

<i>SUMMARY OF CURRENT DOCUMENT</i>	
Name of Issuing Party or Person	PricewaterhouseCoopers Inc., in its capacities as Receiver and Trustee of Hickman Equipment (1985) Limited ("PWC")
Date of Document:	26 February 2003
Summary of Order/Relief Sought or statement of purpose in Filing:	Order Directing Deloitte & Touche LLP to Provide Documents to PWC and for Direction Concerning such Documents
Court Sub-File Number	7:56

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF the *Companies' Creditors Arrangement Act*,
Chapter C-36 of the Revised Statutes of Canada, 1985, as amended

AND IN THE MATTER OF the plan of compromise or arrangement of Hickman Equipment (1985) Limited

AND IN THE MATTER OF Rule 25 of the *Rules of the Supreme Court*, 1986 under the *Judicature Act*, R.S.N. 1990, c. J-4, as amended

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*, Chapter B-3 of the Revised Statutes of Canada, 1985, as amended

AND

District of Newfoundland
Court No. 9733
Estate No. 100813

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
HICKMAN EQUIPMENT (1985) LIMITED, carrying on business at 1269 Topsail Road, in the City of Mt. Pearl in the Province of Newfoundland and Labrador

INTERLOCUTORY APPLICATION
(INTER PARTES)

The Application of PricewaterhouseCoopers Inc., in its capacities as Receiver and Trustee of Hickman Equipment, (the "Applicant") says as follows:

1. By Order of this Honourable Court granted on the 13th day of March, 2002, and filed with the Court on the 14th day of March, 2002, it was ordered that the Applicant be appointed Receiver of Hickman Equipment (the "Receivership Order").
2. By a Receiving Order (the "Receiving Order") made on the 13th day of March, 2002, pursuant to the provisions of the *Bankruptcy and Insolvency Act* ("BIA") and filed with the Supreme Court of Newfoundland and Labrador in Bankruptcy and Insolvency on the 14th day of March, 2002, HEL was adjudged bankrupt and the Applicant was appointed Trustee of the Estate of the bankrupt in bankruptcy.
3. The Receivership Order provided, in part:
 6. THIS COURT ORDERS that PricewaterhouseCoopers Inc., having an office in the City of St. John's (the "Receiver") be appointed the receiver without security pursuant to Rule 25 of the *Rules of the Supreme Court*, 1986 under the *Judicature Act*, R.S.N. 1990, c. J-4, of all the property, assets, entitlements and undertaking (the "Assets") of Hickman Equipment wherever situate including without limitation all property assets and undertaking comprised in the term "Property" as such term is defined in the Initial Order, all on and subject to the directions, powers, authorities and terms of this Order and such further and other order as this Court may hereafter make.
 7. THIS COURT ORDERS that the Receiver is hereby directed to take immediate possession as soon as practically possible of the Assets with power and authority to receive, preserve, protect and realize upon the Assets, or any part thereof, subject to the terms, conditions and in the manner authorized hereunder until further Order of this Court.
 11. THIS COURT ORDERS that, for the purposes of its performance of its duties under this Order or any subsequent order of this Court, the Receiver be and is empowered to review the books and records of Hickman Equipment to determine if those books and records establish that monies or other property and assets of Hickman Equipment are properly accounted for, and whether there are any claims or potential claims by or against Hickman Equipment or any other person who may have received such monies, property or assets, and to report to this Court with respect to the nature and extent of such claims or potential claims.

34. THIS COURT ORDERS that the Receiver may, from time to time, being an interlocutory application before this Court for advice and directions in discharge of its powers and duties hereunder.

4. The *Bankruptcy and Insolvency Act*, ("BIA") provides:

164.(1) Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

(2) Where a person fails to produce a book, document or paper or to deliver property as required by this section within five days after being required to do so, the trustee may, without an order, examine the person before the registrar of the court or other authorized person concerning the property, book, document or paper that the person is supposed to possess.

(3) Any person referred to in subsection (1) may be compelled to attend and testify, and to produce on his examination any book, document or paper that under this section he is liable to produce, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as would apply to a bankrupt.

and in

34.(1) A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

5. The Applicant has determined that it may have a claim against Deloitte & Touche LLP in its capacity as Receiver or in it its capacity as Trustee of Hickman Equipment.

6. The Applicant seeks an Order in the Receivership and pursuant to the provisions of the BIA directing Deloitte & Touche LLP to produce to the Applicant, in its capacities as Receiver and Trustee of Hickman Equipment, any property of Hickman Equipment in its possession and any document in electronic or hard copy form of any kind relating in whole or in part to Hickman Equipment, its dealings or property, from January 1, 1997 to the present and, in particular, to produce:

(1) all working papers pertaining to the audit of HEL for the fiscal years 1997, 1998, 1999 and 2000, together with all working papers developed or prepared in respect of the calendar year 2001;

- (2) all correspondence to and from or relating to HEL including copies of all correspondence conducted by email relating in whole or in part to HEL, its dealings of property during the period January 1, 1997 to the present;
- (3) all books, documents or papers of any kind relating to the inventory of HEL in the period January 1, 1997 to the present;
- (4) all reports, memos, correspondence, files or documents of any kind prepared for or relating to any work performed by Deloitte & Touche LLP alone or in connection with others for HEL during the period January 1, 1997 to the present;
- (5) all invoices submitted to HEL for any services rendered by Deloitte & Touche LLP for the period January 1, 1997 to present.

7. Should this Honourable Court see fit to grant the Order referred to in paragraph 6, the Applicant seeks:

- (a) an Order authorizing the Applicant to take such steps as it may deem necessary or appropriate, including the retention of such agents, consultants, advisors, experts, auditors, and solicitors to determine whether it has, either in its capacity as Receiver or Trustee, a claim against Deloitte & Touche LLP;
- (b) the advice and directions of the Court pursuant to paragraph 34 of the Receivership Order and Section 34(1) of the BIA concerning the Applicant's use and dissemination of the property and information produced;
- (c) an Order authorizing the Applicant to seek such further advice, directions, or authority as it deems necessary in respect of this matter from the inspectors of the Estate of Hickman Equipment in Bankruptcy or this Court by application *ex parte* in Chambers;
- (d) an Order directing that all reasonable costs incurred by the Applicant for any of the purposes referred to herein or in exercising the authority provided herein are proper costs of the Receivership to be allocated and paid in accordance with the provisions of the Cost Allocation Plan.

DATED at Halifax, Nova Scotia, this 26th day of February, 2003



CARL A. HOLM, Q.C.
Solicitors for PricewaterhouseCoopers Inc.
in its capacities as Receiver and Trustee
of Hickman Equipment (1985) Limited

whose address for service is:

Merrick Holm
1801 Hollis Street, Suite 2100
PO Box 1054
Halifax, NS B3J 2X6

or
c/o PricewaterhouseCoopers Inc.
215 Water Street, Suite 802
St. John's, NL A1C 6C9

ISSUED at St. John's, Newfoundland and Labrador, this _____ day of February, 2003.

Registrar

(201343)

<i>SUMMARY OF CURRENT DOCUMENT</i>	
Name of Issuing Party or Person	PricewaterhouseCoopers Inc., in its capacities as Receiver and Trustee of Hickman Equipment (1985) Limited ("PWC")
Date of Document:	26 February 2003
Summary of Order/Relief Sought or statement of purpose in Filing:	Order Directing Deloitte & Touche LLP to Provide Documents to PWC and for Direction Concerning such Documents
Court Sub-File Number	7:5

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF the *Companies' Creditors Arrangement Act*,
Chapter C-36 of the Revised Statutes of Canada, 1985, as amended

AND IN THE MATTER OF the plan of compromise or
arrangement of Hickman Equipment (1985) Limited

AND IN THE MATTER OF Rule 25 of the *Rules of the
Supreme Court*, 1986 under the *Judicature Act*, R.S.N. 1990,
c. J-4, as amended

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*,
Chapter B-3 of the Revised Statutes of Canada, 1985, as amended

AND

District of Newfoundland
Court No. 9733
Estate No. 100813

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE BANKRUPTCY OF
HICKMAN EQUIPMENT (1985) LIMITED**, carrying
on business at 1269 Topsail Road, in the City of Mt. Pearl,
in the Province of Newfoundland and Labrador

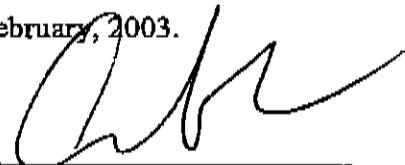
NOTICE

YOU ARE HEREBY NOTIFIED that the foregoing application will be made to the judge presiding in Chambers at the Court House at St. John's, Newfoundland and Labrador, on Wednesday, the 12th day of March, 2003, at 10:00 a.m. or so soon thereafter as the application can be heard.

YOU ARE FURTHER NOTIFIED that the Court has directed that persons wishing to reply or respond to the within Application are to file a reply or response with the Court on or before March 7, 2003 and to give notice of their reply or response to other parties in these proceedings in accordance with the terms of Orders earlier issued in these proceedings

TO: See distribution list attached hereto as Schedule "A"

DATED at Halifax, Nova Scotia, this 26th day of February, 2003.



CARL A. HOLM, Q.C.

Solicitor for PricewaterhouseCoopers Inc.,
in its capacities as Receiver and Trustee of
Hickman Equipment (1985) Limited
whose address for service is:
Merrick Holm
1801 Hollis Street, Suite 2100
PO Box 1054
Halifax, NS B3J 2X6

or

c/o PricewaterhouseCoopers Inc.
215 Water Street, Suite 802
St. John's, NL A1C 6C9

ISSUED at St. John's, Newfoundland and Labrador, this _____ day of February, 2003.

Registrar

Schedule "A"

Parties Who Have Been Served

ABN Amro Bank Canada/ ABN Amro Leasing & Tramac Equipment Ltd.	Aubrey L. Bonnell, Q.C./ Brian Winsor David Timms Brent Keenan	709-722-7521 905-331-2020
Bombardier Capital Leasing & Culease Financial Services	John French	709-754-2701
Caterpillar Equipment	Colin D. Grant	905-849-5512
CAT Finance	James Smyth, Q.C./ Philip Warren	709-754-5662
Cedar Rapids	Nathan Mixdorf/ Francoise Belzil	319-399-4760 780-413-3152
CIBC	R. Wayne Myles/ Geoffrey Spencer	709-579-2647
CIBC Equipment Finance Ltd./CIT Financial Ltd.	Gregory W. Dickie	709-722-9210
Contract Funding Group Inc.	Mark G. Klar	416-218-1831
Daimler Chrysler Financial Services/Daimler Chrysler Capital Services/Mercedes- Benz of Canada Inc.	Philip Buckingham/ Peter O'Flaherty Elaine Gray	709-722-4720 416-863-3527
Fabtek Corp.	Linc A. Rogers Rhodie E. Mercer, Q.C.	416-863-2653 709-726-5705
GE Capital	Harvey Chatton Frederic Scalabrini	416-218-1849 905-319-4855
GMAC	Thomas R. Kendell, Q.C.	709-722-1763
Group Holdings Ltd./ Hickman Equipment/ Hickman Holdings Ltd.	Robert Stack/ Griffith D. Roberts	709-726-2992
Ingersoll-Rand Canada Inc.	R. Barry Learmonth, Q.C. Jonathan Wigley	709-739-8151 416-863-6275

John Deere Ltd./ John Deere Credit Inc.	Neil L. Jacobs/ Bruce Grant/Maureen Ryan	709-722-4565
MTC Leasing Inc./ National Leasing Group Inc.	R. Paul Burgess	709-754-0915
ORIX Financial Services Canada Ltd.	Donald Yaeck	416-236-3010
Goodman Associates Inc.	Paul G. Goodman	902-425-3777
Royal Bank of Canada	Thomas O. Boyne, Q.C.	902-463-7500
TD Asset Finance Corp.	D. Bradford L. Wicks	709-753-5221
United Rentals	Robert Frank	416-360-8277
Wells Fargo Equipment Finance Co.	Richard B. Jones	416-361-6303

<i>SUMMARY OF CURRENT DOCUMENT</i>	
Name of Issuing Party or Person	PricewaterhouseCoopers Inc., in its capacities as Receiver and Trustee of Hickman Equipment (1985) Limited
Date of Document:	26 February 2003
Summary of Order/Relief Sought or statement of purpose in Filing:	Order Directing Deloitte & Touche LLP to Provide Documents to PWC and for Direction Concerning such Documents
Court Sub-File Number	7:56

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF the *Companies' Creditors Arrangement Act*,
Chapter C-36 of the Revised Statutes of Canada, 1985, as amended

AND IN THE MATTER OF the plan of compromise or
arrangement of Hickman Equipment (1985) Limited

AND IN THE MATTER OF Rule 25 of the *Rules of the Supreme Court*, 1986 under the *Judicature Act*, R.S.N. 1990,
c. J-4, as amended

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*,
Chapter B-3 of the Revised Statutes of Canada, 1985, as amended

AND

District of Newfoundland

Court No. 9733
Estate No. 100813

**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY**

**IN THE MATTER OF THE BANKRUPTCY OF
HICKMAN EQUIPMENT (1985) LIMITED**, carrying
on business at 1269 Topsail Road, in the City of Mt. Pearl,
in the Province of Newfoundland and Labrador

MEMORANDUM OF FACT AND LAW

1. PricewaterhouseCoopers Inc. ("PWC") has requested the production of material from Deloitte & Touche LLP. The material has been requested by PWC in its capacities as Receiver and Trustee.
2. A Trustee's entitlement to inspect the documents of 3rd parties, even where the documents are the property of another party, was discussed and affirmed in *Re Network Forest Products Ltd.*, 2002 Carswell Ont. 879, 31 C.B.R. (4th) 297, and in *Re San Squeeze Juices Inc.*, 1994 Carswell Ont. 291, 27 C.B.R. (3d) 98. Both cases deal with materials of an auditor.
3. The purposes for which a Trustee may use such materials and limitation in respect of their dissemination are discussed in *GMAC Commercial Credit Corp - Canada v. TCT Logistics Inc.*, 2002 Carswell Ont. 3678.
4. It is proper and legitimate for a Trustee to seek to conduct examinations under s.163(1) including examinations of prospective defendants prior to determining if there is merit in court proceedings. *Re S.P. Paint Factory Ltd.* (1980), 39 C.B.R. (N.S.) 12 (Man.Q.B.); *Re Long*, 1978 Carswell Ont. 209; ergo it is appropriate to obtain and review documents.
5. PWC seeks an Order requiring production of the documents. PWC cannot use its authority under the BIA to obtain the documents for dissemination to 3rd parties; it can only obtain them for pursuing its *bona fide* purpose as Trustee.
6. It recommends the Order preclude it from disseminating the information obtained except to the Inspectors, the Court, its solicitors, or other agents, it may retain to assist in the review and evaluation of the material.
7. PWC suggests that if it wishes to disseminate the information more broadly or if others wish access, such wider dissemination or access should not be permitted except for the Order of this Court after application and on notice to Deloitte & Touche LLP.
8. It will be necessary for PWC to expend time and obtain opinions if it is to analyse and determine what, if any, causes of action against whom the documents may disclose.

9. If the Court orders Deloitte & Touche LLP to produce the documents requested, PWC requires an Order which will provide for payment of reasonable costs it may incur.

DATED at Halifax, in the Province of Nova Scotia, this 26th day of February, 2003.

CARL A. HOLM, Q.C.

Solicitor for PricewaterhouseCoopers Inc.,
in its capacities as Receiver and Trustee of
Hickman Equipment (1985) Limited
whose address for service is:

Merrick Holm
1801 Hollis Street, Suite 2100
PO Box 1054
Halifax, NS B3J 2X6

OR

c/o PricewaterhouseCoopers Inc.
215 Water Street, Suite 802
St. John's, NL A1C 6C9

(201409)

[View Document](#)

Network Forest Proc
of Justice)

law.pro
CARSWELL

Network Forest P

In the Matter of the Bankruptcy of
Pursuant to the Laws of Ontario, in
Province of Ontario

st Products Limited, a Company Incorporated
ad Office in the City of Toronto, in the

Citation: 2002 CarswellOnt 879, 31 C.B.R. (4th) 297

Court: Ontario Superior Court of Justice

Judge: Cumming J.

