly threatening criminal proceedings is an abuse of process.[40]

54. Trustees and their counsel are entrusted by the government to carry out an important public function in Canada's bankruptcy system. This is made clear by section 34 of the Code of Conduct in the General Rules. The Trustee is effectively an officer of this Court. Confidence in the bankruptcy system will be eroded if trustees and their counsel, or the inspectors who oversee their conduct, are permitted commit abuses of process. This is particularly the case where, as here, an officer of a company has in good faith assigned a company into bankruptcy while still having on-going obligations to other entities.

55. The abuse of process harms not only the targets of such abuse, but also the creditors of the estate. Proceeding with such spurious claims drives up the costs of the trustee and its counsel, thereby reducing the recovery for the estate's creditors. Under no

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[39] Houlden, Morawetz & Sarra, *2021 Annotated Bankruptcy & Insolvency Act*, section J§1 "Offences Generally", p. 1144.
[40] *R. v. Johnson*, 2007 ONCA 419 at para. 18.

circumstance can it be said to have been reasonable to threaten criminal proceedings in order to obtain an additional $97,883 at this time in these circumstances. Neither this Court nor GCI's creditors, who are all paying for the Trustee and its counsel, can have any further confidence that the Trustee and its counsel, or the inspectors, will exercise their powers in a considered, business-minded manner.

56. Sections 14.04 and 116(5) of the BIA, as interpreted by the Court, provide this Court with the authority to replace the Trustee and the inspectors, respectively. Factors that the Court will consider in removing a trustee include: failure to act impartially; an excess or abuse of power of the trustee; lack of *bona fides* by the trustee; and unreasonable conduct by the trustee in relation to the estate.[41]

57. The foregoing demonstrates that the Trustee, together with its counsel, have not acted impartially, have abused the power of the trustee, and cannot be said to be acting *bona fides* as it relates to Mark and there has been unreasonable conduct in threatening criminal proceedings in order to gain an advantage in a civil dispute. Similarly, unless the Trustee or the inspectors are able to demonstrate that the inspectors were not involved in the abuse of process, then the inspectors likewise must be removed.

PART V - RELIEF REQUESTED

58. For these reasons, (a) the Trustee's motion must be dismissed; and (b) it is appropriate for this Court to replace the Trustee and its counsel with a new trustee and

[41] **With respect to trustees, see**: *Commonwealth Investors Syndicate Ltd.*, Re, 1985 CanLII 333 (BC SC); *Bankruptcy of St. Anne-Nackawic Pulp Company Ltd. (Re)* 2005 NBQB 68 at para 23; *Dr. T. Debly Professional Corporation (Re)*, 2008 CanLII 16802. **With respect to inspectors, see**: *Re Greenbaum*, 1998 CarswellQue 4428 (Que. S.C.) at para. 33; *Re Anderson*, 1992 CarswellOnt 2880 at para 15; *Trends Holdings Ltd. (Trustee of) v. Tilson*, 2006 SKQB 541 at para 37.

counsel. Furthermore, it is appropriate that the inspectors also be replaced if they condoned or authorized the threats of criminal proceedings.

59. Alternatively, if the Trustee, its counsel or the inspectors are not removed, then an award showing the Court's opprobrium toward such abuse of process is warranted, including payment of costs personally on a full indemnity basis (as payment from the estate would only further hurt the estate's creditors) and some form of censure. Further, the Court should further order that no claims are to be commenced against Mark without leave of the Court first being obtained.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 22nd day of February, 2023.

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SCHEDULE "A"
LIST OF AUTHORITIES

1. *A.P. Toldo Holding Corporation v. The Queen*, 2013 TCC 416 (CanLII)
2. *Pine Valley Mining Corporation (Re)*, 2008 BCSC 619 (CanLII)
3. *Gestions Cholette Inc. v. The Queen*, 2020 TCC 75 (CanLII)
4. *Trial Lawyers Association of British Columbia v. Royal & Sun Alliance Insurance Company of Canada*, 2021 SCC 47
5. *R. v. Johnson*, 2007 ONCA 419
6. *R v. Gerstein*, 2014 ONSC 1617
7. *Bressi (Trustee of) v. 1418146 Ontario Inc.* 2003 CanLII 30988 (ONSC)
8. *Commonwealth Investors Syndicate Ltd.*, Re, 1985 CanLII 333 (BC SC)
9. *Bankruptcy of St. Anne-Nackawic Pulp Company Ltd. (Re)* 2005 NBQB 68
10. *Dr. T. Debly Professional Corporation (Re)*, 2008 CanLII 16802
11. *Re Greenbaum*, 1998 CarswellQue 4428 (Que. S.C.)
12. *Re Anderson*, 1992 CarswellOnt 2880
13. *Trends Holdings Ltd. (Trustee of) v. Tilson*, 2006 SKQB 541

