IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Witch's Glen Gold Inc. (Re), 2015 NSSC 93

Date: March 26, 2015
Docket: B-38542
Registry: Halifax

District of Nova Scotia
Division No. 1
Court No. 38542
Estate No. 51- 125774

In the Matter of the Bankruptcy of Witch's Glen Gold Inc.

D E C I S I O N

Registrar:	Richard W. Cregan, Q.C.
Heard:	January 20 and 29, 2015, in Halifax Nova Scotia
Counsel:	Pamela Clarke, for Steve Furlotte John O'Neill, for Witch's Glen Gold Inc.

By the Court:

Background

[1] This is an application by Steve Furlotte for a bankruptcy order pursuant to Section 43 of the *Bankruptcy and Insolvency* Act, R.S.C. 1985, c. B-3 (*BIA*) against Witch's Glen Gold Inc., a Nova Scotia company (WGG).

[2] Mr. Furlotte lives in Big River, New Brunswick. He has for some time been in the mining business. He had owned the single issued share in Flex Mining & Exploration Limited (Flex), a Nova Scotia company, incorporated on July 2, 2012. It owns property and mining rights in Nova Scotia.

[3] In 2013 he decided to sell the share and the debt owed to him by Flex in the amount of $951,006.69. Flex had incurred this debt through advances to it by Mr. Furlotte for various expenses in the development of its mining operation.

[4] In August 2013, he received an inquiry from Gary MacKenzie and James Matheson, who were President and Secretary respectively of WGG.

[5] This inquiry led to an agreement dated August 20, 2013, entitled AGREEMENT FOR THE PURCHASE OF SHARES AND SHAREHOLDER LOAN OF FLEX MINING & EXPLORATION LIMITED, between Mr. Furlotte as "Vendor" and WGG as "Purchaser" with Flex as the "Corporation", (Purchase Agreement). It provided that Mr. Furlotte would sell the share and the debt to WGG.

[6] The purchase price was $2,000,000.00. It was to be paid in three installments, evidenced by three promissory notes each dated September 3, 2013. The particulars of these notes are as follows:

1. $500,000.00 due on November 2, 2013;

2. $500,000.00 due on September 1, 2014;

3. $1,000,000.00 due on September 1, 2015.

[7] Payment of the notes was secured by an agreement dated September 3, 2013, entitled SHARE PLEDGE AGREEMENT, among WGG as "Purchaser", Mr. Furlotte as "Creditor", Flex as the "Company" and Gregory A. Mullen, as "Trustee", (Pledge Agreement).

[8] WGG failed to make payment on the first note when it became due. There was agreement that the payment date would be extended to June 1, 2014, if a payment of $60,000.00 was made before December 31, 2013. The $60,000.00 was received before that date. This left $440,000.00 to be paid on this note. A further payment of $40,000.00 was received on or about June 4, 2014 leaving a balance of $400,000.00.

[9] A cheque for this balance was provided by WGG to Mr. Furlotte early in July 2014, but he was asked by Mr. Matheson to hold it until it could be funded by an anticipated transaction. Mr. Furlotte presented the cheque for payment on October 3, 2014, but he was advised by the bank that there were insufficient funds in WGG's account.

[10] Early in August 2014, Mr. Furlotte had his lawyer prepare an agreement, entitled AMENDING AND ACKNOWLEDGEMENT AGREEMENT between himself, WGG and Flex (Amending Agreement) which amended certain provisions in the Purchase Agreement and Pledge Agreement. It was executed by Mr. Furlotte, WGG and Flex. About the same time, a further payment of $50,000.00 was made, reducing the amount owing on the first note to $350,000.00 and thus the total debt to $1,850,000.00. No further payments have been made.