Judgment: January 21, 2002

Year: 2002

Docket: Toronto 31-388513

Counsel: Orestes Pasparakis, Gavin H. Finlayson, for Plaintiff

Subject:

Insolvency

Civil Practice and Procedure

Public

Bankruptcy — Practice and procedure in courts — Discovery and examinations — By trustee — Trustee was investigating significant inventory variance between book value and actual physical inventory of bankrupt and also write-down in inventory balance — Trustee made numerous requests to bankrupt's auditor to deliver working papers and documents relating to its audits of bankrupt but auditor refused — Trustee brought motion for order directing auditor to produce documents for inspection — Motion granted — Section 164(1) of Bankruptcy and Insolvency Act was sufficiently broad in scope to encompass right of inspection of documents pertaining to bankrupt which were property of third party — Section 71(2) of Act vested bankrupt's property in trustee — Rule 210.1 of Institute of Chartered Accountants impressed obligation of confidentiality on auditors but recognized possibility of court order — Rules did not override operation of Act — No privilege attached to requested documents — Sufficient that trustee made bona fide request for documents for order to issue under s. 164 of Act — Given variance in inventory and extraordinary write-down, any onus on trustee was met — Auditor's obligation was to release all documentation to trustee as requested — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 71(2), 164, 164(1).

Cases considered by Cumming J.:

Sun Squeeze Juices Inc., Re, 27 C.B.R. (3d) 98, 1994 CarswellOnt 291 (Ont. Bkcy.) — considered

Statutes considered:

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

Generally — considered

[View Document](#)

s. 71(2) -- referred to

s. 163(1) -- referred to

s. 164 -- considered

s. 164(1) -- considered

MOTION by trustee for order directing bankrupt's auditors to produce documents for inspection.

Cumming J.:

The Motion

1 Richter & Partners Inc. ("Richter"), is Trustee in Bankruptcy (the "Trustee") of Network Forest Products ("Network"), a bankrupt. The Trustee moves pursuant to s. 164 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "BIA") for an order directing Kraft, Berger, Grill, Schwartz, Cohen & March LLP ("Kraft Berger"), the auditor for Network for the 1999 and 2000 fiscal years, to produce for inspection its working papers and other documents relating to its audits of the bankrupt.

2 The Trustee is investigating a very significant inventory variance of at least \$16.4 million between the book value and the actual physical inventory of the bankrupt. Also, a write down of about \$4.5 million in the inventory balance as at June 30, 2000 is queried.

The Law

3 Section 164(1) of the *BIA* is sufficiently broad in scope to encompass the right of inspection of documents pertaining to a bankrupt which are the property of a third party, such as an auditor. *Sun Squeeze Juices Inc., Re* (1994), 27 C.B.R. (3d) 98 (Ont. Bkcy.), at 99. The underlying public policy is apparent. It is in the public interest that there be transparency with respect to the business operations and property of the bankrupt for the protection of creditors.

Analysis

4 The Trustee and its counsel have made numerous requests, with the requisite formal Notice, to Kraft Berger to deliver up the relevant working papers and documentation pertaining to Network, its dealings and its property, since July 23, 2001. These requests have been rebuffed by Kraft Berger.

5 A Notice of Examination pursuant to s. 163(1) of the *BIA*, was also served upon Harry March of Kraft Berger September 5, 2001, but on the advice of counsel he refused to attend the scheduled examination. A further Notice pursuant to s. 164 of the *BIA* was served on Kraft Berger October 24, 2001. Counsel for Kraft Berger then advised that pursuant to the *Institute of Chartered Accountant Rules* Kraft Berger is not permitted to release the information sought.

6 Counsel for Kraft Berger took the position initially that working papers are the property of Network and not Kraft Berger and therefore would not be produced. This stance overlooks not only s.164 of the *BIA* but also s. 71(2) which vests the bankrupt's property in

[View Document](#)

the Trustee.

7 Some information by way of a list of documents has been given to the Trustee since the initial refusals. The list purportedly identifies which documents were prepared by Kraft Berger, which were prepared by the client and which were prepared by other parties.

8 Kraft Berger now takes the position that it will produce all documents prepared by parties other than the auditor itself. Mr. March in his affidavit says that documents produced by Kraft Berger need not be produced. Echoing the earlier position of his counsel, he relies upon Rule 210.1 relating to "Confidentiality of Information" of the Institute of Chartered Accountants, which impresses an obligation of confidentiality upon auditors subject to certain exceptions.

9 Kraft Berger submits that the exceptions in Rule 210.1 do not apply. However, those rules recognize, of course, the possibility of a court order. Rule 210.1(c) provides an exception "...when such information is to be disclosed by order of lawful authority". In all events, these rules can not override the operation of the *BIA*, even if the rules purported to do so which, in my view, they do not. Moreover, there is no privilege attaching to the requested documents. The requested documents have nothing to do with any communications by the bankrupt to a lawyer for the purpose of obtaining legal advice. See *Sun Squeeze Juices Inc. supra* at 99, 100.

10 Nevertheless, Kraft Berger submits that confidentiality adheres to the documents it has prepared as auditor for the bankrupt and the Trustee has not met the onus of establishing that this cloak of confidentiality should be displaced by court order. In my view, it is enough that the Trustee makes a *bona fide* request for the documents for an order to issue under s. 164. In any event, in my view, if there is any onus upon the Trustee such onus has been more than met in the instant situation, given the variance in the inventory and extraordinary write-down.

11 Mr. March in his affidavit claims that the Kraft Berger audits were very limited in scope and the requested information will not assist the Trustee in its investigation. That is not for Mr. March to decide. His obligation is to release *all* documents as requested, including Kraft Berger working papers, and to submit to an examination if requested.

12 In my view, there is no merit in the position of Kraft Berger in respect of the motion at hand. If they were not prepared to act on the Notice by the Trustee without a court order, then an order should not have been opposed.

13 Kraft Berger says that if it is ordered to release its documents that it should be paid for the time spent in identifying and organizing those documents. I disagree. Any expense to Kraft Berger has been very largely, if not entirely, due to Kraft Berger seeking to group or segregate documents in an attempt to avoid disclosure. Kraft Berger is obliged under the governing professional rules to maintain records in respect of its clients in an organized and easily retrievable fashion. If Kraft Berger had met the obvious obligation upon it arising from s. 164 of the *BIA* (and not opposed an order if it was of the view a court order was a necessary prerequisite to disclosure) any time-based opportunity cost to Kraft Berger would have been *de minimis*.

14 The Trustee is entitled to go to the offices of Kraft Berger and identify from the

[View Document](#)

inventory list the documents the Trustee wishes to examine. The Trustee shall pay any disbursements for the Trustee to transport the said identified documents to a photocopier establishment, the expense of photocopying, and the transportation disbursement to return the documents to Kraft Berger.

Disposition

15 For the reasons given the motion is granted.

16 I have been asked to fix costs and there is common ground that the quantum be \$1,0000. inclusive of G.S.T. and all disbursements. Said cost award is payable by Kraft Berger to the Trustee within 30 days.

17 Order signed to issue forthwith.

Motion granted.

Court File No. 31-388513

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE CUMMING

MONDAY, THE 21ST DAY OF JANUARY, 2002

IN THE MATTER OF THE BANKRUPTCY OF

NETWORK FOREST PRODUCTS LIMITED, a company incorporated pursuant to the laws of Ontario, having its head office in the City of Toronto, in the Province of Ontario

ORDER

THIS MOTION, brought by Richter & Partners Inc. ("Richter"), in its capacity as Trustee in Bankruptcy (the "Trustee") of Network Forest Products Limited ("Network"), for an Order compelling Kraft, Berger, Grill, Schwartz, Cohen & March LLP ("Kraft Berger") to produce for inspection and production to the Trustee all books, documents and papers of any kind relating in whole or in part to Network, its dealings or property, was heard this day at 393 University Avenue, Toronto, Ontario.

UPON READING the Trustee's Notice of Motion, the Factums of the parties, the Affidavit of Harry March sworn January 17, 2002, the First and Second Reports of the Trustee, and on hearing the submissions of counsel for the Trustee and Kraft Berger:

1. **THIS COURT ORDERS** Kraft Berger to produce for inspection to the Trustee all books, documents or papers of any kind relating in whole or in part to Network, its dealings or property, including in particular:

(a) working papers pertaining to Network's fiscal 1999 and 2000 audits,

[View Document](#)

Page 5 of 5

including permanent files and system description files;

(b) all correspondence relating to Network and/or E&M Forest Products for the period beginning November 1, 1999 (or the date that Kraft Berger first commenced its relationship with Network) and ending March 16, 2001;

(c) information and working papers concerning physical inventory counts;

(d) information relating to work performed on Network's inventory balance as at June 30, 2000, which resulted in a write down of approximately \$4.5 million; and

(e) information of any nature relating to work performed by Kraft Berger.

2. THIS COURT ORDERS costs of this motion be and the same are hereby fixed at \$ 1000.00 payable forthwith to the Trustee by Kraft Berger.

This Order bears interest at the rate of 5 per cent per annum.

Copyright © CARSWELL, a Division of Thomson Canada Ltd. or its licensors. All rights reserved.

[View Document](#)

Network Forest Products Ltd., Re (Ontario Superior Court of Justice)

law.pro
CARSWELL

Network Forest Products Ltd., Re

In the Matter of the Bankruptcy of Network Forest Products Limited, a Company Incorporated Pursuant to the Laws of Ontario, Having Its Head Office in the City of Toronto, in the Province of Ontario

Citation: 2002 CarswellOnt 879, 31 C.B.R. (4th) 297

Court: Ontario Superior Court of Justice

Judge: Cumming J.

Judgment: January 21, 2002

Year: 2002

Docket: Toronto 31-388513

Counsel: Orestes Pasparakis, Gavin H. Finlayson, for Plaintiff

Subject:

Insolvency

Civil Practice and Procedure

Public

Bankruptcy — Practice and procedure in courts — Discovery and examinations — By trustee — Trustee was investigating significant inventory variance between book value and actual physical inventory of bankrupt and also write-down in inventory balance — Trustee made numerous requests to bankrupt's auditor to deliver working papers and documents relating to its audits of bankrupt but auditor refused — Trustee brought motion for order directing auditor to produce documents for inspection — Motion granted — Section 164(1) of Bankruptcy and Insolvency Act was sufficiently broad in scope to encompass right of inspection of documents pertaining to bankrupt which were property of third party — Section 71(2) of Act vested bankrupt's property in trustee — Rule 210.1 of Institute of Chartered Accountants impressed obligation of confidentiality on auditors but recognized possibility of court order — Rules did not override operation of Act — No privilege attached to requested documents — Sufficient that trustee made bona fide request for documents for order to issue under s. 164 of Act — Given variance in inventory and extraordinary write-down, any onus on trustee was met — Auditor's obligation was to release all documentation to trustee as requested — **Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 71(2), 164, 164(1).**

Cases considered by Cumming J.:

Sun Squeeze Juices Inc., Re, 27 C.B.R. (3d) 98, 1994 CarswellOnt 291 (Ont. Bktry.) — considered

Statutes considered:

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

Generally — considered

[View Document](#)

Sun Squeeze Juices Inc., Re (Ontario Court of Justice (General Division), In Bankruptcy)

law.pro
©CARSWELL

Sun Squeeze Juices Inc., Re

Re bankruptcy of SUN SQUEEZE JUICES INC.

Citation: 1994 CarswellOnt 291, 27 C.B.R. (3d) 98

Court: Ontario Court of Justice (General Division), In Bankruptcy

Judge: Farley J.

Heard: June 24, 1994

Judgment: June 26, 1994

Year: 1994

Docket: Doc. 31-204909-T

Counsel: K. Crofoot, for trustee in bankruptcy, Coopers & Lybrand Limited.

Gerald A. Chouest, for Doane Raymond.

Sandra A. Forbes, for Sun Squeeze Juices Inc.

Subject:

Corporate and Commercial

Insolvency

Civil Practice and Procedure

Public

Bankruptcy — Practice and procedure in Courts — Discovery and examinations — By trustee.

Bankruptcy — Practice and procedure in Courts — Discovery and examinations — Evidentiary issues — Privilege — General.

Professions and Occupations — Accountants.

Professions and Occupations — Auditors.

Examinations — Discovery — Production of documents of third parties — Section 164 of Bankruptcy and Insolvency Act being wide enough to allow inspection of documents of third parties — No privilege attaching to client-accountant relationship — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 164..

Section 164 of the *Bankruptcy and Insolvency Act* is wide enough in scope to include a right of inspection of documents, even where those documents are the property of another person. The documents must, however,

[View Document](#)

be documents "relating in whole or in part to the bankrupt, his dealings or property." While solicitor-client privilege may prevent such production, there is no such relationship between a client and an auditor, accountant or bookkeeper.

Cases considered:

Biomedical Information Corp. v. Pearce (1985), 49 O.R. (2d) 92, 47 C.P.C. 113, 28 B.L.R. 20, 4 C.P.R. (3d) 54 (Master) – referred to

Cry-O-Beef Ltd. Re (1985), 64 C.B.R. (N.S.) 42 (Que. S.C.) – considered

Dilawri, Re; Clarkson Co. v. Chilcott (1984), 53 C.B.R. (N.S.) 251, 48 O.R. (2d) 545, 6 O.A.C. 291, (sub nom. *Chilcott v. Clarkson Co.*) 13 D.L.R. (4th) 481, 13 C.R.R. (C.A.) – referred to

Goode v. Tom Goode & Son Investments Ltd. (1979), 33 C.B.R. (N.S.) 101, 17 B.C.L.R. 244 (S.C.) – referred to

Goodman v. Minister of National Revenue, [1968] 2 O.R. 814 (H.C.) – referred to

Leard, Re (1994), 25 C.B.R. (3d) 210, 114 D.L.R. (4th) 135, (sub nom. *Re Leard (Bankrupt)*) 71 O.A.C. 56 (C.A.) – referred to

Long, Re (1978), 29 C.B.R. (N.S.) 225 (Ont. S.C.) – considered

Maksymyk Homes & Building Supplies Ltd. (Receiver of) v. Canada Mortgage & Housing Corp., (sub nom. *Maksymyk Homes & Building Supplies Ltd. (Trustee of) v. C.M.H.C.*) 74 C.B.R. (N.S.) 209, 35 C.P.C. (2d) 275, 61 Man. R. (2d) 77, [1989] 5 W.W.R. 685 (Q.B.) – referred to

Nadon Paving Ltd. Re (1967), 10 C.B.R. (N.S.) 57, 59 W.W.R. 124, 61 D.L.R. (2d) 510 (Alta. C.A.) – applied

Statutes considered:

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

s. 16(5)

s. 163

s. 164

Motion by accounting firm relating to whether production of documents in its possession required.

Farley J.:

1 In my view *Re Nadon Paving Ltd.* (1967), 10 C.B.R. (N.S.) 57 (Alta. C.A.) clearly establishes that s. 164 of the *Bankruptcy and Insolvency Act* ("BIA") is wide enough to include a right of inspection of documents even though they are the property of another person. Naturally the production of such must be of documents "relating in whole or in part to the bankrupt, his dealings or property". See also s. 16(5) of the BIA.

2 Doane Raymond then cites *Re Dilawri; Clarkson Co. v. Chilcott* (1984), 53 C.B.R. (N.S.) 251 (Ont. C.A.) with respect to privilege. Lacourcière J.A. for the court said at pp. 253-255:

[View Document](#)

We unanimously agree that the appellant was properly ordered to reattend before the special examiner to answer questions regarding his bankrupt client's affairs. We do not agree with the appellant's submission that the bankrupt who faces criminal charges and has retained the appellant as counsel would be substantially deprived of his right to counsel under s. 10(b) of the *Charter [Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt. I]* by this testimonial compulsion: *Re R. and Speid* (1983), 43 O.R. (2d) 596, 37 C.R. (3d) 220, 8 C.C.C. (3d) 18, 3 D.L.R. (4th) 246 (C.A.).