SCHEDULE "B"
TEXT OF STATUTES, REGULATIONS & BY-LAWS

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, Sections 158, 159

Duties of bankrupt

158 A bankrupt shall

- **(a)** make discovery of and deliver all his property that is under his possession or control to the trustee or to any person authorized by the trustee to take possession of it or any part thereof;
- **(a.1)** in such circumstances as are specified in directives of the Superintendent, deliver to the trustee, for cancellation, all credit cards issued to and in the possession or control of the bankrupt;
- **(b)** deliver to the trustee all books, records, documents, writings and papers including, without restricting the generality of the foregoing, title papers, insurance policies and tax records and returns and copies thereof in any way relating to his property or affairs;
- **(c)** at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;
- **(d)** within five days following the bankruptcy, unless the time is extended by the official receiver, prepare and submit to the trustee in quadruplicate a statement of the bankrupt's affairs in the prescribed form verified by affidavit and showing the particulars of the bankrupt's assets and liabilities, the names and addresses of the bankrupt's creditors, the securities held by them respectively, the dates when the securities were respectively given and such further or other information as may be required, but where the affairs of the bankrupt are so involved or complicated that the bankrupt alone cannot reasonably prepare a proper statement of affairs, the official receiver may, as an expense of the administration of the estate, authorize the employment of a qualified person to assist in the preparation of the statement;
- **(e)** make or give all the assistance within his power to the trustee in making an inventory of his assets;
- **(f)** make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before the date of the initial bankruptcy event or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;

- **(g)** make disclosure to the trustee of all property disposed of by transfer at undervalue within the period beginning on the day that is five years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;
- **(h)** attend the first meeting of his creditors unless prevented by sickness or other sufficient cause and submit thereat to examination;
- **(i)** when required, attend other meetings of his creditors or of the inspectors, or attend on the trustee;
- **(j)** submit to such other examinations under oath with respect to his property or affairs as required;
- **(k)** aid to the utmost of his power in the realization of his property and the distribution of the proceeds among his creditors;
- **(l)** execute any powers of attorney, transfers, deeds and instruments or acts that may be required;
- **(m)** examine the correctness of all proofs of claims filed, if required by the trustee;
- **(n)** in case any person has to his knowledge filed a false claim, disclose the fact immediately to the trustee;
- **(n.1)** inform the trustee of any material change in the bankrupt's financial situation;
- **(o)** generally do all such acts and things in relation to his property and the distribution of the proceeds among his creditors as may be reasonably required by the trustee, or may be prescribed by the General Rules, or may be directed by the court by any special order made with reference to any particular case or made on the occasion of any special application by the trustee, or any creditor or person interested; and
- **(p)** until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

- R.S., 1985, c. B-3, s. 158
- 1992, c. 27, s. 59
- 1997, c. 12, s. 94
- 2004, c. 25, s. 73
- 2017, c. 26, s. 9

Where bankrupt is a corporation

159 Where a bankrupt is a corporation, the officer executing the assignment, or such

- **(a)** officer of the corporation, or

- **(b)** person who has, or has had, directly or indirectly, control in fact of the corporation

as the official receiver may specify, shall attend before the official receiver for examination and shall perform all of the duties imposed on a bankrupt by section 158, and, in case of failure to do so, the officer or person is punishable as though that officer or person were the bankrupt.

- R.S., 1985, c. B-3, s. 159
- 1992, c. 27, s. 60

***Bankruptcy and Insolvency General Rules*, c. 368, sections 34 to 53.**

Code of Ethics for Trustees

34 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.

- SOR/98-240, s. 1

35 For the purposes of sections 39 to 52, **professional engagement** means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act.

- SOR/98-240, s. 1

36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.

- SOR/98-240, s. 1

37 Trustees shall cooperate fully with representatives of the Superintendent in all matters arising out of the Act, these Rules or a directive.

- SOR/78-389, s. 2
- SOR/98-240, s. 1

38 Trustees shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process.

- SOR/98-240, s. 1

39 Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.

- SOR/81-646, s. 2

- SOR/98-240, s. 1

40 Trustees shall not disclose confidential information to the public concerning any professional engagement, unless the disclosure is

- **(a)** required by law; or
- **(b)** authorized by the person to whom the confidential information relates.