Passages from Agreements

[11] It is convenient to quote, from the Pledge Agreement:

> **8. Rights of Creditor on Default in payment of the Indebtedness**
>
> If default is made by the Pledgor in payment of the Indebtedness as required pursuant to the Promissory Notes, and the Creditor gives notice of such default to the Trustee (herein referred to as the "Default Notice"), the Trustee shall forthwith give notice to the Pledgor of such default and, if such default is not

rectified or disputed by the Pledgor in writing within 15 days of the giving of such notice by the Trustee to the Pledgor, the Trustee shall deliver to the Creditor the Share Certificates immediately, whereupon:

…

(b) the Creditor may, pending the sale of or realization on the Pledged Shares, have all or any of the Pledged Shares registered in its name or in the name of its nominee, and shall be entitled but not bound or required, to vote the Pledged Shares at any meeting at which the holder thereof is entitled to vote and, generally, to exercise any of the rights that the holder of the Pledged Shares may at any time have; and

…

(d) notwithstanding any other provision of this Agreement, including, without limitation, the foregoing provisions of this section 8, upon realizing upon the Pledged Shares the Creditor shall be entitled to retain ownership of the Pledged Shares for himself on account of complete, full and final satisfaction of the Indebtedness in the event that the Indebtedness then exceeds the value of the Pledged Shares, provided that the Creditor provides the Pledgor with written notice of his intention to do so.

And from the Amending Agreement:

E. The Purchaser and the Vendor have reached mutual agreement on certain new terms that will apply to the Promissory Notes as of and from the effective date hereof, including, without limitation but in particular, payment of the outstanding balance and the amount in default under the First Promissory Note and the Vendor's ability to realize on the Pledged Shares in the event that there is any default in payment of the Promissory Notes following the effectiveness of his Agreement;

4. **Default in Payment under Promissory Notes** – In the event that the Purchaser makes any default in payment of the Promissory Notes, including for greater certainty as the First Promissory Note is it is (sic) amended hereunder, the Vendor shall be entitled to make an immediate realization of the Pledged Shares pursuant to the Share Pledge Agreement without providing any notice period to the Vendor or without allowing the Purchaser the benefit of any period of time to cure or remedy such a default, notwithstanding that such a notice/cure period may have been provided for under the terms of the Share Pledge Agreement or that it may be otherwise provided for pursuant to any statue of the Province of Nova Scotia or any statute of Canada that may be applicable to realization of the Pledged Shares.

> 5. **Retention of Pledged Shares in Satisfaction of Obligations Owned** – In the event of a default in re-payment under any of the Promissory Notes, the Vendor hereby provides the Purchaser with express and written notice of its intention to rely upon sub-section 62(1) of the *Personal Property Security Act* (Nova Scotia) and paragraph 8(d) of the Share Pledge Agreement as the basis for taking ownership of the Pledged Shares in satisfaction of the obligations owing to him pursuant to the Promissory Notes.
>
> 6. **Promissory Notes and Share Pledge Agreement** - Except as expressly modified and amended under this Agreement, the Promissory Notes and the Share Pledge Agreement shall remain unaltered from the form in which they were initially adopted and executed by the respective parties hereto, and such documents shall, after the date hereof, continue to be binding on the applicable parties hereto as same are modified pursuant to the terms of this Agreement.

These are the provisions which relate to the issues in dispute.

[12] As well, I quote for reference Subsections (1), (2) and (3) of Section 62 of the *Personal Property Securities Act*, Statutes NS 1995-96, c. 13, as amended (*PPSA*):

> 62 (1) After default, the secured party may propose to take the collateral in satisfaction of the obligation secured by it and shall give notice of the proposal to
>
> (a) the debtor or any other person who is known by the secured party to be an owner of the collateral;
>
> (b) a creditor or person with a security interest in the collateral whose security interest is subordinate to that of the secured party and
>
> (i) who has registered, before the notice of the proposal is given to the debtor, a financing statement that includes the name of the debtor or that includes the serial number of the collateral if the collateral is goods of a kind that are prescribed as serial numbered goods, or
>
> (ii) whose security interest was perfected by possession when the secured party seized or repossessed the collateral;

