NOVA SCOTIA COURT OF APPEAL
Citation: *Levick v. Canada Revenue Agency*, 2020 NSCA 2

Date: 20200107
Docket: CA 485235
Registry: Halifax

Between:

Edward Mark Levick

Appellant

v.

Canada Revenue Agency

Respondent

Judge:	The Honourable Justice Peter M. S. Bryson
Appeal Heard:	October 7, 2019, in Halifax, Nova Scotia
Subject:	Bankruptcy. Filing proof of claim. Dividends.
Summary:	Mr. Levick owed Canada Revenue Agency $161,477.56 in taxes, penalties, and interest. He filed a Proposal which was rejected, so he was deemed to make an assignment in bankruptcy. CRA failed to file a proof of claim after receiving Notice to do so within 30 days in accordance with s. 149 of the *Bankruptcy and Insolvency Act*. The Trustee then prepared a Statement of Receipts and Disbursements showing a $108,512.44 payment to Mr. Levick. CRA then filed a claim, but Mr. Levick objected that CRA was out of time because CRA had not filed within 30 days or obtained an extension pursuant to s. 149(2) of the *Act*. CRA argued that it could file at any time in accordance with s. 150 of the *Act*. Mr. Levick responded that the words in s. 149(2) "notwithstanding anything in this *Act*" precluded CRA's reliance on s. 150. He sought distribution of the $108,512.44 to himself. The motions judge dismissed his motion. Mr. Levick appealed.

Issues: Was CRA precluded from filing a claim pursuant to s. 149 or could it do so relying on s. 150?

Result: Appeal dismissed. Section 149 of the *Act* provides that a dividend "will be declared" if the recipient of the Notice does not file a claim or obtain and extension to do so. In the unusual circumstances of this case, where CRA was the only creditor, s. 149 did not apply because without CRA's claim, no dividend would be declared as s. 149 contemplates. Section 150 has no such time limit. A dilatory creditor may not be able to share in a dividend because it is declared before the creditor files its proof of claim. But the creditor is not time-barred from filing. Whether s. 149 otherwise has the draconian effect for which Mr. Levick argued, need not be resolved in this case.

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Judges:	Beveridge, Hamilton and Bryson, JJ.A.
Appeal Heard:	October 7, 2019, in Halifax, Nova Scotia
Held:	Appeal dismissed, per reasons for judgment of Bryson, J.A.; Beveridge and Hamilton, JJ.A. concurring
Counsel:	Timothy Hill, Q.C. and Meaghan Kells, for the appellant Deanna M. Frappier, Q.C., for the respondent

Reasons for judgment:

Introduction

[1] In the unusual circumstances of this case, Edward Mark Levick says he should be discharged from a tax debt which he went bankrupt to avoid, while retaining virtually all his assets, owing to Canada Revenue Agency's failure to promptly pursue its claim.

[2] The Honourable Justice Ann E. Smith did not agree. She dismissed Mr. Levick's motion to disallow payment of a dividend to CRA (2019 NSSC 45).

[3] Mr. Levick maintains that the judge erred by failing to properly apply s. 149 of the *Bankruptcy and Insolvency Act* which requires a creditor to file its proof of claim within 30 days of notification to do so by the Trustee. He adds that s. 150 of the *Act* – which has no time limit for filing of a claim – does not apply where a creditor has received a s. 149 notification and has failed to file a proof of claim or obtain an extension to do so.

[4] The hearing judge did not directly confront the apparent conflict between the foregoing sections but relied upon the general principle embodied in s. 150 that creditors may file claims at any time to share in dividends of undistributed assets of the estate of a bankrupt.

[5] While Mr. Levick is correct that the judge did not resolve the suggested conflict between ss. 149 and 150, nevertheless for reasons that follow she did not err in allowing a dividend payment to CRA in the circumstances of this case.