.....

One of the cases relied upon is *Gresley v. Mouseley* (1856), 2 K. & J. 288, 69 E.R. 789. However, Cordery's 7th edition (1981), at p. 3, states as follows:

The position as between the client's representatives and their *cestui que trust* is not free from doubt: certainly the privilege does not extend beyond what is reasonably necessary to afford the protection without which professional legal advice and assistance could not be obtained safely or efficiently. [The footnote reference is to *Re Londonderry's Settlement; Peat v. Walsh*, [1965] Ch. 918, [1965] 2 W.L.R. 229, [1964] 3 All E.R. 855 (C.A.).]

With this qualification in mind we are satisfied that the appellant can set up against the trustee in bankruptcy the client's privilege in respect of his professional legal advice and assistance.

In our view, the appellant can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the appellant for the purpose of giving legal advice. These communications with respect to property are not privileged.

3 I merely state the obvious when I state that there is a recognized solicitor client privilege which of course involves counsel and client. See *Lacourcière J.A.* at p. 254:

We also agree with the learned motions court judge's analysis of the rationale for the protection of the solicitor-client privilege without which the legal system could not function.

4 I do not see that there is any such relationship between a client and auditor/accountant/bookkeeper. It should also go without saying that such a person may well be a source of a fund of information especially when the bankrupt is or claims to be lacking in records or parts thereof. I note these are not of the nature of solicitor/third party documents as discussed in *Biomedical Information Corp. v. Pearce* (1985), 47 C.P.C. 113 (Ont. Master) or *Goodman v. Minister of National Revenue*, [1968] 2 O.R. 814 (H.C.). The examination of Blum under s. 163 contained many suggestions by Blum in answer to questions concerning the financial arrangements of the bankrupt that the Trustee should inquire of Doane Raymond. For example, see Questions 204-205 and Answers thereto of the transcript of the examination of Blum conducted on May 26, 1994. Blum was quite specific:

(A 205)

I didn't pay \$175,000.00 (sic) a year so I have to explain these statements. You can invite Les Nochomovitz and he'll talk about it, or Bruce.

I am certain that it would be very helpful for the process for Doane Raymond to assist and explain and especially when there appear to be missing original journals. The records that Doane Raymond could have concerning the investigation done concerning the preparation of financial statements may well be the best evidence available of the foundation material.

[View Document](#)

5 As I read *Re Long* (1978), 29 C.B.R. (N.S.) 225 (Ont. S.C.) Cory J. at p. 227 was merely warning of the dangers of the *potential* for abuse. He was not saying that such an examination by the Trustee would automatically result in an abuse. Given the shocking paucity of material relating to the financial affairs of the bankrupt found at the premises of the bankrupt or subsequently delivered to the Trustee (e.g. lack of monetary records and not having original journals), I do not see that the Trustee can be accused of embarking on a fishing expedition, especially when the request is made of Doane Raymond which as a professional firm would have to have satisfied itself in accordance with the principles of the CICA (including sampling techniques and verifications) relating to its review of the financial statements of the bankrupt. (See *Maksymyk Homes & Building Supplies Ltd. (Receiver of) v. Canada Mortgage & Housing Corp.* (1989), unreported decision of Manitoba Court of Queen's Bench (M.J. No. 230) at pp. 4-5) [now reported at (sub nom. *Maksymyk Homes & Building Supplies Ltd. (Trustee of) v. C.M.H.C.*) 74 C.B.R. (N.S.) 209]. I do not see that the demand of the Trustee in these circumstances could be characterized as unfair and abusive. See paras. 16-17 of *Re Leard* (1994) unreported decision of the Ontario Court of Appeal (O.J. No. 719) [now reported at 25 C.B.R. (3d) 210], where Weiler J.A. said [at p. 215]:

[para. 16] With respect to the second argument, that the proposed examination would be unfair or oppressive, Kennedy J. concluded ...:

It is clear that the Trustee will be unable to complete its investigation and prepare the necessary accounting without the examination of Graat and the production of the documentation which he has. The proposed examination is critical to the investigation of the Trustee. Graat is the sole means by which the Trustee can obtain the missing documentation.

[para. 17] There would appear to be an ample evidentiary basis for Kennedy J. to come to this conclusion and accordingly the proposed examination is not unfair or abusive. The applicant argued that the proposed examination was simply a "fishing expedition" by the Trustee on behalf of the creditors who were down, and that this was not the role of the Trustee. In response to this argument, the respondent points out that the Trustee could advance trustee's remedies of fraudulent preference and settlement as part of the role of Trustee and that this was an additional reason why the action was not abusive. I accept this submission.

(Emphasis added in these reasons.)

6 I do not think that *Re Cry-O-Beef Ltd.* (1985), 64 C.B.R. (N.S.) 42 (Que. S.C.) should be taken to stand for the proposition that the trustee must prove just cause in a vacuum. It should also be noted that the Quebec Superior Court in that instance was dealing with whether a *particular* memo should be produced. It was only within that context that Desjardins J. said at p. 46:

Celui qui invoque les disposition de l'art. 133 doit dévoiler le but poursuivi afin de permettre un tribunal de vérifier si la demande est faite sur la base de l'arbitraire, ou, pour des motifs sérieux, dans le cadre visé à cet article. La preuve de la justification incombe à celui qui en exige la production. En l'espèce, cette preuve n'a pas été faite.

7 In conclusion, I am of the view that the Trustee is entitled to proceed notwithstanding the claim of client-professional (accountant/auditor) privilege, non-property of bankrupt and unfair and abusive investigation based on the situation in this case. It also seems clear from *Bankruptcy & Insolvency Law of Canada*, 3d ed., L.W. Houlden and C.H. Morawetz at p. 6-18.5 (1994), that the bankrupt (and a fortiori here Blum) does not have the right to be present and/or ask questions when others are being examined. See *Goode v. Tom Goode &*

[View Document](#)

Son Investments Ltd. (1979), 33 C.B.R. (N.S.) 101 (B.C. S.C.).

8 I would have thought that it would have been more productive and fruitful for Doane Raymond to have pursued enquiries of the Trustee so as to make the production, examination and inspection more meaningful and avoid a great deal of wastage of time and money rather than immediately proceeding with this motion without pre-alerting the Trustee. This is particularly so when the last information which the Trustee had was that Mr. Nachomovitz was requesting an indulgence to have time to assemble the material so as to convenience himself regarding his vacation, an indulgence accorded him without expression of concern or doubt.

9 Costs are awarded to the Trustee as requested in the amount of \$1000. Doane Raymond is to pay same forthwith.

Order accordingly.

Copyright © CARSWELL, a Division of Thomson Canada Ltd. or its licensors. All rights reserved.

Received 12/30/2002 08:11AM in 03:58 on line [1] for RECEPTION * Pg 4/10
12/30/2002 09:41 FAX 7221428 PWC FAS + Merrick Holm 004
Dec-27-2002 10:51am From MCINNES COOPER 708 7221769 T-828 P-003/000 F-577

GMAC Commercial Credit Corp. -- Canada v. TCT Logistics Inc.
(Ontario Superior Court of Justice)

law.pro
©CARSWELL

First hit: [History and Treatments](#)

GMAC Commercial Credit Corp. -- Canada v. TCT Logistics Inc.

In the Matter of an Application Under Section 47(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c.B-3 and Section 101 of the Courts of Justice Act, R.S.O. 1990, c.C-43

In the Matter of the Bankruptcy and Insolvency of the TCT Group of Companies

GMAC Commercial Credit Corporation -- Canada, Applicant and TCT Logistics Inc. and the Companies Listed on Schedule "A" Hereto, Respondents

Citation: 2002 CarswellOnt 3678

Court: Ontario Superior Court of Justice

Judge: Farley J.

Heard: October 17, 2002

Judgment: October 22, 2002

Year: 2002

Docket: 02-CL-4387

Counsel: K. Crofoot, for KPMG Inc., Interim Receiver and Trustee in Bankruptcy of TCT Logistics Inc. and related companies

S. Lamont, for Deloitte & Touche LLP and Deloitte & Touche Inc.

Alan Merskey, for GMAC Commercial Credit Corp., a creditor

Douglas Harrison, for Ontario Teachers Pension Plan Board, a creditor

Subject:

Bankruptcy

Bankruptcy.

Farley J.:

1 KPMG Inc. ("KPMG") in its capacity as Trustee in Bankruptcy ("Trustee") of TCT Logistics Inc. and related companies ("TCT Group") moved for an order as follows:

An Order directing Deloitte & Touche LLP and its subsidiaries, in particular Deloitte & Touche Inc. (collectively, "Deloitte & Touche"), to produce for the immediate inspection of the Trustee and the Interim Receiver all books, documents and papers of any kind in the possession of Deloitte & Touche relating in whole or in part to the TCT Group, its dealings or

Received 12/30/2002 08:11AM in 03:58 on line 111 for RECEPTION * Pg 5/10
 12/30/2002 09:42 FAX 7221428 PwC FAS + Merrick Holm 005

Dec-27-2002 10:52am From:MCINNES COOPER

709 7221762

T-829 P.004/008 F-677

property (collectively, the "Relevant Documents"), including in particular:

- (i) the current audit working paper files of Deloitte & Touche LLP for fiscal years ended December 31, 1997 through 2001 inclusive;
- (ii) all notes to file prepared by employees of Deloitte & Touche and all internal memoranda of Deloitte & Touche in respect of the Companies;
- (iii) any permanent files with Deloitte & Touche in respect of the Companies;
- (iv) any management letters of Deloitte & Touche LLP for the fiscal years 1997 through 2001 inclusive;
- (v) information of any nature relating to work performed by Deloitte & Touche in respect of the Companies;
- (vi) all correspondence relating to the Companies for the period beginning the date Deloitte & Touche LLP and Deloitte & Touche Inc. first commenced their respective relationship with the Companies;
- (vii) any working paper prepared by Deloitte & Touche Inc. pursuant to its retainer by the Board of Directors in January 2002; and
- (viii) special reports, if any, prepared by Deloitte & Touche for the Companies from 1997 to 2001, including work performed by Deloitte & Touche LLP as auditor of the Companies and work performed by Deloitte & Touche Inc. in or around January 2002 to assess the financial situation of the Companies.

KMPG also moved for this relief in its capacity as Court appointed Interim Receiver of the TCT Group; however, it seems to me that the thrust of this motion has been brought by it in its Trustee role and I have decided it on that basis. It seems to me that the rights of the Interim Receiver to the requested material owned by the TCT Group is subsumed in the right of the Trustee.

2 During the hearing of this motion the Trustee acknowledged that it did not require any material, prior to the TCT Group reorganization which took place in 1997 and, as such, the Trustee's request was limited to the above documents for the fiscal years ended December 31, 1997 through 2001 inclusive.

3 It should go without saying that the Trustee (and for that matter the Interim Receiver by virtue of the Interim Receivership) by virtue of the property vesting in the Trustee pursuant to the provision of the *Bankruptcy and Insolvency Act* ("BIA") is entitled to obtain any property (including books, records, documents, accounts and information) of the TCT Group now held by Deloitte & Touche. See s. 16(5) of the *BIA*. The more pertinent question is as that type of material which relates to the financial and other affairs of the TCT Group which maybe characterized as the work product of Deloitte & Touche and not owned by the TCT Group. This would include working papers of Deloitte & Touche as auditors and otherwise.

4 Pursuant to s. 164(1) of the *BIA*, a trustee in bankruptcy is able to require the production of any document or paper of any kind relating to a bankrupt. See *Re Sun Squeeze Juices Inc.* (1994), 27 C.B.R. (3d) 98 (Ont. Gen. Div.) at p. 99 where I stated:

...s. 164 of the *Bankruptcy and Insolvency Act* is wide enough to include a right of inspection of documents even though they are the property of another person.

5 While Rule 210.1 of the *Rules of Professional Conduct* governing Chartered Accountants in Canada prohibits its members from disclosing any confidential information concerning the affairs of any client or former client, except in limited circumstances. One of the exceptions is when such information is required to be disclosed by order of lawful authority. See *Re Network Forest Products Ltd.* (2002), 31 C.B.R. (4th) 297

Received 12/30/2002 08:11AM in 03:58 on Line (1) for RECEPTION * Pg 6/10
12/30/2002 09:42 FAX 7221428 PWC FAS + Merrick Holm 008

Dec-27-2002 10:52am From MCINNES COOPER

709 7221783

T-629 P.005/008 F-577

(Ont. S.C.J.) at p. 299.

6. Documents produced by an auditor are not protected by any privilege recognized by Canadian law which prevents their production to a trustee in bankruptcy. As stated at p. 100 of *Sab Squeezed*:

I merely state the obvious when I state that there is a recognized solicitor-client privilege which of course involves counsel and client...

I do not see that there is any such relationship between a client and auditor/accountant/bookkeeper. It should also go without saying that such a person may well be a source of a flood of information especially when the bankruptcy is on claims to be lacking in records or part thereof. I note these are not of the nature of witness/third party documents as discussed in *Biomedical Information Corp. v. Permalloy Inc.* 47 F.R. 113 (Ont. Master) or *Goodman v. Minister of National Revenue*, [1968] 2 Q.R. 514 (H.C.).

See also *Network* at pp. 299-300.

7. It is not for the auditor to withhold material on the basis that the auditor feels that such would not be helpful to the trustee in bankruptcy. See *Network* at p. 299 where Cumming J. stated:

Mr. March in his affidavit claims that the Kraft Berger audits were very limited in scope and the requested information will not assist the Trustee in its investigation. That is not for Mr. March to decide.

8. What is required is that the trustee in bankruptcy make a good faith request for production from a third party for an order to issue under s. 164. See *Network* at p. 299 where Cumming J. stated:

In my view, it is enough that the Trustee makes a *bona fide* request for the documents for an order to issue under s. 164. In any event, in my view, if there is any onus upon the Trustee such onus has been more than met in the instant situation, given the variance in the inventory and extraordinary writedown.

9. In its 17th Interim Receiver Report dated June 24, 2002, KMPG stated at paras. 63-5:

63. The Interim Receiver has determined that the Preliminary Investigation has disclosed information sufficient for it to pursue any claims, including any insurance claims it may have, if it wishes to do so. If the Interim Receiver requires any further assistance from KMPG Forensic for these purposes at a later date, it will consider retaining them at that time.

64. In light of the information obtained, and the absence of GMACOC-C's support, the Interim Receiver is of the view that the Preliminary Investigation should be terminated.

65. In the event that GMACOC-C wishes to further pursue issues relating to the conduct of TCT including, but not limited to those addressed as part of the Preliminary Investigation, GMACOC-C may retain KMPG Forensic to perform an independent and more extensive investigation.

However in its 19th Interim Receiver Report and its 1st Report as Trustee, KMPG had to retreat somewhat from that position of "full knowledge, need nothing else." It stated at para. 16-7:

16. On July 2, 2002, this honorable Court authorized and directed, at the request of the Interim Receiver, that KMPG Forensic terminate the Preliminary Investigation. The Interim Receiver had determined that the Preliminary Investigation had disclosed information sufficient for it pursue any claims, including any insurance claims it may have, if it wished to do so. However, as reported to this Honourable Court at paragraph 63 of the Seventeenth Report, the Interim Receiver was of the view that it might require further assistance from KMPG Forensic at a later date and would consider retaining them at that time.

17. The Trustee and the Interim Receiver would like to explore whether there are claims against a number of parties, including the auditor of the Companies and the principals of the Companies, relating to their duties and any improper

Received 12/30/2002 08:11AM in 03:58 on line [1] for RECEPTION * Pg 7/10
 12/30/2002 09:43 FAX 7221428 PWC FAS → Merrick Holm 007

Dec-27-2002 10:59am From MCINNES COOPER

709 7221783 T-823 P-008/008 F-577

transactions. The Trustee has already given notice of an insurance claim for funds that appear to have been diverted by the Companies from the BMO Account.

It went on at paras. 25-7:

25. Given the huge shortfall in amounts owing to creditors after the realization of the operating assets, the Trustee and the Interim Receiver are obligated to pursue various investigations into the conduct giving rise to such shortfall and to pursue recovery where appropriate.