> (c) a judgment creditor whose interest in the collateral is subordinate to that of the secured party and who has registered, before the notice of the proposal is given to the debtor, a notice of judgment that includes the name of the debtor or that includes the serial number of the collateral if the collateral is goods of a kind that are prescribed as serial numbered goods; and
>
> (d) any other person with an interest in the collateral who has given a written notice to the secured party of that person's interest before the notice of the proposal is given to the debtor.
>
> (2) Where the interest in the collateral of any person entitled to a notice under subsection (1) would be adversely affected by the secured party's proposal, that person may give to the secured party a notice of objection within fifteen days after the notice under subsection (1) is given.
>
> (3) Subject to subsections (6) and (7), where a notice of objection is given pursuant to subsection (2), the secured party shall dispose of the collateral pursuant to Section 60.

[13] This section provides a secured creditor with the statutory remedy of foreclosure whereby it may take the collateral in full satisfaction of the obligation secured. Once exercised the creditor has no right to claim a deficiency. Once the notice is sent and no objection is filed, the debt is extinguished and the creditor acquires the collateral. This is an alternative to the remedy of seizing the collateral, selling it and making a deficiency claim, if applicable, as provided in Sections 60 and 61 of the *PPSA*. Creditors have to consider many factors in determining which course to take.

[14] A good analysis of this provision can be found in *Personal Property Security Law*, by Ronald C.C. Cuming, Catherine Walsh and Roderick J. Wood, Irwin Law 2005, at page 552, in Professor Walsh's *An Introduction to the New*

Brunswick Personal Property Security Act, at page 289, and **Island Kenworth Ltd. v. Laboucane**, 2004 BCSC 411 (Melnick J.).

[15] It is very clear in this section and in the commentary that before it is operative, the creditor must strictly comply with the requirements. There must first be default followed by the secured party proposing to take the collateral in full satisfaction of the debt and giving notice thereof to the debtor and certain subordinate creditors. They have fifteen days to give notice of objection.

Mr. Furlotte's Position

[16] Section 43 of the *BIA* requires for a bankruptcy order that the applicant prove that the unsecured debts of the debtor owed to it amount to $1,000.00 and that the debtor within six preceding months has committed an act of bankruptcy as defined in Subsection 42(1).

[17] Mr. Furlotte's position is that he can prove the elements necessary for a Bankruptcy Order. WGG owes him $1,850,000.00. It holds security which he values at $750,000.00, more than $1,000.00 of which is unsecured. As well WGG has committed acts of bankruptcy within six months of the filing of this application, namely, that it has given notice to a creditor that it has suspended, or is

about to suspend, payment of the debt, and that it has ceased to meet its liabilities generally as they become due.

WGG's Position

[18] WGG simply alleges that a proposal under Section 62 of the *PPSA* has been made by Mr. Furlotte and no objection has been taken or that he has taken the share in Flex in full satisfaction of the debt as provided in the quoted parts of the Pledge Agreement and the Amending Agreement. Either results in there being no remaining debt owed by WGG to him. Mr. Furlotte has thus failed to prove that he is owed $1,000.00 or more. On this ground WGG says the application should be dismissed.

Proposal under the *PPSA*

[19] The Pledge Agreement makes no mention of the *PPSA* except in paragraph 17 where WGG's right to receive a verification statement under this *Act* is waived.

[20] A letter from Mr. Furlotte's solicitor to WGG's solicitor, James Enman, dated May 29, 2014 refers to the PPSA. I quote the relevant paragraph:

> My client wishes to advise WGGI that in the event that payment of the entire amount of $440,000.00 is not made by June 1, 2014, my client will immediately proceed with strictly enforcing the rights and remedies available to him under the Share Pledge Agreement. In particular my client intends to rely upon his right, pursuant to paragraph 8(d) of the Share Pledge Agreement and the provisions of

> the *Personal Property Security Act* (Nova Scotia), to take ownership of the share that is the subject matter of the pledge in full and complete satisfaction of the obligations that WGGI owes to him. As trustee under the Share Pledge Agreement, you and your client can expect to hear from me on June 2, in the event that payment in full is not made by June 1.