[6] It will be convenient to begin with some factual background, followed by a consideration of the judge's decision, Mr. Levick's argument that s. 149 of the *Act* precluded her reliance on s. 150 and concluding with an analysis of the applicability of ss. 149 and 150 to the facts of this case.

Background

[7] CRA alleged Mr. Levick received a benefit arising from property transfers to him from his solely owned company which owed taxes. CRA assessed Mr. Levick $161,393.23, inclusive of interest and penalites, for outstanding corporate income tax debt of his company.

[8] On October 31, 2016, Mr. Levick filed a Proposal under the *Bankruptcy and Insolvency Act*. Mr. Levick's Statement of Affairs attached to the Proposal identified the CRA debt as his principal liability.

[9] CRA filed a proof of claim in the Proposal for $161,477.56 which included $78,657.99 in interest and penalties, in addition to the principal. CRA voted against the Proposal which resulted in its defeat. Mr. Levick was therefore deemed to have made an assignment in bankruptcy and his property vested in the Trustee in accordance respectively with ss. 57(a) and 71 of the *Act*.

[10] On September 11, 2017, the Trustee telephoned CRA and was informed that CRA would not file a proof of claim in the bankruptcy because "the personal income tax liability was very small and the bulk owed related to a corporate debt".

[11] On November 16, 2017, the Trustee forwarded to CRA a "Notice Requiring Person to Prove Claim" on or before December 18, 2017. No response was received from CRA within those 30 days. CRA's proof of claim at the Proposal stage did not apply to the bankruptcy proceeding.

[12] On November 24, 2017, the Trustee sent a Notice of Bankruptcy, First Meeting of Creditors, and Impending Automatic Discharge to CRA.

[13] On December 19, 2017, the Trustee issued a Statement of Receipts and Disbursements identifying a surplus of $108,512.44 to be remitted to Mr. Levick as debtor. No proved claims or dividend payments were noted on the Statement. The Statement was duly forwarded to the Office of the Superintendent of Bankruptcy for comment. That Office queried the Statement because it made no note of any dividend payable to CRA.

[14] On January 9, 2018, CRA filed a proof of claim with the Trustee. On January 16, 2018, the Trustee issued an Amended Statement of Receipts and Disbursements which acknowledged CRA's claim and provided for the payment of a dividend to CRA of $103,086.82. Mr. Levick objected that CRA had filed out of time.

[15] Mr. Levick moved under s. 34 of the *Act* for directions. In particular he sought an order requiring the Trustee to reject CRA's "late filed" proof of claim and to proceed with distribution in accordance with the Final Statement prepared on December 19, 2017 which provided for the payment of the $108,512.44 surplus to him.

[16] Justice Smith rejected Mr. Levick's motion. He appealed, arguing that the judge misinterpreted ss. 149 and 150 of the *Act*. Both sections deal with payment of dividends to creditors but for reasons developed further below, Mr. Levick says that s. 149 is the relevant section and s. 150 does not apply in this case.

The judge's decision and Mr. Levick's challenge

[17] Section 149(1) of the *Act* provides for notification to creditors of proposed payment of a dividend:

> *Notice that final dividend will be made*
>
> 149 (1) The trustee may, after the first meeting of the creditors, send a notice, in the prescribed manner, to every person with a claim of which the trustee has notice or knowledge but whose claim has not been proved. The notice must inform the person that, if that person does not prove the claim within a period of 30 days after the sending of the notice, the trustee will proceed to declare a dividend or final dividend without regard to that person's claim.

[18] Section 149(2) forecloses the claim of notified persons, unless the Court extends time to file a proof of claim:

> *Court may extend time*
>
> (2) Where a person notified under subsection (1) does not prove the claim within the time limit or within such further time as the court, on proof of merits and satisfactory explanation of the delay in making proof, may allow, the claim of that person shall, notwithstanding anything in this Act, be excluded from all share in any dividend [. . .]