26. As indicated in the Interim Receiver's First Report to this Honourable Court dated February 5, 2002 and the Interim Receiver's Second Report to this Honourable Court dated February 21, 2002, the books and records of the Companies are not adequate or reliable. In many instances the documentation is missing, incomplete and inconsistent.

27. Without prejudicing any of the issues it may be obliged to address, the Trustee and the Interim Receiver are of the view that Deloitte & Touche has information pertaining to the Companies that is relevant to possible claims being considered in respect of the affairs for the Companies, including, but not limited to, claims against the directors and officers (including those involved in the audit committee.) The Trustee and the Interim Receiver are also of the view that Deloitte & Touche may have information relating to the Companies that is relevant to certain insurance claims.

10 Cory J. in *Re Long* (1978), 29 C.B.R. (N.S.) 225 (Ont. S.C.) observed that the trustee was entitled by a s. 164 order of the Bankruptcy Court to proceed with an examination which was in essence a discovery. He said at p. 227:

There may be many instances where it is essential for the benefit of the creditors of the bankrupt that the trustee obtain as much information as possible before he determines whether or not to proceed with an action or undertake an action on behalf of the bankrupt's estate. The principle thus given is of great importance and ought not, in my opinion, to be unduly fettered or restricted. It would seem that in many situations the trustee can proceed with an examination which is, in effect, a discovery, without there being payment of security costs for the protection of the other parties. That right is prone to abuse, and no doubt in some instances, if it were exercised without restraint by a trustee, it could become so abusive that the court would take steps to restrict the practice.

I do not think there is any abuse in the Trustee here finding out what went on for the purpose of possible litigation for the benefit of the estate.

11 However, Deloitte & Touche challenges the right of the Trustee to obtain the requested material if it could be turned around and used against Deloitte & Touche in an action against that firm for, *inter alia*, auditor's negligence. However, notwithstanding the adoption of the implied undertaking rule in our *Rules of Civil Procedure* and the recognition of the general rule of privacy as discussed in *Goodman v. Rossi* (1995), 24 O.R. (3d) 259 (Ont. C.A.) at pp 267-9 (see also *VitaPharm Canada Ltd. v. F. Hoffman-LaRoche Ltd.* (2001), 212 D.L.R. (4th) 5463 (Ont. Div. Ct.) and *Lac d'Amiante du Québec Ltée v. 2857-0702 Québec Inc.*, [2001] 2 S.C.R. 743), I do not see that the paramount federal bankruptcy legislation provision of s. 164 of the *BLA* is affected.

12 Should I exercise my discretion however, to restrict the Trustee from making the material thus obtained pursuant to s. 164 available to the creditors. Both of the creditors attending on this motion has a great interest in this material, given that there will be significant shortfall for the first secured creditor and an absolute shortfall for the second. As I read s. 16(5), s. 26 and s. 164 of the *BLA*:

S. 16(5) — No person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents, including material in electronic form, relating to the accounts or to any trade dealings of the bankrupt or to set up any lien or right of retention thereon.

S. 26(1) — The trustee shall keep proper books and records of the administration of each estate to which he is appointed, in which shall be entered a record of all moneys received or disbursed by him, a list of all creditors filing claims, the amount

12/30/2002 09:43 FAX 7221428

Received 12/30/2002 08:11AM in 03:58 on line [1] for RECEPTION * Pg 8/10

PWC FAS

→ Merrick Holm

008

Dec-27-2002 10:54am From-MCINNES COOPER

709 7221763

T-829 P.007/009 F-577

Page 30/72

and disposition of those claims, a copy of all notices sent out, the original signed copy of all minutes, proceedings had, and resolutions passed at any meeting of creditors or inspectors, court orders and all such other matters or proceedings as may be necessary to give a complete account of his administration of the estate.

S. 26(2) – The estate books, record and documents relating to the administration of an estate are deemed to be the property of the estate, and, in the event of any change of trustee, shall forthwith be delivered to the substituted trustee.

S. 26(3) – The trustee shall permit the books, records and documents referred to in subsection (2) to be inspected and copies thereof made by the Superintendent, the bankrupt or any creditor or their agents at any reasonable time.

S. 164(1) – Where a person has, or is believed or suspected to have, in his possession or power any of the property of the bankrupt, or any book, document or paper of any kind relating in whole or in part to the bankrupt, his dealings or property, or showing that he is indebted to the bankrupt, he may be required by the trustee to produce the book, document or paper for the information of the trustee, or to deliver to him any property of the bankrupt in his possession.

S. 164(2) – Where a person fails to produce a book, document or paper or to deliver property as required by this section within days after being required to do so, the trustee may, without an order, examine the person before the registrar of the court or other authorized person concerning the property, book document or paper that the person is supposed to possess.

S. 164(3) – Any person referred to in subsection (1) may be compelled to attend and testify, and to produce on his examination any book, document or paper that under this section he is liable to produce, in the same manner and subject to the same rules of examination, and the same consequences of neglecting to attend or refusing to disclose the matters in respect of which he may be examined, as would apply to a bankrupt.

only s. 164 extends beyond those documents which are owned by the bankrupt. It seems to me that, in the context of s. 165(5), it should be restricted to actual property (including documents) of the bankrupt. Similarly the meaning given to documents in s. 26 should have the same restricted meaning in that context. the trustee's correspondence file does not come within s. 216(1) and need not be produced for examination (in that case by the bankrupt): *Re Chua* (1995), 34 C.B.R. (3d) 226 (B.C. Master). See also Rule 68 of the *Bankruptcy Rules*.

68(1) – Unless the court orders otherwise, a trustee shall keep, for at least four years after the date of the trustee's discharge, the books, records and documents relating to the administration of that estate.

68(2) – Unless the court order otherwise, the trustee shall, after being discharged, send to the latest known address of the debtor, bankrupt or officer of the bankrupt corporation, a written notice, unless there is a written waiver giving up the right to be notified, that they or their representative may, within 30 days following the sending of the notice, take back any of the debtor's or bankrupt's books, records and documents to which subsection (1) does not apply.

Houlden & Morawetz, *Bankruptcy and Insolvency Act*, (Carswell, Toronto; 2001) states on p. 863:

There is a clear distinction between the books, records and documents relating to the administration of the estate itself and the books, records and documents of a debtor. Rule 68(2) permits the trustee, after he has received his discharge, to deliver to the bankrupt debtor, where the debtor is an individual, or to an officer of a bankrupt corporation, where the debtor is a corporation, the books, records and documents of the debtor.

In any event in my view the inspection of those "estate books, records and documents" relating to the administration of the estate is to be done by creditors in their capacity as creditors of a bankrupt and not with a view as to advancing their claims outside of bankruptcy.

13 While *Re Taylor ventures Ltd.* 1999, 9. C.B.R. (4th) 136 (B.C.S.C.) dealt with material involving solicitors, Burnyeat J. carefully analysed that which was subject to solicitor-client privilege and that which was not so privileged. Commencing at p. 148, he reviewed the heading question: *Can Documents which are not privileged be Provided to Third parties*. he stated at pp. 150-2:

12/30/2002 09:44 FAX 7221428

PWC FAS

Received 12/30/2002 08:11AM in 03:58 on Line [1] for RECEPTION * Pg 9/10
+ Merrick Holm

009

Dec-27-2002 10:58am From-MCINNES COOPER

709 7221763

T-878 P.000/000 P-577

The powers available to the Trustee do not include the ability to review the books and records of the bankrupt to obtain, nor information which is pertinent to the affairs of the bankrupt, but information which would be of use third parties. The efforts of the Trustee and the Inspectors must be spent for the benefit of the creditors only as the interest of those creditors relate to the property, dealings and affairs of the bankrupt. It is clear that the Inspectors and Trustee stand in a fiduciary relation to the general body of creditors. As a result, the Inspectors and Trustee must not use their access to the books and records of the bankrupt for their own purposes, the purposes of creditors who may have separate actions against third parties who had dealings with the bankrupt or in a way which would conflict with the Trustee's obligation to pursue all legitimate claims against third parties that may be available to the Trustee and the bankrupt.

.....

The Inspectors were not appointed in order that they might review the materials available to them to see whether they or others might have causes of action available against parties who had dealings with the Bankrupt. Plaintiff having causes of action against parties such as the former solicitors will have all of the rights of discovery allowed by the Supreme Court Rules. It is inappropriate to allow the Inspectors to use their present access to materials to allow them or others to have early access to materials which will be available on discovery or to have access to material which would not be available on discovery.

In the circumstances of this case, the access which both the Trustee and the Inspectors and their solicitors will have to the documents and records obtained from the former solicitors will be limited to using those documents in relation only to the "affairs of the Bankrupt" its "account", its "trade dealings", or its "dealings or property" and not in relation to any other purposes. Accordingly, it is appropriate to impose upon the Trustee and the Inspectors and their respective solicitors that, while the Trustee and the Inspectors will have complete and unrestricted access to all Taylor and related files which the Trustee has received from the former solicitors of the Bankrupt, they may use those files and the information contained only in relation to the affairs of the Bankrupt. At the same time, the solicitor for the Inspectors will provide an undertaking that she and those in her office who are assisting her in her representation of the Inspectors will not provide any of the information or documents they obtain in that capacity to any other members of their firm.

I am in agreement with that analysis. Indeed to my mind it would be a dereliction of duty by a trustee in bankruptcy to provide material which it has obtained pursuant to a s. 164 order with others (including creditors in their individual personal capacity) so that in effect the trustee in bankruptcy would be assisting other litigants in competition with the trustee in bankruptcy (which is charged with the responsibility of maximizing the estate of the bankrupt for appropriate distribution to the creditors pursuant to the hierarchy of s. 136 of the *BLA*). In my view it would be inappropriate to allow these creditors here in their individual personal capacities to piggyback upon the Trustee's s. 164 examination to get a leg up in non-bankruptcy litigation. This would be indirectly an improper compulsory order which would be contrary to the right to privacy as discussed in *Goodman v. Rossi*, *VitaPharm* and *Lac d'Amante*. The fact that there is compulsion takes it out of the "as found exception" as discussed in *VitaPharm*.

14 Order accordingly.

15 Given that success was in essence divided, each party is to bear its own costs.

Appendix

Schedule "A" TCT Logistics Inc. Related Companies

TCT Logistics Inc.

TCT Acquisition No. 1 Ltd.

Atomic TCT Logistics Inc.

Atomic TCT Logistics (Alberta) Inc.

12/30/2002 09:44 Received 12/30/2002 08:11AM in 03:58 on line (1) for RECEPTION * Pg 10/10
FAX 7221428 PWC FAS → Merrick Holm 0 D10

Dec-27-2002 10:56am From-MCINNES COOPER

708 7221763

T-828 F.008/008 F=677

Page 1 of 1

TCT Canada Logistics Inc.

Inter-Ocean Terminals (B.C.) Ltd.

Atomic Transport Incorporated

TCT Warehousing Logistics Inc.

TCT Warehousing Logistics No. 2 Inc.

R.R.S. Transport (1998) Inc.

TCT Acquisition No. 2 Ltd.

Tri-Line Expressways Ltd. (a successor to Tri-Line Expressway Ltd. and TCT Acquisition No. 3 Ltd.)

Tri-Line Expressways, Inc. 2984008 Canada Inc.

High-Tech Express & Distribution Inc.

606965 British Columbia Ltd.

606966 British Columbia Ltd.

Copyright © CARSWELL, a division of Thomson Canada Ltd. or its licensors. All rights reserved.

set off certain outstanding obligations of the retired partner. The court held that set-off was available because the cross-claims were debts or, if not, were "flowing out of and inseparately connected with his previous dealings and transactions with the firm". This raised the prospect of set-off which does not arise out of the actual contract creating the *choses* in action assigned. However, the court felt it necessary to find a connection between the two, a connection which — it could be argued — was sufficiently close to create constructive notice. I say no more, except that this is no authority for the proposition the appellant offers.

Lastly, the appellant also relied on *Williams v. Davies* (1829), 2 Sim. 461, 57 E.R. 860. This case was decided in 1829. In his one-sentence judgment, the Vice-Chancellor *seems* to understand that he is dealing with two judgment debts. In any event, the decision was doubted later by Lord Cottenham in *Rawson* and I do not think it is worthy of further consideration.

I concluded that the authorities do not support any further extension of the rule in the *Nfld. Ry.* case, even restated as I have restated it. Accordingly, the claim of the appellant must fail.

I would dismiss the appeal with costs.

Appeal dismissed.

Re S.P. PAINT FACTORY LTD.

Manitoba Queen's Bench,
Cantlie, Registrar

Judgment — July 4, 1980.

Practice and procedure — Right to discovery — Application to require bank representatives to re-attend for examination and produce documents — Inspectors' resolution authorizing examination of any person in trustee's opinion having knowledge of bankrupt's affairs — Proper delegation — Bank compelled to produce evidence supporting claims against it — Order for re-attendance.

The trustee of a bankrupt estate brought an application to require representatives of a bank to attend for examination pursuant to s. 133 of the Bankruptcy Act

Re S.P. Paint Factory Ltd. [Man.] Cantlie, Registrar 13

and to produce certain documents in the possession of the bank. A copy of the resolution of the inspectors authorizing the examination was not produced at the examination. The resolution of the inspectors did not specifically name the representatives of the bank but authorized the examination of any person who appeared to the trustee to have knowledge of the affairs of the bankrupt. The resolution was attacked as an improper delegation by the inspectors to the trustee of the power to decide who should be examined. The trustee also sought the production of documents relating to the validity of the bank's security and its realization of its security.

Held — Representatives of bank required to re-attend for examination and produce documents sought.

The inspectors were entitled to delegate to the trustee the determination of those to be examined under s. 133 of the *Bankruptcy Act*. The trustee was empowered to order production of a document independently of any examination of the person producing it. The bank was required to produce documents which could be used as evidence to support claims against it.

Cases considered

Re Long (1978), 29 C.B.R. (N.S.) 225 (Ont. S.C.) — followed.

Statutes considered

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 133.

Canada Evidence Act, R.S.C. 1970, c. E-10, s. 29 [am. 1974-75-76, c. 14, s. 57].

[Note up with 3 Can. Abr. (2d) *Bankruptcy*, XVIII, 11.]

APPLICATION to require representatives of a bank to attend for examination and to produce certain documents.

D. Lloyd, for applicant.

T.E. Wright and *W.E. Skelly*, for respondent.

(Winnipeg No. 44/80 Bkcy)

4th July 1980. CANTLIE, Registrar:—This is an application by the trustee in bankruptcy of S.P. Paint Factory for "an Order requiring Arthur Wrightson and Elliott Dary, as designated representatives of the Canadian Imperial Bank of Commerce, to re-attend, at their own expense, before a Special Examiner, to be examined by the Trustee, under Section 133 of *The Bankruptcy Act* [R.S.C. 1970, c. B-3] and to produce thereat all banking documents in the possession of the bank pertaining to the accounts of S.P. Paint Factory Ltd. and further all records pertaining to the sale of the assets of the bankrupt by the Canadian Imperial Bank of Commerce, pursuant to its various security instruments".

The trustee, under the authority of a resolution of the inspectors at a meeting on 26th February 1980, the minutes of which are Ex. A. to the affidavit of I.K. Strang, summoned Arthur Wrightson and Elliott Dary to be examined under s. 133 and to produce thereat all relevant records of the bank. They duly attended, but when called on to produce the records, refused to do so. Hence this application.

On behalf of the bank, Mr. Wright raised two preliminary objections. The first was that no copy of the text of the inspectors' resolution had been produced at the examination, although he conceded that Mr. Lloyd, on behalf of the trustee, had instead undertaken to deliver one subsequently. As the bank now has the text in Ex. A to the affidavit, nothing could now turn on this point, except the costs of this application.

Mr. Wright's second objection was to the terms of the resolution. So far as relevant, the minutes of the inspectors' meeting read as follows:

It was moved by Mr. Bodrug, seconded by Mr. Strome, and unanimously carried, that the Trustee instruct the estate solicitor to examine the validity of the security held by the Canadian Imperial Bank of Commerce.