[21] This reference is only to what Mr. Furlotte intends to do, if money is not paid and default continues. These are not operative words. They merely indicate Mr. Furlotte's intention. For there to be an operative notice of a proposal, there must be clear language that a proposal under the *PPSA* is being made followed up by the requirements in Section 62. Saying that he will rely on that section is not enough.

[22] Later in the Amending Agreement paragraph 5 there is reference to the *PPSA*. It provides that "in the event of a default" certain consequences will follow. This can only refer to a default happening later. Subsection 62 (1) of the *PPSA* requires that there first be default and then the creditor must give notice of the proposal.

[23] WGG wants this provision to permit a proposal to be made before there is default. This is putting the cart before the horse. The proposal cannot be given until after there is default. This is what both the language of paragraph 5 of the Amending Agreement and Section 62 of the *PPSA* both demand.

[24] There is mention of the *PPSA* in two "Without Prejudice" letters subsequent to the Amending Agreement. There is some question of their admissibility. If they are not admissible nothing more should be said of them. If they are admissible, the same can be said of the references they contain. Their wording is not sufficient to constitute the making of a proposal under the *PPSA*.

[25] Accordingly, I am satisfied that Mr. Furlotte cannot be deemed to have made such a proposal under the *PPSA*.

Proceeding under Paragraph 8(d) of the Pledge Agreement

[26] This paragraph requires careful examination. It lists what Mr. Furlotte can do to realize on his security. Specifically it:

(a) confirms that, if Mr. Furlotte sells the share, the Pledgor (WGG) shall be liable for any deficiency or, if there is a surplus after satisfaction in full, it shall be paid to the Pledgor;

(b) provides that pending sale or realization, the Share may be registered in the Creditor's name or nominee with the rights normally available to the holder;

(c) acknowledges that there could be problems respecting a private sale of the share resulting from securities laws;

(d) simply says that the creditor

> "shall be entitled to retain ownership of the Pledged Shares for himself on account of complete, full and final satisfaction of the Indebtedness in the event that the Indebtedness then exceeds the value of the Pledged Share, provided that the Creditor provides the Pledgor with written notice of his intention to do so". *(underlining added*)

[27] This parallels the provision of S. 62 of the *PPSA*. I think that to activate this provision there must be a written notice clearly stating that such is what Mr. Furlotte intended to do and in fact was so declaring that such was what he was doing.

[28] The references which are relied upon by WGG do not have the required provision. There are threats of what he may do, not declarations of what he is doing.

[29] The notice given in paragraph 5 of the Amending Agreement is not an unqualified statement of intention, that is, it is not the act contemplated by the Pledge Agreement to have the effect of satisfaction of the debt. It is a conditional statement that, if there is default, notice is already given that this is what Mr. Furlotte is going to do. Again it is a threat or simple advice of what can happen and is not an operative act. Furthermore specific notice of taking the share in

satisfaction of the debt can only be given once there is default. At this point default had not occurred.

[30] The Amending Agreement provides for payment of $400,000.00 by September 1, 2014. There was no default until September 2. The Amending Agreement appears to have been executed by all parties on or about August 8, 2014, long before there was default under its terms. It must be noted that in determining default the events prior to the execution of the Amending Agreement are not relevant. Time began to run again with this agreement. It is to be noted that there was a memorandum sent to Mr. Furlotte dated September 24, 2014 from Mr. Matheson and Mr. MacKenzie by which they acknowledge that they had reached another deadline "for your cash payout". Clearly this is an admission by them that Mr. Furlotte had not taken the share in full satisfaction of the debt.

[31] Paragraph 4 of the Amending Agreement simply provides that Mr. Furlotte shall be entitled without notice to take the share in satisfaction. He has taken the share under limited circumstances. There is nothing to conclusively determine that it was in satisfaction of the debt in full.