[19] Mr. Levick argues that because notification of a pending dividend was given to CRA in accordance with s. 149 and no proof of claim was filed or court extension to late file was granted, CRA is not entitled to any dividend.

[20] For its part, CRA relies on the general language of s. 150 of the *Act* which says:

> *Right of creditor who has not proved claim before declaration of dividend*
>
> 150 A creditor who has not proved his claim before the declaration of any dividend is entitled on proof of his claim to be paid, out of any money for the time being in the hands of the trustee, any dividend or dividends he may have failed to receive before that money is applied to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before his claim

> was proved for the reason that he has not participated therein, except on such terms and conditions as may be ordered by the court.

[21] The judge accepted CRA's submissions. She reasoned:

> [14] If CRA is prevented from sharing in any distribution, Mr. Levick will have received a windfall as a result of CRA's failure to file in a timely way.
>
> [15] The interpretation to be given to s. 150 is significant. That section suggests that the proof of claim and the timing of the distribution of the dividend are related. If the claim is not proven before the distribution has been made, the creditor is not entitled to disturb that dividend. If the money is still in the hands of the trustee, the creditor may still prove his claim even if out of time.

[22] The judge relied on Justice Hallett in *Bank of Nova Scotia v. Janzen (Trustee of)* (1989), 90 N.S.R. (2d) 67 (T.D.) at para. 6:

> ***To disallow a creditor's proof of claim filed before the distribution of a dividend is too harsh a penalty, even if the creditor was negligent in filing its proof in the first instance. The objective of bankruptcy legislation to give all creditors an opportunity to share in the assets can be achieved by penalizing the late filing creditor by charging against the creditor's share of the estate the cost of additional work required by the Trustee to alter the dividend sheet, etc.*** This is the principle referred to in the cases cited in *Pilot Butte*. In my opinion, the learned Registrar erred in failing to consider the basic principle that allows creditors with proven claims to share in the estate if the distribution has not been made before the claim is filed. In this case, there was not going to be any further distribution and, considering all the circumstances, to disallow the Bank to participate in a share of the amounts available for distribution is an improper exercise of discretion. In my opinion, the Bank should be allowed to participate pursuant to the power given to the court in s. 121 [now s. 150] of the *Bankruptcy Act*.
>
> [Emphasis added]

[23] *Janzen* itself relies on venerable authority that a creditor may prove a claim at any time provided it does not interfere with already declared dividends unless the Court so permits. For example, Lord Davey put it this way in *Harrison v. Kirk*, [1904] A.C. 1 at p. 6:

> …being so, the Court of Chancery usually fixed a time within which the creditors could come in and prove their debts; and obvious convenience rendered that necessary, because otherwise the administration would have been hung up for ever. No doubt, as has been pointed out***, the language in which the time was fixed was somewhat peremptory; it told people that they would be excluded from***

> ***the benefit of the decree if they did not come in within the time***. But it has long been settled that the language so used was in terrorem only, and that ***the effect of it was merely this***, and nothing more: that ***any creditor who did not come in and prove his debt before the day fixed ran the risk of some of the assets being administered and disposed of*** by the Court in payment of other creditors; and in that way the fund for the payment of his debt might be imperilled, or if the estate was insolvent he might lose a portion of the dividends which he would otherwise have received.
>
> [Emphasis added]

Other authorities include: *Hicks v. May* (1879), 13 Ch. D. 236 (C.A.); *Brown v. Lake* (1847), 63 E.R. 1008 (Ch.D.); *Re Bryant,Isard & Company* (1925), 5 C.B.R. 571 (Ont. S.C.).

[24] Nevertheless, Mr. Levick insists the judge was wrong in law. Correct statutory interpretation precludes the conclusion she reached. Mr. Levick argues that *Janzen* is distinguishable because in that case the creditor had not received a notification to file a proof of claim in accordance with s. 149 and therefore the broad remedial authority of s. 150 was unimpaired and Justice Hallett was free to apply it.