It was moved by Mr. Bodrug, seconded by Mr. Strome, and unanimously carried, that the Trustee investigate the circumstances of the sale of the bankrupt's inventory and chattels by Mr. W. Warms, agent for the Canadian Imperial Bank of Commerce, in order to determine whether or not it was an improvident realization.

It was moved by Mr. Bodrug, seconded by Mr. Strome, and unanimously carried, that pursuant to Section 133 of The Bankruptcy Act, the following persons be examined:

Mr. G.V. Hague
Mr. P. Leibel
Mr. D. MacDonnel
Mr. B. Fry
Mr. W. Warms, F.C.A.
Mr. Schimnowski

and further any other person that in the opinion of the Trustee have knowledge of the affairs of the Bankrupt be examined in accordance with the provisions of Section 133 of The Bankruptcy Act.

Mr. Warms was the receiver appointed by the bank, but no officer of the bank is named or explicitly referred to in the resolution passed under s. 133. The trustee's authority to examine Messrs. Wrightson and Dary, therefore, rests on the authorization given to

Re S.P. Paint Factory Ltd. [Man.] Cantlie, Registrar 15

him to examine any other person who appears to him to have knowledge of the affairs of the bankrupt.

Mr. Wright attacked this as an improper delegation by the inspectors to the trustee of the power to decide who should be examined. He contended that the requirement for authorization by the creditors or the inspectors is intended to protect persons in the position of his client from being exposed to an irresponsible exercise by the trustee of his power to examine. I agree that the requirement is intended to preclude an irresponsible exercise of this power by the trustee, but the purpose, in my opinion, is to protect, not the persons who may be liable to examination, but the assets of the estate from being expended in futile examinations. If the inspectors have sufficient confidence in the trustee to give him a discretion to add to the list of persons to be examined, that is their concern. It is not a ground on which a person summoned by the trustee can refuse to submit to examination.

Furthermore, in the instant case, it is abundantly clear, from the two paragraphs in the minutes preceding the actual resolution, that the inspectors wanted the validity of the bank's security and its realization of its security investigated and the concluding part of the resolution is obviously intended to authorize the trustee to examine anyone who appears to be able to give information on these matters.

Turning to the substance of the motion, Mr. Wright made it clear that the bank's objection related entirely to the documents it was being required to produce, and that, once that issue was settled, the bank would undertake to cause Messrs. Wrightson and Dary to re-attend for examination and to answer any proper questions. In view of this undertaking, the first part of the order requested is not necessary. Furthermore, it is not conducive to an expeditious examination for the trustee to see the documents for the first time at the examination. Section 133 empowers the trustee to order documents to be produced, not by any person being examined, but "by any person liable to be examined". He can, therefore, order production of a document independently of any examination of the person producing it. This is clearly what is wanted here.

It remains to consider what documents the trustee actually wants and whether it is entitled to them.

The trustee has already seen the chattel mortgages and other documents that actually create the bank's security. The documents it still wants to see fall into three categories, namely:

- (1) the actual banking records of the bankrupt's various accounts with the bank;
- (2) documents, correspondence and papers relating to the taking of the chattel mortgage dated 28th June 1979;
- (3) documents, correspondence and papers relating to the realization of the bank's security on the assets of the bankrupt.

The trustee's right to see the documents in the first category is not contested. The bankrupt likely has copies of them, or of most of them, and the trustee is really only concerned to verify that the bankrupt's copies are complete. As these are the only documents to which s. 29 [am. 1974-75-76, c. 14, s. 57] of the Canada Evidence Act, R.S.C. 1970, c. E-10 could apply, the possible effect of that section in a case where the right to inspect the documents is contested does not arise in this case.

The trustee's object in asking for production of the second category of documents is, of course, to determine whether the chattel mortgage can be attacked as a preference, and the object in asking for production of the third category is to ascertain whether or not the assets concerned were sold at an undervalue. In short, the trustee is looking for evidence that could be used in claims against the bank in its capacity as a secured creditor. Indeed, the circumstance that this secured creditor is a bank is irrelevant; precisely similar issues could arise in any bankruptcy in respect to any secured creditor.

In attacking the chattel mortgage as a preference, the trustee will be pursuing a remedy conferred by the Bankruptcy Act, which indeed would not exist but for the bankruptcy. Undoubtedly, the trustee is hoping to make the bank produce documents which will provide evidence against itself, but equally obviously that is precisely what s. 133 is intended to enable a trustee to do. Consequently, I can see no possible answer to this part of the trustee's request.

The potential claim in respect to the sale of the assets is different. If they were sold at an undervalue, the trustee's remedy, if it has one, is precisely the same as the remedy the bankrupt itself would have had if there had been no bankruptcy. It is a remedy that cannot be pursued by any proceeding in the bankruptcy, but must be the subject of an ordinary action at law. In substance, the trustee is trying to get discovery before commencing the action, an advantage that is not available to ordinary litigants and would not have been available to the bankrupt. However, the wording of s. 133 is wide enough to cover

Re S.P. Paint Factory Ltd. [Man.] Cantlie, Registrar 17

it, and in *Re Long* (1978), 29 C.B.R. (N.S.) 225 (Ont. S.C.), Cory J. permitted a trustee to examine, under s. 133, the other party to an action on a contract for the sale of land that had been commenced by the bankrupt. Accordingly, I am of the opinion that the trustee must succeed on this part of the application also.

There will, therefore, be an order requiring the proper officers of the bank to produce the documents of all three categories. The trustee's application having succeeded on all points of importance, it is entitled to its costs to be paid by the bank, fixed at \$150 inclusive of disbursements.

Application granted.

RE CRAIG

British Columbia Supreme Court [In Bankruptcy],
Campbell L.J.S.C.

Heard — December 4, 1980 and April 14, 1981.
Judgment — May 11, 1981.

Discharge of bankrupt — Assets less than 50 cents on the dollar of amount of unsecured liabilities — Arising from circumstances for which bankrupt could not justly be held responsible — Failure of bankrupt to perform his duties — Obligation of bankrupt to his creditors — Necessary for bankrupt to maintain his family — Order of discharge conditional upon payment to creditors.

Cases considered

Re Lambert (1962), 3 C.B.R. (N.S.) 216 (Ont. S.C.) — applied.

Statutes considered

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 142, 143 (a), (m).

[Note up with 3 Can. Abr. (2d) *Bankruptcy*, XXII, 3.]

APPLICATION of bankrupt for discharge from bankruptcy.

B.T. Gibson, for applicant.

R.E. Turner, for opposing creditors.

(Vancouver No. 94296; 65/80)

11th May 1981. CAMPBELL L.J.S.C.:—The bankrupt applies

Long, Re (Ontario Supreme Court, In Bankruptcy)

**Long, Re****RE LONG****Citation: 1978 CarswellOnt 209, 29 C.B.R. (N.S.) 225****Court: Ontario Supreme Court, In Bankruptcy****Judge: Cory J.****Heard: November 14, 1978****Judgment: November 14, 1978****Year: 1978****Docket: No. 578/78****Counsel: *H. Fogul*, for trustee.*****P. Sengbusch*, for respondent.****Subject:**

Corporate and Commercial

Bankruptcy

Civil Practice and Procedure

Bankruptcy — Practice and procedure in courts — Discovery and examination — By trustee.**Examination — Examination by trustee under s. 133(1) of the Bankruptcy Act.****Held:**

There may be many instances where it is essential for the benefit of the creditors of the bankrupt that the trustee obtain as much information as possible before he determines whether or not to proceed with an action or undertake an action on behalf of the bankrupt's estate. The principle thus given is of great importance and ought not to be unduly fettered or restricted. That right is prone to abuse and no doubt in many instances, if it were exercised without restraint by a trustee, it could become so abusive that the court would take steps to restrict the practice.

Statute considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 133(1)

Application by trustee to examine certain persons under s. 133(1) of the Bankruptcy Act.

Cory J. (orally):

[View Document](#)

1 An application has been brought by the trustee to examine Mr. Kenneth Wilford pursuant to the provisions of s. 133(1) of the Bankruptcy Act, R.S.C. 1970, c. B-3. The relevant section provides as follows:

133. (1) The trustee, upon ordinary resolution passed by the creditors or upon the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

2 The affidavit of Mr. Aykroyd, chartered accountant of the city of Peterborough, states that he is the resident manager for Dunwoody Limited, the trustee of the estate of the bankrupt. The affidavit contains as Ex. 2 a direction from Don Lamont. It is in the following terms:

I, Don Lamont, being the sole inspector of the above estate hereby authorize Dunwoody Limited, trustee, to examine Kenneth Wilford under oath and to order him to produce any books, documents, correspondents [sic] or papers in his possession or power relating in all or in part to the bankrupt's dealings with the said Wilford on the matter of an option to purchase property and a deposit of \$1,500.00. Trustee is hereby authorized to direct estate solicitor to provide him with all necessary assistance on the matter.

3 An appointment was then duly served upon Mr. Wilford. Mr. Wilford did not attend. Mr. Wilford's solicitor contends that s. 133 of the Bankruptcy Act does not apply. He states firstly that there is no evidence before the court of the interest of Mr. Wilford in the affairs of the bankrupt. That submission I cannot accept, for the affidavit material includes the direction of Mr. Lamont, the inspector, which in turn refers to the option to purchase. That in my opinion is sufficient to demonstrate the interest that Mr. Wilford has in the affairs of the bankrupt.

4 It was next contended that Mr. Wilford does not fall within the ambit of s. 133(1). I cannot accept that contention for there are many examples that might be given where the deposit or when the interest in real estate of the bankrupt was the most significant asset of the bankrupt's estate. In such circumstances the trustee would be duty-bound to examine fully and carefully in regard to the interest in realty and the deposits paid and to pursue such interests that were for the benefit of the creditors of the bankrupt.

5 Lastly it is stated that the trustee is attempting to do indirectly what it could not do directly. For that position I have a great deal of sympathy. Although it is not all before me by way of material I accept the submissions made by both counsel, that the history of this matter would indicate that the bankrupt had entered into an offer with Wilford before he had his assignment in bankruptcy. There was a dispute between the bankrupt and Wilford at the time of closing, and the bankrupt then brought an action against Wilford for the return of the deposit. Pleadings were exchanged between the parties. Before discoveries could be held the bankrupt made his assignment. The same solicitors are acting for the trustee as acted for the bankrupt in the action against Wilford. Further, in January 1978, it would appear that the solicitors for the trustee advised the solicitor for Wilford that they were authorized by the trustee to proceed with the action. I then have some very serious misgivings as to the bona fides of the application. However, on principle it would appear that the Bankruptcy Act has given specific powers to the trustee to examine Wilford pursuant to s. 133(1).

[View Document](#)

6 There may be many instances where it is essential for the benefit of the creditors of the bankrupt that the trustee obtain as much information as possible before he determines whether or not to proceed with an action or undertake an action on behalf of the bankrupt's estate. The principle thus given is of great importance and ought not, in my opinion, to be unduly fettered or restricted. It would seem that in many situations the trustee can proceed with an examination which is, in effect, a discovery, without there being payment of security costs for the protection of the other parties. That right is prone to abuse, and no doubt in some instances, if it were exercised without restraint by a trustee, it could become so abusive that the court would take steps to restrict the practice. In this case it seems appropriate to require the respondent, Wilford, to re-attend on an appointment to be examined. In my view there was a valid objection raised by the respondent, and he ought not to be penalized by way of costs. The only costs therefore will be the costs of the trustee out of the estate.

Application granted.

Copyright © CARSWELL, a Division of Thomson Canada Ltd. or its licensors. All rights reserved.

<u>SUMMARY OF CURRENT DOCUMENT</u>	
Name of Issuing Party or Person	PricewaterhouseCoopers Inc., in its capacities as Receiver and Trustee of Hickman Equipment (1985) Limited
Date of Document:	26 February 2003
Summary of Order/Relief Sought or statement of purpose in Filing:	Order Directing Deloitte & Touche LLP to Provide Documents to PWC and for Direction Concerning such Documents
Court Sub-File Number	7:50

2002 01T 0352

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR

IN THE MATTER OF the *Companies' Creditors Arrangement Act*,
Chapter C-36 of the Revised Statutes of Canada, 1985, as amended

AND IN THE MATTER OF the plan of compromise or
arrangement of Hickman Equipment (1985) Limited

AND IN THE MATTER OF Rule 25 of the *Rules of the
Supreme Court*, 1986 under the *Judicature Act*, R.S.N. 1990,
c. J-4, as amended

AND IN THE MATTER OF the *Bankruptcy and Insolvency Act*,
Chapter B-3 of the Revised Statutes of Canada, 1985, as amended

AND

District of Newfoundland
Court No. 9733
Estate No. 100813

IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE BANKRUPTCY OF
HICKMAN EQUIPMENT (1985) LIMITED, carrying
on business at 1269 Topsail Road, in the City of Mt. Pearl,
in the Province of Newfoundland and Labrador

AFFIDAVIT OF JAMES KIRBY
Sworn 26 February 2003

I, James A. Kirby, C.A., CIRP, Senior Vice-President of PricewaterhouseCoopers Inc. of St. John's, in the Province of Newfoundland and Labrador, make oath and say as follows:

1. By Order of this Court granted on the 13th day of March, 2002, PricewaterhouseCoopers Inc. was appointed the Receiver of Hickman Equipment (1985) Limited ("HEL") and by a Receiving Order granted on March 13, 2002 appointed as the Trustee of the Estate of HEL in Bankruptcy. In this Affidavit, PricewaterhouseCoopers Inc. is referred to in its capacities as Receiver and Trustee as "PWC".
2. I am Senior Vice-President of PWC and as such have personal knowledge of all matters herein deposed to, except where stated to be based on information and belief.
3. I wrote Mr. Kenneth Fredeen, General Counsel of Deloitte & Touche LLP, on behalf of PWC on October 11, 2002, requesting production of property and materials as described in the letter. A true copy of my letter is attached and marked as Exhibit "A" to this my Affidavit.
4. I e-mailed Mr. Fredeen on November 14, 2003, following up on my October 11th letter. A true copy of my e-mail of November 14th is attached and marked as Exhibit "B" to this my Affidavit.
5. On December 2, 2002, I received a photocopy of an e-mail Mr. Fredeen attempted to send on November 25, 2002, in which he said:

James, my apologies for the delay. We would be pleased to produce the documents provided to us by our client. I shall instruct our offices in St. John (*sic*) to forward those to you.

With respect to Deloitte & Touche prepared documents, could you please advise as to why these documents are required and the planned use of same. Your request is expansive and your further advice on the intended use would be helpful. Please let me know if you think a meeting would be helpful.

Thanks. Ken

6. I replied to Mr. Fredeen's e-mail by letter dated December 12, 2002. A true copy of my letter of December 12th is attached and marked as Exhibit "C" to this my Affidavit.
7. Mr. Fredeen replied by letter dated January 17, 2003. A true copy of Mr. Fredeen's letter is attached and marked as Exhibit "D" to this my Affidavit.
8. I have not replied to Mr. Fredeen's letter, but Receiver's counsel, Carl Holm, and I have attempted to speak with him to discuss his letter and production. To date, we have been unsuccessful. Copies of exchange of e-mails concerning our efforts to speak with him are attached and marked as Exhibit "E" to this my Affidavit.

9. Based on review of the books and records of Hickman Equipment conducted in the course of the Receivership to date, PWC has determined PWC may have a claim in its capacity as Receiver or in its capacity as a Trustee under the BIA against Deloitte and Touche LLP.
10. It is PWC's opinion that it cannot determine whether there is such a claim without receiving and reviewing the materials requested from Deloitte & Touche LLP and obtaining legal and other expert opinion thereon.
11. PWC has been advised by counsel it is proper for a trustee to seek the material requested; he reports that in the 2003 Annotated edition of the *Bankruptcy Act* by Houlden & Morawitz at page 662, the following is stated:

Before a trustee commences civil proceedings, it is quite proper for the trustee to conduct examinations under section 163(1), including examinations of the defendants in the proposed civil action. *Re S.A. Paint Factory Ltd.* (1980), 39 C.B.R. (N.S.) 12 (Man.Q.B.). The trustee is entitled to investigate the matter thoroughly before expending estate moneys in court proceedings.