[32] Paragraph 5 of the Amending Agreement is not the notice required by the *PPSA* Section 62 nor under paragraph 8(d) of the Pledge Agreement. Its only

effect is to warn the debtor that he may act under one of these provisions. It does not constitute the act required to activate these provisions.

[33] All that Mr. Furlotte did with the share, including registering it in his own name, passing a special resolution dated October 2, 2014 and filing it with the Registrar of Joint Stock Companies on October 27, 2014, were things contemplated by subparagraph 8(a), (b) and (c) of the Pledge Agreement. Subparagraph (d) simply provides an entitlement to go further, something Mr. Furlotte has not done.

Accord and Satisfaction

[34] The foregoing discussion answers the allegation that Mr. Furlotte has taken the share in full satisfaction of the debt. He simply has not.

[35] However, counsel for WGG argued that with the Amending Agreement there has been an accord and satisfaction, that is, that the parties have made a new arrangement and Mr. Furlotte has taken the share in full satisfaction of the debt. This should be addressed.

[36] The Purchase Agreement provided the terms for the sale of the share. The Pledge Agreement provided the security to Mr. Furlotte for the performance of the Purchase Agreement. One must then carefully analyse how the Amending

Agreement alters the rights under the first two agreements. The following are the material points:

- The Amending Agreement acknowledges that there is mutual agreement regarding the new terms of payment, particularly regarding the amount owing on the first promissory note and Mr. Furlotte's ability to realize on the share on default under the note;

- It confirms the dates under which the second and third notes are to be paid;

- It provides that Mr. Furlotte shall on default be "entitled" to make realization of the share without the notice required under the Pledge Agreement. In effect, it provides for a waiver of notice and opportunity to cure any default.

- It purports to give WGG express and written notice of Mr. Furlotte's intention to make use of S. 62(1) of the *PPSA* or paragraph 8(d) of the Pledge Agreement to take ownership of the share.

- It provides that except for the modifications made in it, the notes and Pledge Agreement remain unaltered and continue to be binding.

[37] WGG's submission is in contrast to the submission of Mr. Furlotte's counsel that all the remedies of the Pledge Agreement remain in place and that notices provided are only assertions of intention and not operative notices required under either S. 62(1) of the *PPSA* or under the Pledge Agreement.

[38] Obviously, the Amending Agreement effectively amends certain provisions of the Pledge Agreement, but only to the extent its language demands. I do not see that the language shows an accord and satisfaction which has the result that Mr. Furlotte has taken the share in full satisfaction. The language makes it clear that the Amending Agreement does not constitute the act of giving notice under either of the two methods of taking title to the share. It speaks of entitlement or intention to do so. Clearly the notice of proposal under the *PPSA* has not been effected, and clearly Mr. Furlotte has not carried out any intention he may have had to take title to the share in full satisfaction. What he did was simply to take the share under the provision of paragraph 8(b) of the Pledge Agreement. This is not a provision which has the consequences alleged by WGG's counsel. It is a provision whereby Mr. Furlotte has been given as secured creditor a measure of control over the share to preserve his security pending resolution of the matter. This is consistent with the memorandum mentioned in [30]. The Pledge Agreement was amended but there was no satisfaction.

Value of Security

[39] The debt of WGG to Mr. Furlotte is $1,850,000.00. The original debt being the purchase price for the share and for the shareholder's loan owed to him was $2,000,000.00. Payments totalling $150,000.00 were received.

[40] The shareholder's loan was $951,006.69. Subtracting that from the purchase price gives $1,048,993.31. There is no allocation in the Purchase Agreement, but one may assume that the share would be worth somewhere in the vicinity of $1,000,000.00. It is only the share which is subject to the security. In the Application Mr. Furlotte values it at $750,000.00. There is some evidence to support that it has declined in value since the sale. It has not been paying its general expenses, e.g. insurance and utilities. I take this valuation in the circumstances to be reasonable.