[25] Mr. Levick's distinction here appears to depend on the quotation from Justice Hallett (para. 22 above). But the record in *Janzen* shows that a s. 149(1) Notice was sent to creditors (then s. 120(1) of the *Act*, para. 1 of *Janzen*).

[26] In any event, Mr. Levick especially draws our attention to the following emphasized language in s. 149(2):

> Where a person notified under subsection (1) does not prove the claim within the time limit or within such further time as the court, on proof of merits and satisfactory explanation of the delay in making proof, may allow, the claim of that person shall, ***notwithstanding anything in this Act***, be excluded from all share in any dividend [. . .]
>
> [Emphasis added]

[27] Mr. Levick says this means that s. 149 is a complete "code" when notice to file a proof of claim has been given. A person so notified may still prove a claim within thirty days – or within such further time as a court may allow – but otherwise is excluded from "all share in any dividend". So the remedial provisions of s. 150 can have no application.

[28] Mr. Levick adds that this is the interpretation placed on these sections in the case of *125258 Canada Inc. (Trustee of) v. Walker* (1986), 64 C.B.R. (N.S.) 183 (Quebec Superior Court – Registrar in Bankruptcy) which Houlden & Morawetz, *Bankruptcy and Insolvency Law of Canada*, 4th ed, relies upon to summarize as follows:

> Section 150, which deals with the effect of late filing of a proof of claim, has no application to s. 149(1). If a notice to prove has been given under s. 149(1) and the creditor has not proved a claim, a creditor cannot, by filing a claim, receive the protection of s. 150: *125258 Canada Inc. (Trustee of) v. Walker* (1986), 64 C.B.R. (N.S.) 183 (Que. S.C.). [. . .]
>
> The remedial provisions of s. 150 do not apply where a creditor has received a notice under s. 149(1) to prove a claim and has failed to do so or has not obtained an extension of time for doing so. Such a creditor must first obtain an extension of time under s. 149(2) and file a claim before seeking the benefit of s. 150 (citing *Walker*).
>
> [G§183 and 184]

[29] The correct principles of statutory interpretation are not in doubt. They are more easily stated than applied. There is no contest here about the principle which Mr. Levick correctly summarizes citing the Supreme Court of Canada in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27 at para. 21:

> [21] Although much has been written about the interpretation of legislation (see, e.g., Ruth Sullivan, *Statutory Interpretation* (1997); Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed. 1994) (hereinafter "*Construction of Statutes*"); Pierre-André Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991)), Elmer Driedger in *Construction of Statutes* (2nd ed. 1983) best encapsulates the approach upon which I prefer to rely. He recognizes that statutory interpretation cannot be founded on the wording of the legislation alone. At p. 87 he states:
>
> > ***Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.***
>
> Recent cases which have cited the above passage with approval include: *R. v. Hydro-Québec*, [1997] 3 S.C.R. 213; *Royal Bank of Canada v. Sparrow Electric Corp.*, [1997] 1 S.C.R. 411; *Verdun v. Toronto-Dominion Bank*, [1996] 3 S.C.R. 550; *Friesen v. Canada*, [1995] 3 S.C.R. 103.
>
> [Emphasis added]

[30] Confronted with the opposing authority of *Walker* which held that the remedial provisions of s. 150 had no application where a creditor had been notified and had not applied for an extension to file in accordance with s. 149, the judge chose to favour the policy described in *Janzen*. She concluded:

> [23] With respect, the reasoning in *Janzen* is more persuasive. A just distribution requires that some consideration be given to the rights of a just claim made by a negligent claimant. The use of s. 150 to allow for late filing does not mean that the filing limits have no meaning. The creditor who files late has lost the benefit of participating in any distribution that has already been made. The claim may be subject to other conditions to reflect the lack of diligence on the part of the creditor.