12. Various creditors have made inquiries of PWC concerning access to Deloitte & Touche LLP's working papers. Creditors have indicated a desire to obtain for their own review copies of documents which PWC may obtain.
13. PWC has been advised by counsel that it is proper for a trustee to request and obtain the materials sought if intended for use by the Trustee in the performance of its duties as Trustee; counsel has advised it would not be proper to require production of the documents for the purpose of disseminating same to creditors for their independent use.
14. If PWC is to obtain production of the documents and use it for purposes of determining whether a valid cause of action may exist, it will incur costs through the expenditure of time of its personnel and in obtaining expert legal and audit opinions.
15. PWC requires the advice and direction of the Court pursuant to paragraph 34 of the Receivership Order and section 34 of the BIA concerning the use and dissemination of materials which may be produced by Deloitte & Touche LLP and an Order that costs reasonably incurred by PWC as taxed and allowed by this Court will constitute costs of this proceeding, to be paid pursuant to the provisions of the Cost Allocation Plan.

SWORN TO at St. John's, in the)
Province of Newfoundland and)
Labrador, this 26th day of)
February A.D. 2003, before me,)

A Barrister of the Supreme Court)
of Newfoundland and Labrador)



JAMES KIRBY

(201350)

COPY

Deloitte & Touche LLP
800 Sun Life Tower
Box 40
150 King Street West
Toronto, ON
M5H 1J9

PricewaterhouseCoopers Inc.
Atlantic Place
Box 75, 215 Water Street, Suite 802
St. John's, NL
Canada A1C 6C9
Telephone +1 (709) 722 3883
Facsimile +1 (709) 722 1428

Attention: Mr. Kenneth J. Fredeen, General Counsel

No. 200201T0352
This is Exhibit A referred to in the
affidavit of James Kirby
sworn before me this 26th day of
February 2003

October 11, 2002

Gentlemen:

A Barrister of the Supreme Court of
Newfoundland and Labrador

Re: Hickman Equipment (1985) Limited (HEL)

PricewaterhouseCoopers Inc. (PwC) is the Receiver and Trustee in Bankruptcy of HEL.

PwC writes in the capacities noted to require you to produce to PwC any property of HEL in your possession and any document in electronic or hardcopy form of any kind relating in whole or in part to HEL, its dealings or property from January 1, 1997 to the present and in particular to produce:

1. All working papers pertaining to the audit of HEL for the fiscal years 1997, 1998, 1999 and 2000, together with all working papers developed or prepared in respect of the calendar year 2001;
2. All correspondence to and from or relating to HEL including copies of all correspondence conducted by email relating in whole or in part to HEL, its dealings of property during the period January 1, 1997 to the present;
3. All books, documents or papers of any kind relating to the inventory of HEL in the period January 1, 1997 to the present;
4. All reports, memos, correspondence, files or documents of any kind prepared for or relating to any work performed by you alone or in connection with others for HEL during the period January 1, 1997 to the present.
5. All invoices submitted to HEL for any services rendered by you for the period January 1, 1997 to present.

PRICEWATERHOUSECOOPERS

Please advise within seven days that the material requested will be delivered to the undersigned within the next three weeks.

Attached for your information and assistance are copies of decisions I believe you will find relevant, namely: *Sun Squeeze Juices Inc.*, a decision of Justice Farley of the Ontario Court of Justice in Bankruptcy; and *Re Network Forest Products Ltd.*, a decision of Justice Cummings of the Ontario Superior Court of Justice.

It is our hope that we can work cooperatively in dealing with the matters raised by this letter so as to avoid the necessity of a court application.

Yours very truly,
PricewaterhouseCoopers Inc.
Receiver

Per: James A. Kirby
James A. Kirby, C.A., C.M.R.P.
Senior Vice-President

JAK/cmc

Encl.

Deloitte-Oct11.doc

PRICEWATERHOUSECOOPERS

Bob, Mr. Carl Holm, Merrick Holm, Barristers & Solicitors - P.O. Box 1054, 1801 Hollis St., Suite 2100, Halifax, NS B3J 2X6

Mr. Fred Constantine, Patterson Palmer Hunt Murphy - Scotia Centre, 235 Water St., St. John's, NL A1C 5L3

Mr. Larry Wurd, PricewaterhouseCoopers - 145 King St., W., 18th Floor, Toronto, ON M5H 1V8

Network Forest Proc
of Justice)

law.pro
CARSWELL

Network Forest P

**In the Matter of the Bankruptcy of
Pursuant to the Laws of Ontario,
Province of Ontario**

**St Products Limited, a Company Incorporated
and Office in the City of Toronto, in the**

Citation: 2002 CarswellOnt 879, 31 C.B.R. (4th) 297

Court: Ontario Superior Court of Justice

Judge: Cumming J.

Judgment: January 21, 2002

Year: 2002

Docket: Toronto 31-388513

Counsel: Orestes Pasparakis, Gavin H. Finlayson, for Plaintiff

Subject:

Insolvency

Civil Practice and Procedure

Public

Bankruptcy — Practice and procedure in courts — Discovery and examinations — By trustee — Trustee was investigating significant inventory variance between book value and actual physical inventory of bankrupt and also write-down in inventory balance — Trustee made numerous requests to bankrupt's auditor to deliver working papers and documents relating to its audits of bankrupt but auditor refused — Trustee brought motion for order directing auditor to produce documents for inspection — Motion granted — Section 164(1) of Bankruptcy and Insolvency Act was sufficiently broad in scope to encompass right of inspection of documents pertaining to bankrupt which were property of third party — Section 71(2) of Act vested bankrupt's property in trustee — Rule 210.1 of Institute of Chartered Accountants impressed obligation of confidentiality on auditors but recognized possibility of court order — Rules did not override operation of Act — No privilege attached to requested documents — Sufficient that trustee made bona fide request for documents for order to issue under s. 164 of Act — Given variance in inventory and extraordinary write-down, any onus on trustee was met — Auditor's obligation was to release all documentation to trustee as requested — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 71(2), 164, 164(1).

Cases considered by Cumming J.:

Sun Squeeze Juices Inc., Re, 27 C.B.R. (3d) 98, 1994 CarswellOnt 291 (Ont. Bktry.) — considered

Statutes considered:

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

Generally — considered

- s. 71(2) – referred to
- s. 163(1) – referred to
- s. 164 – considered
- s. 164(1) – considered

MOTION by trustee for order directing bankrupt's auditors to produce documents for inspection.

Cumming J.:

The Motion

- 1 Richter & Partners Inc. ("Richter"), is Trustee in Bankruptcy (the "Trustee") of Network Forest Products ("Network"), a bankrupt. The Trustee moves pursuant to s. 164 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c.B-3 (the "BIA") for an order directing Kraft, Berger, Grill, Schwartz, Cohen & March LLP ("Kraft Berger"), the auditor for Network for the 1999 and 2000 fiscal years, to produce for inspection its working papers and other documents relating to its audits of the bankrupt.
- 2 The Trustee is investigating a very significant inventory variance of at least \$16.4 million between the book value and the actual physical inventory of the bankrupt. Also, a write down of about \$4.5 million in the inventory balance as at June 30, 2000 is queried.

The Law

- 3 Section 164(1) of the *BIA* is sufficiently broad in scope to encompass the right of inspection of documents pertaining to a bankrupt which are the property of a third party, such as an auditor. *Sun Squeeze Juices Inc., Re* (1994), 27 C.B.R. (3d) 98 (Ont. Bkcy.), at 99. The underlying public policy is apparent. It is in the public interest that there be transparency with respect to the business operations and property of the bankrupt for the protection of creditors.

Analysis

- 4 The Trustee and its counsel have made numerous requests, with the requisite formal Notice, to Kraft Berger to deliver up the relevant working papers and documentation pertaining to Network, its dealings and its property, since July 23, 2001. These requests have been rebuffed by Kraft Berger.
- 5 A Notice of Examination pursuant to s. 163(1) of the *BIA*, was also served upon Harry March of Kraft Berger September 5, 2001, but on the advice of counsel he refused to attend the scheduled examination. A further Notice pursuant to s. 164 of the *BIA* was served on Kraft Berger October 24, 2001. Counsel for Kraft Berger then advised that pursuant to the *Institute of Chartered Accountant Rules* Kraft Berger is not permitted to release the information sought.
- 6 Counsel for Kraft Berger took the position initially that working papers are the property of Network and not Kraft Berger and therefore would not be produced. This stance overlooks not only s. 164 of the *BIA* but also s. 71(2) which vests the bankrupt's property in

the Trustee.

7 Some information by way of a list of documents has been given to the Trustee since the initial refusals. The list purportedly identifies which documents were prepared by Kraft Berger, which were prepared by the client and which were prepared by other parties.

8 Kraft Berger now takes the position that it will produce all documents prepared by parties other than the auditor itself. Mr. March in his affidavit says that documents produced by Kraft Berger need not be produced. Echoing the earlier position of his counsel, he relies upon Rule 210.1 relating to "Confidentiality of Information" of the Institute of Chartered Accountants, which impresses an obligation of confidentiality upon auditors subject to certain exceptions.

9 Kraft Berger submits that the exceptions in Rule 210.1 do not apply. However, those rules recognize, of course, the possibility of a court order. Rule 210.1(c) provides an exception "...when such information is to be disclosed by order of lawful authority". In all events, these rules can not override the operation of the *BLA*, even if the rules purported to do so which, in my view, they do not. Moreover, there is no privilege attaching to the requested documents. The requested documents have nothing to do with any communications by the bankrupt to a lawyer for the purpose of obtaining legal advice. See *Sun Squeeze Juices Inc. supra* at 99, 100.

10 Nevertheless, Kraft Berger submits that confidentiality adheres to the documents it has prepared as auditor for the bankrupt and the Trustee has not met the onus of establishing that this cloak of confidentiality should be displaced by court order. In my view, it is enough that the Trustee makes a *bona fide* request for the documents for an order to issue under s. 164. In any event, in my view, if there is any onus upon the Trustee such onus has been more than met in the instant situation, given the variance in the inventory and extraordinary writedown.

11 Mr. March in his affidavit claims that the Kraft Berger audits were very limited in scope and the requested information will not assist the Trustee in its investigation. That is not for Mr. March to decide. His obligation is to release *all* documents as requested, including Kraft Berger working papers, and to submit to an examination if requested.

12 In my view, there is no merit in the position of Kraft Berger in respect of the motion at hand. If they were not prepared to act on the Notice by the Trustee without a court order, then an order should not have been opposed.

13 Kraft Berger says that if it is ordered to release its documents that it should be paid for the time spent in identifying and organizing those documents. I disagree. Any expense to Kraft Berger has been very largely, if not entirely, due to Kraft Berger seeking to group or segregate documents in an attempt to avoid disclosure. Kraft Berger is obliged under the governing professional rules to maintain records in respect of its clients in an organized and easily retrievable fashion. If Kraft Berger had met the obvious obligation upon it arising from s. 164 of the *BLA* (and not opposed an order if it was of the view a court order was a necessary prerequisite to disclosure) any time-based opportunity cost to Kraft Berger would have been *de minimis*.

14 The Trustee is entitled to go to the offices of Kraft Berger and identify from the

inventory list the documents the Trustee wishes to examine. The Trustee shall pay any disbursements for the Trustee to transport the said identified documents to a photocopier establishment, the expense of photocopying, and the transportation disbursement to return the documents to Kraft Berger.

Disposition

15 For the reasons given the motion is granted.

16 I have been asked to fix costs and there is common ground that the quantum be \$1,000.00 inclusive of G.S.T. and all disbursements. Said cost award is payable by Kraft Berger to the Trustee within 30 days.

17 Order signed to issue forthwith.

Motion granted.

Court File No. 31-388513

ONTARIO

SUPERIOR COURT OF JUSTICE

THE HONOURABLE MR. JUSTICE CUMMING

MONDAY, THE 21ST DAY OF JANUARY, 2002

IN THE MATTER OF THE BANKRUPTCY OF

NETWORK FOREST PRODUCTS LIMITED, a company incorporated pursuant to the laws of Ontario, having its head office in the City of Toronto, in the Province of Ontario

ORDER

THIS MOTION, brought by Richter & Partners Inc. ("Richter"), in its capacity as Trustee in Bankruptcy (the "Trustee") of Network Forest Products Limited ("Network"), for an Order compelling Kraft, Berger, Grill, Schwartz, Cohen & March LLP ("Kraft Berger") to produce for inspection and production to the Trustee all books, documents and papers of any kind relating in whole or in part to Network, its dealings or property, was heard this day at 393 University Avenue, Toronto, Ontario.

UPON READING the Trustee's Notice of Motion, the Facts of the parties, the Affidavit of Harry March sworn January 17, 2002, the First and Second Reports of the Trustee, and on hearing the submissions of counsel for the Trustee and Kraft Berger:

1. **THIS COURT ORDERS** Kraft Berger to produce for inspection to the Trustee all books, documents or papers of any kind relating in whole or in part to Network, its dealings or property, including in particular:

(a) working papers pertaining to Network's fiscal 1999 and 2000 audits,

including permanent files and system description files;

(b) all correspondence relating to Network and/or E&M Forest Products for the period beginning November 1, 1999 (or the date that Kraft Berger first commenced its relationship with Network) and ending March 16, 2001;

(c) information and working papers concerning physical inventory counts;

(d) information relating to work performed on Network's inventory balance as at June 30, 2000, which resulted in a write down of approximately \$4.5 million; and

(e) information of any nature relating to work performed by Kraft Berger.

2. THIS COURT ORDERS costs of this motion be and the same are hereby fixed at \$ 1000.00 payable forthwith to the Trustee by Kraft Berger.

This Order bears interest at the rate of 5 per cent per annum.

Copyright © CARSWELL, a Division of Thomson Canada Ltd. or its licensors. All rights reserved.

Network Forest Products Ltd., Re (Ontario Superior Court of Justice)**law.pro**
CARSWELL**Network Forest Products Ltd., Re**

In the Matter of the Bankruptcy of Network Forest Products Limited, a Company Incorporated Pursuant to the Laws of Ontario, Having its Head Office in the City of Toronto, in the Province of Ontario

Citation: 2002 CarswellOnt 879, 31 C.B.R. (4th) 297

Court: Ontario Superior Court of Justice

Judge: Cumming J.

Judgment: January 21, 2002

Year: 2002

Docket: Toronto 31-388513

Counsel: Orestes Pasparakis, Gavin H. Finlayson, for Plaintiff

Subject:

Insolvency

Civil Practice and Procedure

Public

Bankruptcy — Practice and procedure in courts — Discovery and examinations — By trustee — Trustee was investigating significant inventory variance between book value and actual physical inventory of bankrupt and also write-down in inventory balance — Trustee made numerous requests to bankrupt's auditor to deliver working papers and documents relating to its audits of bankrupt but auditor refused — Trustee brought motion for order directing auditor to produce documents for inspection — Motion granted — Section 164(1) of Bankruptcy and Insolvency Act was sufficiently broad in scope to encompass right of inspection of documents pertaining to bankrupt which were property of third party — Section 71(2) of Act vested bankrupt's property in trustee — Rule 210.1 of Institute of Chartered Accountants impressed obligation of confidentiality on auditors but recognized possibility of court order — Rules did not override operation of Act — No privilege attached to requested documents — Sufficient that trustee made bona fide request for documents for order to issue under s. 164 of Act — Given variance in inventory and extraordinary write-down, any onus on trustee was met — Auditor's obligation was to release all documentation to trustee as requested — Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, ss. 71(2), 164, 164(1).

Cases considered by Cumming J.:

Sun Squeeze Juices Inc., Re, 27 C.B.R. (3d) 98, 1994 CarswellOnt 291 (Ont. Bktcy.) — considered

Statutes considered:

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

Generally — considered

Sun Squeeze Juices Inc., Re (Ontario Court of Justice (General Division), In Bankruptcy)

law.pro
CARSWELL

Sun Squeeze Juices Inc., Re

Re bankruptcy of SUN SQUEEZE JUICES INC.