- SOR/81-646, s. 3
- SOR/98-240, s. 1

41 Trustees shall not use any confidential information that is gathered in a professional capacity for their personal benefit or for the benefit of a third party.

- SOR/98-240, s. 1

42 Trustees shall not purchase, directly or indirectly,

- **(a)** property of any debtor for whom they are acting with respect to a professional engagement; or
- **(b)** property of any estates in respect of which the Act applies, for which they are not acting, unless the property is purchased
    - **(i)** at the same time as it is offered to the public,
    - **(ii)** at the same price as it is offered to the public, and
    - **(iii)** during the normal course of business of the bankrupt or debtor.

- SOR/98-240, s. 1

- **43 (1)** Subject to subsection (2), if trustees have a responsibility to sell property in connection with a proposal or bankruptcy, they shall not sell the property, directly or indirectly,
    - **(a)** to their employees, agents or mandataries, or persons not dealing at arms' length with the trustees;
    - **(b)** to other trustees or, knowingly, to employees of other trustees; or
    - **(c)** to related persons of the trustees or, knowingly, to related persons of the persons referred to in paragraph (a) or (b).
- **(2)** If trustees have a responsibility to act in accordance with subsection (1), they may sell property in connection with a proposal or bankruptcy to the persons set out in paragraph (1)(a), (b) or (c), if the property is offered for sale
    - **(a)** at the same time as it is offered to the public;
    - **(b)** at the same price as it is offered to the public; and
    - **(c)** during the normal course of business of the bankrupt or debtor.

- SOR/98-240, s. 1
- SOR/2007-61, ss. 9(E), 63(E)

44 Trustees who are acting with respect to any professional engagement shall avoid any influence, interest or relationship that impairs, or appears in the opinion of an informed person to impair, their professional judgment.

- SOR/98-240, s. 1

45 Trustees shall not sign any document, including a letter, report, statement, representation or financial statement that they know, or reasonably ought to know, is false or misleading, and shall not associate themselves with such a document in any way, including by adding a disclaimer of responsibility after their signature.

- SOR/98-240, s. 1
- SOR/2005-284, s. 4

46 Trustees may transmit information that they have not verified, respecting the financial affairs of a bankrupt or debtor, if

- **(a)** the information is subject to a disclaimer of responsibility or an explanation of the origin of the information; and
- **(b)** the transmission of the information is not contrary to the Act, these Rules or any directive.

- SOR/98-240, s. 1

46.1 [Repealed, SOR/98-240, s. 1]

47 Trustees shall not engage in any business or occupation that would compromise their ability to perform any professional engagement or that would jeopardize their integrity, independence or competence.

- SOR/98-240, s. 1

48 Trustees who hold money or other property in trust shall

- **(a)** hold the money or property in accordance with the laws, regulations and terms applicable to the trust; and
- **(b)** administer the money or property with due care, subject to the laws, regulations and terms applicable to the trust.

- SOR/98-240, s. 1

49 Trustees shall not, directly or indirectly, pay to a third party a commission, compensation or other benefit in order to obtain a professional engagement or accept, directly or indirectly from a third party, a commission, compensation or other benefit for referring work relating to a professional engagement.

- SOR/98-240, s. 1

50 Trustees shall not obtain, solicit or conduct any engagement that would discredit their profession or jeopardize the integrity of the bankruptcy and insolvency process.

- SOR/98-240, s. 1

51 Trustees shall not, directly or indirectly, advertise in a manner that

- **(a)** they know, or should know, is false, misleading, materially incomplete or likely to induce error; or
- **(b)** unfavourably reflects on the reputation or competence of another trustee or on the integrity of the bankruptcy and insolvency process.

- SOR/98-240, s. 1

52 Trustees, in the course of their professional engagements, shall apply due care to ensure that the actions carried out by their employees, agents or mandataries or any persons hired by the trustees on a contract basis are carried out in accordance with the same professional standards that those trustees themselves are required to follow in relation to that professional engagement.

- SOR/98-240, s. 1
- SOR/2007-61, s. 10(E)

53 Any complaint that relates to a contravention of any of sections 36 to 52 must be sent to the Division Office in writing.

- SOR/98-240, s. 1

Court File No. BK-31-2747949

IN THE MATTER OF THE BANKRUPTCY OF GROSS CAPITAL INC., OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

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

Proceeding commenced at TORONTO

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