[31] The *Bankruptcy and Insolvency Act* does not describe its objectives. We must resort to the case law. Two objectives relevant in this case are the equitable distribution of assets of the debtor to creditors and the debtor's financial rehabilitation unencumbered by past debts (*Vachon v. Canada (Employment & Immigration Commission)*, [1985] 2 S.C.R. 417 at p. 429, citing *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, at p. 120). The two principles are really correlatives; the bankrupt gets the latter and the creditors, the former.

[32] These general principles must be read in relation to more specific policy decisions which the legislative language reflects. For example, there are different classes of creditor who enjoy different forms of priority. Similarly, there are some debts which are not released by discharge and survive bankruptcy.

[33] In this case, what is the provenance of the time limitation for filing in s. 149 which Mr. Levick says prevents payment of a dividend to CRA in accordance with s. 150? This question requires consideration of some history.

[34] The origins of ss. 149 and 150 of the current *Act* can be found in British antecedents. Section 43 of the 1869 *Bankruptcy Act* of the United Kingdom empowered the trustee to pay dividends to creditors who had proved their debts provided they did so before declaration of a dividend – they could not participate in dividends already declared. But there was no time limit within which a creditor must file a proof of claim. Such a requirement was introduced into the 1889 U.K. *Bankruptcy Act* (s. 62), but the Court could extend the time. Absent prejudice to others, the courts invariably extended time to file proofs of claim (*Re McMurdo Penfield v. McMurdo*, [1902] 2 Ch. 684 (C.A.) at pp. 699-700).

[35] Canada's first codification of bankruptcy law was embodied in the 1919 *Bankruptcy Act*, SC 1919, c. 36 which was heavily reliant on the U.K. *Act* of 1883. The 1919 Canadian predecessor of the present-day s. 150 permitted late filing creditors to participate in dividends, but not to receive anything from dividends previously declared:

> 37 (3) Any creditor who has not proved his debt before the declaration of any dividend or dividend shall be entitled to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend or dividends, but he shall not be entitled to disturb the distribution of any dividend declared before his debt was proved by reason that he has not participated therein.

[36] The predecessor of the current s. 149 which imposes a time limit on creditors also appears in s. 37 of the 1919 *Act*:

> 37 (6) When the trustee has realized all the property of the bankrupt, or authorized assignor, or so much thereof as he can, in the joint opinion of himself and of the inspectors, be realized without needlessly protracting the trusteeship, he shall declare a final dividend, but before so doing he shall give notice by registered prepaid letter posted to the persons whose claims to be creditors have been notified to him but not established to his satisfaction, there if they do not establish their claims to the satisfaction of the court within a time limited by the notice (which shall be within thirty days after the mailing or service of the notice), he will proceed to make a final dividend without regard to their claims.
>
> (7) After the expiration of the time so limited, or if the court on application by any such claimant grants him further time for establishing his claim, then on the expiration of such further time, the property of the bankrupt, or authorized assignor shall be divided among the creditors who have proved their debts, without regard to the claims of any other persons.

[37] Section 37(3) anticipates the current authority of the Court in s. 150 of the *Act* to allow a creditor to participate in a dividend not yet declared. Subsections 6 and 7 contemplate the giving of notice to creditors who have not proved their claims, and provides for distribution, notwithstanding unproved claims, after the passage of 30 days.

[38] Amendments made in 1921 (SC 1921, c. 17) created the language now under scrutiny in current ss. 149(1) and (2). The relevant portions of the 1921 amendments said:

> 37 … The trustee may, at any time after the first meeting of creditors, give notice by registered mail prepaid to every person of whose claim to be a creditor with a provable debt the trustee has notice or knowledge, but whose said debt has not been proved, that if such person does not prove his debt within a period limited by the notice and expiring not sooner than thirty days after the mailing of the notice the trustee will proceed to make a dividend or final dividend without regard to such person's claim.
>
> If any person so notified does not prove his debt within the time limited or within such further time as the court, upon proof of merits and satisfactory explanation of the delay in making proof, may allow, the claim of such person shall, ***notwithstanding anything in this Act***, be excluded from all share in any dividend.
>
> [Emphasis added]

The emphasized language is new.