Citation: 1994 CarswellOnt 291, 27 C.B.R. (3d) 98

Court: Ontario Court of Justice (General Division), In Bankruptcy

Judge: Farley J.

Heard: June 24, 1994

Judgment: June 26, 1994

Year: 1994

Docket: Doc. 31-204909-T

Counsel: K. Crofoot, for trustee in bankruptcy, Coopers & Lybrand Limited.

Gerald A. Chouest, for Doane Raymond.

Sandra A. Forbes, for Sun Squeeze Juices Inc.

Subject:

Corporate and Commercial

Insolvency

Civil Practice and Procedure

Public

Bankruptcy -- Practice and procedure in Courts -- Discovery and examinations -- By trustee.

Bankruptcy -- Practice and procedure in Courts -- Discovery and examinations -- Evidentiary issues -- Privilege -- General.

Professions and Occupations -- Accountants.

Professions and Occupations -- Auditors.

Examinations -- Discovery -- Production of documents of third parties -- Section 164 of Bankruptcy and Insolvency Act being wide enough to allow inspection of documents of third parties -- No privilege attaching to client-accountant relationship -- Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, s. 164..

Section 164 of the *Bankruptcy and Insolvency Act* is wide enough in scope to include a right of inspection of documents, even where those documents are the property of another person. The documents must, however,

be documents "relating in whole or in part to the bankrupt, his dealings or property." While solicitor-client privilege may prevent such production, there is no such relationship between a client and an auditor, accountant or bookkeeper.

Cases considered:

Biomedical Information Corp. v. Pearce (1985), 49 O.R. (2d) 92, 47 C.P.C. 113, 28 B.L.R. 20, 4 C.P.R. (3d) 54 (Master) – referred to

Cry-O-Beef Ltd., Re (1985), 64 C.B.R. (N.S.) 42 (Que. S.C.) – considered

Dilawri, Re; Clarkson Co. v. Chilcott (1984), 53 C.B.R. (N.S.) 251, 48 O.R. (2d) 545, 6 O.A.C. 291, (sub nom. *Chilcott v. Clarkson Co.*) 13 D.L.R. (4th) 481, 13 C.R.R. (C.A.) – referred to

Goode v. Tom Goode & Son Investments Ltd. (1979), 33 C.B.R. (N.S.) 101, 17 B.C.L.R. 244 (S.C.) – referred to

Goodman v. Minister of National Revenue, [1968] 2 O.R. 814 (H.C.) – referred to

Leard, Re (1994), 25 C.B.R. (3d) 210, 114 D.L.R. (4th) 135, (sub nom. *Re Leard (Bankrupt)*) 71 O.A.C. 56 (C.A.) – referred to

Long, Re (1978), 29 C.B.R. (N.S.) 225 (Ont. S.C.) – considered

Maksymyk Homes & Building Supplies Ltd. (Receiver of) v. Canada Mortgage & Housing Corp., (sub nom. *Maksymyk Homes & Building Supplies Ltd. (Trustee of) v. C.M.H.C.*) 74 C.B.R. (N.S.) 209, 35 C.P.C. (2d) 275, 61 Man. R. (2d) 77, [1989] 5 W.W.R. 685 (Q.B.) – referred to

Nadon Paving Ltd., Re (1967), 10 C.B.R. (N.S.) 57, 59 W.W.R. 124, 61 D.L.R. (2d) 510 (Alta. C.A.) – applied

Statutes considered:

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

s. 16(5)

s. 163

s. 164

Motion by accounting firm relating to whether production of documents in its possession required.

Farley J.:

1 In my view *Re Nadon Paving Ltd.* (1967), 10 C.B.R. (N.S.) 57 (Alta. C.A.) clearly establishes that s. 164 of the *Bankruptcy and Insolvency Act* ("BIA") is wide enough to include a right of inspection of documents even though they are the property of another person. Naturally the production of such must be of documents "relating in whole or in part to the bankrupt, his dealings or property". See also s. 16(5) of the BIA.

2 Doane Raymond then cites *Re Dilawri; Clarkson Co. v. Chilcott* (1984), 53 C.B.R. (N.S.) 251 (Ont. C.A.) with respect to privilege. Lacourciere J.A. for the court said at pp. 253-255:

We unanimously agree that the appellant was properly ordered to reattend before the special examiner to answer questions regarding his bankrupt client's affairs. We do not agree with the appellant's submission that the bankrupt who faces criminal charges and has retained the appellant as counsel would be substantially deprived of his right to counsel under s. 10(b) of the *Charter [Canadian Charter of Rights and Freedoms, Constitution Act, 1982, Pt I]* by this testimonial compulsion; *Re R. and Speid* (1983), 43 O.R. (2d) 596, 37 C.R. (3d) 220, 8 C.C.C. (3d) 18, 3 D.L.R. (4th) 246 (C.A.).

One of the cases relied upon is *Gresley v. Mouseley* (1856), 2 K. & J. 288, 69 E.R. 789. However, *Cordery's 7th edition* (1981), at p. 3, states as follows:

The position as between the client's representatives and their *cestuis que trust* is not free from doubt: certainly the privilege does not extend beyond what is reasonably necessary to afford the protection without which professional legal advice and assistance could not be obtained safely or efficiently. [The footnote reference is to *Re Londonderry's Settlement; Peat v. Walsh*, [1965] Ch. 918, [1965] 2 W.L.R. 229, [1964] 3 All E.R. 855 (C.A.).]

With this qualification in mind we are satisfied that the appellant can set up against the trustee in bankruptcy the client's privilege in respect of his professional legal advice and assistance.

In our view, the appellant can be compelled to disclose all information regarding the bankrupt's affairs, transactions and the whereabouts of his property, etc., which do not require the disclosure of communications made to the appellant for the purpose of giving legal advice. These communications with respect to property are not privileged.

3. I merely state the obvious when I state that there is a recognized solicitor-client privilege which of course involves counsel and client. See *Lacoutière J.A.* at p. 254:

We also agree with the learned motions court judge's analysis of the rationale for the protection of the solicitor-client privilege without which the legal system could not function.

4. I do not see that there is any such relationship between a client and auditor/accountant/bookkeeper. It should also go without saying that such a person may well be a source of a fund of information especially when the bankrupt is or claims to be lacking in records or parts thereof. I note these are not of the nature of solicitor/third party documents as discussed in *Biomedical Information Corp. v. Pearce* (1985), 47 C.P.C. 113 (Ont. Master) or *Goodman v. Minister of National Revenue*, [1968] 2 O.R. 814 (H.C.). The examination of Blum under s. 163 contained many suggestions by Blum in answer to questions concerning the financial arrangements of the bankrupt that the Trustee should inquire of Doane Raymond. For example, see Questions 204-205 and Answers thereto of the transcript of the examination of Blum conducted on May 26, 1994. Blum was quite specific:

(A 205)

I didn't pay \$175,000.00 (sic) a year so I have to explain these statements. You can invite Les Nochomovitz and he'll talk about it, or Bruce.

I am certain that it would be very helpful for the process for Doane Raymond to assist and explain and especially when there appear to be missing original journals. The records that Doane Raymond could have concerning the investigation done concerning the preparation of financial statements may well be the best evidence available of the foundation material.

5 As I read *Re Long* (1978), 29 C.B.R. (N.S.) 225 (Ont. S.C.) Cory J. at p. 227 was merely warning of the dangers of the *potential* for abuse. He was not saying that such an examination by the Trustee would automatically result in an abuse. Given the shocking paucity of material relating to the financial affairs of the bankrupt found at the premises of the bankrupt or subsequently delivered to the Trustee (e.g. lack of monetary records and not having original journals), I do not see that the Trustee can be accused of embarking on a fishing expedition, especially when the request is made of Doane Raymond which as a professional firm would have to have satisfied itself in accordance with the principles of the CICA (including sampling techniques and verifications) relating to its review of the financial statements of the bankrupt. (See *Maksymyk Homes & Building Supplies Ltd. (Receiver of) v. Canada Mortgage & Housing Corp.* (1989), unreported decision of Manitoba Court of Queen's Bench (M.J. No. 230) at pp. 4-5) [now reported at (sub nom. *Maksymyk Homes & Building Supplies Ltd. (Trustee of) v. C.M.H.C.*) 74 C.B.R. (N.S.) 209]. I do not see that the demand of the Trustee in these circumstances could be characterized as unfair and abusive. See paras. 16-17 of *Re Leard* (1994) unreported decision of the Ontario Court of Appeal (O.J. No. 719) [now reported at 25 C.B.R. (3d) 210], where Weiler J.A. said [at p. 215]:

[para. 16] With respect to the second argument, that the proposed examination would be unfair or oppressive, Kennedy J. concluded ...:

It is clear that the Trustee will be unable to complete its investigation and prepare the necessary accounting without the examination of Graat and the production of the documentation which he has. The proposed examination is critical to the investigation of the Trustee. Graat is the sole means by which the Trustee can obtain the missing documentation.

[para. 17] There would appear to be an ample evidentiary basis for Kennedy J. to come to this conclusion and accordingly the proposed examination is not unfair or abusive. The applicant argued that the proposed examination was simply a "fishing expedition" by the Trustee on behalf of the creditors who were down, and that this was not the role of the Trustee. In response to this argument, the respondent points out that the Trustee could advance trustee's remedies of fraudulent preference and settlement as part of the role of Trustee and that this was an additional reason why the action was not abusive. I accept this submission.

[Emphasis added in these reasons.]

6 I do not think that *Re Cry-O-Beef Ltd.* (1985), 64 C.B.R. (N.S.) 42 (Que. S.C.) should be taken to stand for the proposition that the trustee must prove just cause in a vacuum. It should also be noted that the Quebec Superior Court in that instance was dealing with whether a *particular* memo should be produced. It was only within that context that Desjardins J. said at p. 46:

Celui qui invoque les dispositions de l'art. 133 doit dévoiler le but poursuivi afin de permettre un tribunal de vérifier si la demande est faite sur la base de l'arbitraire, ou, pour des motifs sérieux, dans le cadre visé à cet article. La preuve de la justification incombe à celui qui en exige la production. En l'espèce, cette preuve n'a pas été faite.

7 In conclusion, I am of the view that the Trustee is entitled to proceed notwithstanding the claim of client-professional (accountant/auditor) privilege, non-property of bankrupt and unfair and abusive investigation based on the situation in this case. It also seems clear from *Bankruptcy & Insolvency Law of Canada*, 3d ed., L.W. Houlden and C.H. Morawetz at p. 6-18.5 (1994), that the bankrupt (and a fortiori here Blum) does not have the right to be present and/or ask questions when others are being examined. See *Goode v. Tom Goode &*

Son Investments Ltd. (1979), 33 C.B.R. (N.S.) 101 (B.C. S.C.).

8 I would have thought that it would have been more productive and fruitful for Doane Raymond to have pursued enquiries of the Trustee so as to make the production, examination and inspection more meaningful and avoid a great deal of wastage of time and money rather than immediately proceeding with this motion without pre-alerting the Trustee. This is particularly so when the last information which the Trustee had was that Mr. Nachomovitz was requesting an indulgence to have time to assemble the material so as to convenience himself regarding his vacation, an indulgence accorded him without expression of concern or doubt.

9 Costs are awarded to the Trustee as requested in the amount of \$1000. Doane Raymond is to pay same forthwith.

Order accordingly.

Copyright © CARSWELL, a Division of Thomson Canada Ltd. or its licensors. All rights reserved.

Carl Holm

From: James.a.kirby@ca.pwccglobal.com
Sent: November 14, 2002 10:55 AM
To: kfredeen@deloitte.ca
Subject: RE: Hickman Equipment request for working papers

Mr. Fredeen:

Further to the attached letter, please advise me when the information will be provided. If you are not prepared to provide the information, please let me know by return email.

Jim

James A. Kirby, CA, CIRP
Senior Vice-President
PricewaterhouseCoopers Inc.
St. John's, NF

Telephone 709-722-1535 (direct)
709-722-3883 (office)
Fax 709-722-1428

No. 2002 OTT 0352
This is Exhibit "B" referred to in the
affidavit of James Kirby
sworn before me this 26th day of
February, 2003

A Barrister of the Supreme Court of
Newfoundland and Labrador

Deloitte & Touche LLP
800 Sun Life Tower
Box 40
150 King Street West
Toronto, ON
M5H 1J9

PricewaterhouseCoopers Inc.
Atlantic Place
Box 75, 215 Water Street, Suite 802
St. John's, NL
Canada A1C 6C9
Telephone +1 (709) 722 3883
Facsimile +1 (709) 722 1428

Attention: Mr. Kenneth J. Fredeen, General Counsel

October 11, 2002

Gentlemen:

Re: Hickman Equipment (1985) Limited (HEL)

PricewaterhouseCoopers Inc. (PwC) is the Receiver and Trustee in Bankruptcy of HEL.

PwC writes in the capacities noted to require you to produce to PwC any property of HEL in your possession and any document in electronic or hardcopy form of any kind relating in whole or in part to HEL, its dealings or property from January 1, 1997 to the present and in particular to produce:

1. All working papers pertaining to the audit of HEL for the fiscal years 1997, 1998, 1999 and 2000, together with all working papers developed or prepared in respect of the calendar year 2001;
2. All correspondence to and from or relating to HEL including copies of all correspondence conducted by email relating in whole or in part to HEL, its dealings of property during the period January 1, 1997 to the present;
3. All books, documents or papers of any kind relating to the inventory of HEL in the period January 1, 1997 to the present;
4. All reports, memos, correspondence, files or documents of any kind prepared for or relating to any work performed by you alone or in connection with others for HEL during the period January 1, 1997 to the present.
5. All invoices submitted to HEL for any services rendered by you for the period January 1, 1997 to present.

PRICEWATERHOUSECOOPERS

Please advise within seven days that the material requested will be delivered to the undersigned within the next three weeks.

Attached for your information and assistance are copies of decisions I believe you will find relevant, namely: *Sun Squeeze Juices Inc.*, a decision of Justice Farley of the Ontario Court of Justice in Bankruptcy; and *Re Network Forest Products Ltd.*, a decision of Justice Cummings of the Ontario Superior Court of Justice.

It is our hope that we can work cooperatively in dealing with the matters raised by this letter so as to avoid the necessity of a court application.

Yours very truly,
PricewaterhouseCoopers Inc.
Receiver

Per:

James A. Kirby, C.A., C.I.R.P.
Senior Vice-President

JAK/cmc

Encl.

Deloitte-Oct11.doc

(2)

Bcc. Mr. Carl Holm, Merrick Holm, Barristers & Solicitors - P.O. Box 1054, 1801 Hollis St., Suite 2100, Halifax, NS B3J 2X6

Mr. Fred Constantine, Patterson Palmer Hunt Murphy - Scotia Centre, 235 Water St., St. John's, NL A1C 5L3

Mr. Larry Ward, PricewaterhouseCoopers - 145 King St., W., 18th Floor, Toronto, ON M5H 1V8

(3)

PRICEWATERHOUSECOOPERS

Deloitte & Touche LLP
800 Sun Life Tower
Box 40
150 King Street West
Toronto, ON
M5H 1J9

COPY

PricewaterhouseCoopers Inc.
Atlantic Place
Box 75, 215 Water Street, Suite 802
St. John's, NL
Canada A1C 6C9
Telephone +1 (709) 722 3883
Facsimile +1 (709) 722 1428

Attention: Mr. Kenneth J. Fredeen, General Counsel

No. 200201T0352

This is Exhibit "C" referred to in the
affidavit of James Kirby
sworn before me this 26th day of
February, 2003

December 12, 2002

Dear Kenneth:

A Barrister of the Supreme Court of
Newfoundland and Labrador

Re: Hickman Equipment (1985) Limited (HEL)

Thank you for the photocopy, received on December 2, 2002, of the e-mail you attempted
to send me on November 25, 2002 in response to my letter of October 11th.