[39] What prompted the 1921 amendments? Hansard is ambiguous as the following exchange between members of the House discloses:

> **Mr. CANNON:** ***How can this section [now s. 149] be reconciled with the preceding one [now s. 150]? The preceding one says they can always obtain payment providing they prove their claim, whereas this section provides that unless the creditor's claim is proved within a certain time, the trustee may proceed to make a dividend without regard to his claim.***
>
> **Mr. GUTHRIE (for the government):** With regard to dividends and the distribution of dividends, there are no less than nine sections, and the one I just read is only one showing what rights the creditor has in respect to making proof of his claim. ***This is to hurry up distribution. In practice it has been found that creditors withheld proof of their claim until after notice of the final dividend, and this delayed the winding up of the estate to the great prejudice of everyone concerned. This changes the present law to this effect, that the trustee may at any time after the first meeting of the creditors – he does not have to wait until after the final notice*** – give notice by registered mail to every person of whose claim to be a creditor with a provable debt he has notice or knowledge.
>
> **Mr. CANNON:** Under the first clause [s. 150], if there is no such notice sent, the creditor may be paid even after the dividend list has been prepared, but under this clause [s. 149] the creditor has to prove his debt within thirty days after the mailing of the notice, or he will have no further claim.
>
> (See *House of Commons Debates*, 13th Parl, 5th Sess, No. 3 (3 May 1921) at 2930-31)
>
> [Emphasis added]

[40] The foregoing shows that Mr. Cannon had identified the apparent contradiction between ss. 149 and 150 now in dispute in these proceedings. Mr. Guthrie did not directly answer Mr. Cannon's question but described the purpose of the amendments as "to hurry up distribution". He elaborated that creditors had previously withheld proofs of their claims until after notice of final dividend, thus delaying the winding up of the estate to the great prejudice of all concerned – presumably creditors and bankrupt both. These comments are consistent with the policy purposes described by Lord Davey in *Harrison* (para. 23 above). The only concrete "change" Mr. Guthrie identified was the timing of Notice. He did not say it trumps what is now s. 150.

[41] One last amendment was made to what is now s. 150 in the new *Bankruptcy Act* of 1949. Then s. 109 – currently s. 150 – was amended to read:

> A creditor who has not proved his claim before the declaration of any dividend is entitled upon proof of his claim to be paid out of any money for the time being in the hands of the trustee any dividend or dividends he may have failed to receive, before that money is applied to the payment of any future dividend, but he is not entitled to disturb the distribution of any dividend declared before his claim was proved by reason that he has not participated therein, ***except on such terms and conditions as may be ordered by the court.***
>
> [Emphasis added]

[42] The emphasized passage permitted creditors to participate in dividends already declared, should the Court so decide. It has a liberalizing effect in favour of the dilatory creditor.

[43] Neither the exchange between Messrs Cannon and Guthrie, nor the broadening of what is now s. 150 in the 1949 *Act*, support the draconian interpretation of s. 149(2) for which Mr. Levick contends. But for reasons that follow, we need not decide that question.

Does s. 149 of the Act preclude payment of any dividend to CRA?

[44] To answer this question a closer look at what transpired in this case is necessary. Certainly the *Act* allows the bankrupt to receive any surplus after payment of creditors:

> 144 The bankrupt, or the legal personal representative or heirs of a deceased bankrupt, is entitled to any surplus remaining ***after payment in full of the***

> ***bankrupt's creditors*** with interest as provided by this Act and of the costs, charges and expenses of the bankruptcy proceedings.
>
> [Emphasis added]

[45] The November 16 Notice issued by the Trustee to CRA described the intended declaration of a dividend:

> TAKE NOTICE that ***a dividend is intended to be declared*** in the above matter and that if you do not prove your claim on or before 18th day of December, 2017 or within such further time as the Court may allow, ***we shall proceed to make a dividend*** without regard to claims which have not been filed.
>
> [Emphasis added]

[46] We know this to be inaccurate. The Trustee could not "proceed to declare a dividend without regard" to CRA, because without CRA, there would be no dividend. There were no creditors except CRA. This is plain from the Statement of Receipts and Disbursements dated a month later. The only distribution described is proposed payment of a $108,512.44 surplus to Mr. Levick.

[47] In the *Act*, ss. 149 and 150 appear under the main heading "Dividends". The subheading for s. 149 specifically says "Notice that final dividend will be made". But that is not what the Final Statement said. No creditors or dividends were described in that Statement and no dividend was declared. No other creditors were involved because there were no other creditors. The Notice sent to CRA was a Notice that a dividend would be paid within the meaning of s. 149(1). Because it would be impossible to declare a dividend if CRA did not file, the facts fall outside the language of s. 149(1). The prohibition in s. 149(2) precluding payment of a dividend notified under s. 149(1) could not apply.

[48] The Notice could be viewed as disingenuous in this sense: without CRA there could be no dividend. The whole exercise was designed to rid Mr. Levick of his CRA debt. No doubt he did not anticipate a six-figure bonus. He could not count on CRA's indolence.

[49] In contrast to s. 149, s. 150 is preceded with the following title, "Right of creditor who has not proved claim before declaration of dividend". Section 150 preserves the longstanding policy of courts administering bankruptcy law to allow a creditor to prove a claim "at any time during the administration" (*Janzen* at para. 8 quoting *Re McMurdo*) provided that the creditor does not interfere with the prior distribution of the estate unless the Court so permits.

[50] Section 150 applies to the circumstances of this case because CRA had not yet filed and no dividend could be declared by the Trustee as contemplated by s. 149(1) and threatened in the Trustee's November 16 Notice. CRA's proof of claim clearly fell within the language of s. 150 which begins, "A creditor who has not proved his claim before the declaration of any dividend is entitled on proof of his claim to be paid [. . .]".

[51] This application of the facts to ss. 149 and 150 not only accords with the ordinary language of those sections, but also with a key policy purpose of the *Act* identified in *Vachon* which is to ensure equitable distribution of the estate to creditors. Payment of a windfall to Mr. Levick, whose bankruptcy filing was obviously prompted by his CRA liability, frustrates rather than fulfills that purpose. It also supports the policy which s. 144 implements of only paying a surplus to the bankrupt once creditors have been paid.

Conclusion

[52] Section 149 does not apply in the special circumstances of this case because without CRA no dividend could be paid if CRA failed to file a proof of claim in accordance with s. 149(1). So the exclusion in s. 149(2), authorized by the s. 149(1) Notice, could not apply.

[53] Section 150 applies because it places no time limit on filing a proof of claim. This interpretation furthers the objective of equitable treatment of creditors, prior to the payment of any surplus to the debtor.

[54] Whether *Walker* was correctly decided need not be resolved in this case. It could have been avoided altogether if CRA had applied for an extension as contemplated by s. 149(2).

[55] Counsel for CRA says that CRA did not seek an extension because it was thought unnecessary and later the Trustee amended the Statement of Affairs to reflect payment to CRA. She counters Mr. Levick's submission by arguing that it was he who should have applied to expunge the dividend to CRA under s. 135 of the *Act*. The judge was not diverted by these procedural arguments, but it seems clear from her exchanges with counsel and from her decision, that she would have granted leave to this "just but delinquent creditor", had it been sought. On the record, she would have been fully justified in doing so.

[56] I would dismiss the appeal, but in view of CRA's conduct which prompted the litigation, without costs.

Bryson, J.A.

Concurred in:

Beveridge, J.A.

Hamilton, J.A.