In your e-mail, you have asked:

"With respect to Deloitte & Touche prepared documents,
could you please advise as to why these documents are
required and the planned use of same. Your request is
expansive and your further advice on the intended use would
be helpful. Please let me know if a meeting would be
helpful."

The documents are requested to enable PricewaterhouseCoopers Inc. to carry out its duties
as Receiver of HEL and Trustee of the Estate of HEL in Bankruptcy.

The documents are all in the nature of books, documents or papers which relate in whole or
in part to HEL, its dealings or property, and are requested pursuant to the provisions of
Section 164(1) the BIA.

Please advise whether you are prepared to provide the material requested.

In my original letter of October 11, 2002, I had asked to be advised within 7 days that the
material would be provided within 3 weeks but did not hear from you until December 2,
2002. Unless I hear by December 18, 2002 that you will make the material requested
available no later than January 10, 2003, it seems I must assume you will not.

PRICEWATERHOUSECOOPERS

I do not see any object in a meeting unless its purpose is to discuss how the material requested is most effectively and efficiently made available to us on or before January 10, 2003.

Yours very truly,
PricewaterhouseCoopers Inc.
Receiver

Per: James A. Kirby
James A. Kirby, C.A., C.I.R.P.
Senior Vice-President

JAK/cnc
Encl.
Deloitte-Dec12.doc

•(2)

02/26/2003 15:52 FAX 7221428

PWC PAS

+ Merrick Holm

002

SENT BY:DELOITTE & TOUCHE

; 1-17- 3 ; 4:27PM ;PARTNER AFFAIRS/RISK

7221428;# 2/ 3

Deloitte & Touche LLP
 800 Sun Life Tower
 Box 40
 150 King Street West
 Toronto, ON M5H 1J8
 Canada

Tel: (416) 874 3875
 Fax: (416) 599 8009
 www.deloitte.ca

**Deloitte
 & Touche**

January 17, 2003

DELIVERED BY FAX

Mr. James A. Kirby, C.A., C.I.R.P.
 PriceWaterhouseCoopers Inc.
 Atlantic Place
 Box 75
 #802 - 215 Water Street
 St. John's, Newfoundland A1C 6C9

Dear Mr. Kirby:

Subject: Deloitte & Touche LLP vrs. Hickman Equipment (1985) Limited

This letter is in response to your letter of December 12, 2002 and, more specifically, the request by PriceWaterhouseCoopers Inc. ("PwC") for production of certain documents from Deloitte & Touche LLP ("Deloitte").

Deloitte has cooperated with PwC throughout these proceedings and it is our intention to cooperate as PwC completes its work in its capacity as trustee in bankruptcy for Hickman Equipment (1985) Limited, though this cooperation must not result in prejudicing the interests of Deloitte. As previously stated, we have no issue with providing the trustee with Hickman documents. But prior to releasing any Deloitte documents, we require your assurances that the information contained in the Deloitte documents will be revealed only to:

- i) The inspectors appointed by the Court in respect of the bankruptcy of Hickman Equipment (1985) Limited (the "Inspectors");
- ii) Any creditor (a "Section 38 Creditor") who obtains an order pursuant to section 38(1) of the *Bankruptcy and Insolvency Act* authorizing him or her to take a proceeding;
- iii) The solicitors for the Trustee, the Inspectors and any Section 38 Creditor (except any such solicitors who also act for any creditors of Hickman Equipment (1985) Limited in connection with evaluating or prosecuting an independent claim of the creditor relating to the bankruptcy of Hickman Equipment (1985) Limited), and;
- iv) Any experts or advisors retained by the Trustee, the Inspectors, or any Section 38 Creditor to assess or evaluate the documents.

Furthermore, it is our position that those persons who are given access cannot reveal the information to any other third party and that all such persons given access to the information shall only use such

**Deloitte
 Touche
 Tohmatsu**

No. 2002 OIT 0352
 This is Exhibit 51 referred to in the
 affidavit of James Kirby
 sworn before me this 26th day of
February, 2003.

A Barrister of the Supreme Court of Newfoundland and Labrador

Mr. James A. Kirby, C.A., C.I.R.P.
January 17, 2003
Page 2

information in relation to the affairs of the bankrupt, but not in connection with a claim brought by such person against Deloitte.

We look forward to receiving your confirmation of these conditions.

Yours truly,



Kenneth J. Fredeen
General Counsel

Carl Holm

From: james.a.kirby@ca.pwccglobal.com
Sent: January 20, 2003 2:30 PM
To: kfredeen@deloitte.ca
Cc: cholm@merrickholm.com
Subject: RE: Hickman Equipment audit working paper and other files

Mr. Fredeen:

This is to acknowledge receipt of your faxed letter dated January 17, 2003. We are reviewing your letter and will reply relating to your conditions over the next few days.

Jim

James A. Kirby, CA, CIRP
Senior Vice-President
PricewaterhouseCoopers Inc.
St. John's, NF

Telephone 709-722-1535 (direct)
709-722-3883 (office)
Fax 709-722-1428

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from any computer.

La présente communication n'est destinée qu'... à ou qu'aux personne(s) mentionnée(s) et peut contenir des informations confidentielles ou privilégiées. Toute révision, reproduction, retransmission ou autre dissémination de cette communication ainsi que toute mesure prise sur la foi de son contenu par une personne ou une entité autre que son destinataire désigné est strictement interdite. Si vous recevez ce courriel par erreur, veuillez contacter l'expéditeur et le supprimer de tout ordinateur.

No. 200201T0352
This is Exhibit "F" referred to in the
affidavit of James Kirby
sworn before me this 26th day of
February, 2003

A Barrister of the Supreme Court of
Newfoundland Labrador

Carl Holm

From: james.a.kirby@ca.pwccglobal.com
Sent: February 21, 2003 12:06 PM
To: kfredeen@deloitte.ca
Cc: cholm@merrickholm.com
Subject: RE: Hickman Equipment request for working papers

Ken:

If possible, I would like to have a discussion this afternoon with you and the Receiver's counsel, Carl Holm of Merrick Holm in Halifax, after 12:30 EST. We would like to discuss your January 17, 2003 letter. Please let me know by return email what time is satisfactory to you.

Jim

James A. Kirby, CA, CIRP
Senior Vice-President
PricewaterhouseCoopers Inc.
St. John's, NF

Telephone 709-722-1535 (direct)
709-722-3883 (office)
Fax 709-722-1428

The information transmitted is intended only for the person or entity to which it is addressed and may contain confidential and/or privileged material. Any review, retransmission, dissemination or other use of, or taking of any action in reliance upon, this information by persons or entities other than the intended recipient is prohibited. If you received this in error, please contact the sender and delete the material from any computer.

Carl Holm

From: Carl Holm
Sent: February 21, 2003 3:28 PM
To: Kenneth J. Fredeen (E-mail)
Cc: Jim Kirby (E-mail)
Subject: Hickman Equipment (1985) Limited

Ken;

I am acting for PWC in its capacity as Receiver and Trustee of the above noted. I have a copy of your letter of January 17 addressed to Jim Kirby of PWC.

Jim and I called this afternoon to discuss.

The court has set Feb 27 for PWC filing applications in respect of issues it wishes the court to address with a reply date of March 7 and hearing date of March 12.

The availability of the materials requested to PWC as Receiver and Trustee are issues PWC needs addressed if it is to proceed with its mandate.

We had been calling to discuss to see whether we could have agreement in respect of availability and terms so we would not need to apply.

I now need to leave for the afternoon. but am available Monday morning for a call as is Jim Kirby.

Can you call Jim at 1-709-722-3883 or 1-709-722-1535 to arrange a time for a conference call. Absent resolution PWC will be applying for an order.

Best Regards

Carl

Carl A. Holm, Q.C.
Merrick Holm
902-482-7001

The information in this e-mail and attachments is privileged and confidential. The information is intended only for the use of the individual to whom it is addressed and any other distribution, copying or disclosure is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone or reply by e-mail to the sender. Thank you.

Carl Holm

From: Carl Holm
Sent: February 25, 2003 10:04 AM
To: Kenneth J. Fredeen (E-mail)
Cc: Jim Kirby (E-mail)
Subject: Hickman- Deloitte & Touche.

Dear Ken :

Further to our attempted calls (J. Kirby & myself) on Friday, J. Kirby's attempted call of yesterday and my e-mail to you of Friday and not having heard back from you , As an application needs to be filed by Feb 27 PWC will be proceeding with an application. As earlier indicated the date for filing replies is March 7 . The hearing date March 12.. You will of course be provided with a copy of the application.

Regards

Carl

Carl A. Holm, Q.C.
Merrick Holm
902-482-7001

The information in this e-mail and attachments is privileged and confidential. The information is intended only for the use of the individual to whom it is addressed and any other distribution, copying or disclosure is strictly prohibited. If you have received this communication in error, please notify us immediately by telephone or reply by e-mail to the sender. Thank you.

Carl Holm

From: Fredeen, Kenneth J. (CA - Toronto) [kfredeen@deloitte.ca]
Sent: February 25, 2003 10:05 AM
To: Carl Holm
Cc: Jim Kirby (E-mail)
Subject: RE: Hickman- Deloitte & Touche.

Thanks, Carl. My apologies but I have been in meetings. Could you clarify for me what application you are referring to and what is to be heard on March 12. I had not received a written response to the position being taken by Deloitte & Touche on the production of documents.

I am just heading into a meeting and then have to be in court for the balance of the day. I am in the office for the balance of the week if we need to set up a conference call. Ken

-----Original Message-----

From: Carl Holm [mailto:cholm@merrickholm.com]
Sent: Tuesday, February 25, 2003 9:04 AM
To: Fredeen, Kenneth J. (CA - Toronto)
Cc: Jim Kirby (E-mail)
Subject: Hickman- Deloitte & Touche.

Dear Ken ;

Further to our attempted calls (J. Kirby & myself) on Friday, J. Kirby's attempted call of yesterday and my e-mail to you of Friday and not having heard back from you . As an application needs to be filed by Feb 27 PWC will be proceeding with an application. As earlier indicated the date for filing replies is March 7 . The hearing date March 12.. You will of course be provided with a copy of the application.

Regards

Carl

Carl A. Holm, Q.C.
Merrick Holm
902-482-7001

> The information in this e-mail and attachments is privileged and
> confidential. The information is intended only for the use of the
> individual to whom it is addressed and any other distribution, copying or
> disclosure is strictly prohibited. If you have received this
> communication in error, please notify us immediately by telephone or reply
> by e-mail to the sender. Thank you.
>
>

Carl Holm

From: Carl Holm
Sent: February 25, 2003 10:30 AM
To: 'Fredeen, Kenneth J. (CA - Toronto)'
Cc: Jim Kirby (E-mail)
Subject: RE: Hickman- Deloitte & Touche.

The judge in the Hickman matter has directed PWC to bring any issues it has forward by way of application on the 27th.

I appreciate your time table is jammed. As a result I can not wait to draft an application.

Perhaps you or your secretary can call to schedule a conference call with Jim and I. Jim's # 709-722-1535 mine 902- 482-7001

Regards

-----Original Message-----

From: Fredeen, Kenneth J. (CA - Toronto) [mailto:kfredeen@deloitte.ca]
Sent: February 25, 2003 10:05 AM
To: Carl Holm
Cc: Jim Kirby (E-mail)
Subject: RE: Hickman- Deloitte & Touche.

Thanks, Carl. My apologies but I have been in meetings. Could you clarify for me what application you are referring to and what is to be heard on March 12. I had not received a written response to the position being taken by Deloitte & Touche on the production of documents.

I am just heading into a meeting and then have to be in court for the balance of the day. I am in the office for the balance of the week if we need to set up a conference call.
Ken

-----Original Message-----

From: Carl Holm [mailto:cholm@merrickholm.com]
Sent: Tuesday, February 25, 2003 9:04 AM
To: Fredeen, Kenneth J. (CA - Toronto)
Cc: Jim Kirby (E-mail)
Subject: Hickman- Deloitte & Touche.

Dear Ken ;

Further to our attempted calls (J. Kirby & myself) on Friday, J. Kirby's attempted call of yesterday and my e-mail to you of Friday and not having heard back from you . As an application needs to be filed by Feb 27 PWC will be proceeding with an application. As earlier indicated the date for filing replies is March 7 . The hearing date March 12.. You will of course be provided with a copy of the application.

Regards

Carl

Carl A. Holm, Q.C.
Merrick Holm
902-482-7001

1 An application has been brought by the trustee to examine Mr. Kenneth Wilford pursuant to the provisions of s. 133(1) of the Bankruptcy Act, R.S.C. 1970, c. B-3. The relevant section provides as follows:

133. (1) The trustee, upon ordinary resolution passed by the creditors or upon the written request or resolution of a majority of the inspectors, may, without an order, examine under oath before the registrar of the court or other authorized person, the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property and may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power relating in all or in part to the bankrupt, his dealings or property.

2 The affidavit of Mr. Aykroyd, chartered accountant of the city of Peterborough, states that he is the resident manager for Dunwoody Limited, the trustee of the estate of the bankrupt. The affidavit contains as Ex. 2 a direction from Don Lamont. It is in the following terms:

I, Don Lamont, being the sole inspector of the above estate hereby authorize Dunwoody Limited, trustee, to examine Kenneth Wilford under oath and to order him to produce any books, documents, correspondents [sic] or papers in his possession or power relating in all or in part to the bankrupt's dealings with the said Wilford on the matter of an option to purchase property and a deposit of \$1,500.00. Trustee is hereby authorized to direct estate solicitor to provide him with all necessary assistance on the matter.

3 An appointment was then duly served upon Mr. Wilford. Mr. Wilford did not attend. Mr. Wilford's solicitor contends that s. 133 of the Bankruptcy Act does not apply. He states firstly that there is no evidence before the court of the interest of Mr. Wilford in the affairs of the bankrupt. That submission I cannot accept, for the affidavit material includes the direction of Mr. Lamont, the inspector, which in turn refers to the option to purchase. That in my opinion is sufficient to demonstrate the interest that Mr. Wilford has in the affairs of the bankrupt.

4 It was next contended that Mr. Wilford does not fall within the ambit of s. 133(1). I cannot accept that contention for there are many examples that might be given where the deposit or when the interest in real estate of the bankrupt was the most significant asset of the bankrupt's estate. In such circumstances the trustee would be duty-bound to examine fully and carefully in regard to the interest in realty and the deposits paid and to pursue such interests that were for the benefit of the creditors of the bankrupt.

5 Lastly it is stated that the trustee is attempting to do indirectly what it could not do directly. For that position I have a great deal of sympathy. Although it is not all before me by way of material I accept the submissions made by both counsel, that the history of this matter would indicate that the bankrupt had entered into an offer with Wilford before he had his assignment in bankruptcy. There was a dispute between the bankrupt and Wilford at the time of closing, and the bankrupt then brought an action against Wilford for the return of the deposit. Pleadings were exchanged between the parties. Before discoveries could be held the bankrupt made his assignment. The same solicitors are acting for the trustee as acted for the bankrupt in the action against Wilford. Further, in January 1978, it would appear that the solicitors for the trustee advised the solicitor for Wilford that they were authorized by the trustee to proceed with the action. I then have some very serious misgivings as to the bona fides of the application. However, on principle it would appear that the Bankruptcy Act has given specific powers to the trustee to examine Wilford pursuant to s. 133(1).

6 There may be many instances where it is essential for the benefit of the creditors of the bankrupt that the trustee obtain as much information as possible before he determines whether or not to proceed with an action or undertake an action on behalf of the bankrupt's estate. The principle thus given is of great importance and ought not, in my opinion, to be unduly fettered or restricted. It would seem that in many situations the trustee can proceed with an examination which is, in effect, a discovery, without there being payment of security costs for the protection of the other parties. That right is prone to abuse, and no doubt in some instances, if it were exercised without restraint by a trustee, it could become so abusive that the court would take steps to restrict the practice. In this case it seems appropriate to require the respondent, Wilford, to re-attend on an appointment to be examined. In my view there was a valid objection raised by the respondent, and he ought not to be penalized by way of costs. The only costs therefore will be the costs of the trustee out of the estate.

Application granted.