[41] The valuation of a security is something a secured creditor must do with care. It limits what the creditor can recover from the secured collateral, leaving the balance to be claimed *pro rata* with all the unsecured creditors. Unless there is some ulterior motive involved, reality forces the creditor to be very careful in making this determination. There is nothing to suggest such motive or to suggest that this valuation is a sham.

[42] I reviewed this matter in **LaHave Equipment Ltd. (Re)**, 2007 NSSC 283. I quote from the following paragraphs:

> 51 It is not necessary that the exact amount of the unsecured debt be proved. What is required is that the petitioner make a reasonable estimate of the value of its security and then of the unsecured deficiency. I quote from *Re McKelvey*, [1983] O.J. No. 2348, 1983 CarswellOnt 200 where Sutherland, J. commented at para. 4 that
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> > the only obligation upon a petitioning creditor in such circumstances is to make a reasonable estimate of the value of its securities …
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> 52 I quote from: *Re C. Tokmakjian*, [2003] O.J. NO. 4667, 3003 CarswellOnt 4616 (Cameron J.)
>
> > 34 The petitioning secured creditor need not prove the value of its security. It need only provide an estimate which it must establish is not a sham or absurdly low. The petitioning creditor must establish that $1,000 of unsecured debt is owing.
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> 53 From *Re Hugh M. Grant*, [1982] O.J. No. 267, 1982 CarswellOnt 156 (Gray J.) at para. 20
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> > If the estimate by the petitioning creditor is real and not a sham, two authorities (*Re Button; Ex parte Voss*, [1905] 1 K.B. 602 (C.A.), and *Re Baker; Goodyear Tire and Rubber Co. v. Baker* (1973), 19 C.B.R. 73 (Ont)) stand for the proposition that the court should not enter into a determination of the true value after the declaration of the estimated value.
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> 54 From *Re 484030 Ontario Ltd.*, (1992) 12 C.B.R. (3d) 302 (Ont. Ground J.) at para. 26
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> > … it is not the function of the bankruptcy court, at the hearing of the petition, to value security. It is sufficient to find that there is at least $1000 owing to the petitioning creditor.
>
> And at para. 28

> It is therefore not necessary for the creditor to establish the process by which it valued its security unless its estimate is considered by the court to be a sham or absurdly low.

[43] Robertson, J. in the appeal of this decision (**LaHave Equipment Ltd. V. Royal Bank of Canada,** 2007 NSSC 381) quoted these passages and concluded in paragraph [13]:

> This is a correct statement of the law and in my view a correct application of the law to the facts that were before the registrar.

[44] There is nothing before me to suggest that this valuation was a sham, or anything other than a reasonable determination on Mr. Furlotte's part. Elsewhere I have found that Mr. Furlotte has done nothing whereby he should be deemed to have taken the share in full satisfaction of the debt. Thus there is in excess of $1,000 owed to Mr. Furlotte which is unsecured.

Acts of Bankruptcy

[45] Mr. Furlotte must prove that there has been an act of bankruptcy as defined in Section 42 within the six months preceding the filing of the application. The submission is that there are two such acts:

> (h) if he gives notice to any of his creditors that he has suspended or that he is about to suspend payment of his debts;

(j) if he ceases to meet his liabilities generally as they become due.

Notice of Suspending Payments

[46] As to the first act, I think the law is well summarized in the commentary in *The 2014-2015 Annotated Bankruptcy and Insolvency Act* (Toronto Carswell) 2014-1015 at page 153, D§11:

> A debtor commits an act of bankruptcy if the debtor gives notice to any of his or her creditors that the debtor has suspended or is about to suspend payment of his or her debts: s. 42(1) (h). The notice may be given orally: *Re Walker; Ex parte Nickoll* (1884), 13 Q.B.D. 469, 1 Mor. 188; *Re King Petroleum Ltd.* (1973), 19 C.B.R. (N.S.) 16, 2 O.R. (2d) 192, 42 D.L.R. (3d) 332 (Ont. S.C.). It is immaterial what form the notice takes and it does not have to use the word "suspend"; however, the notice must make it clear that the debtor is in effect suspending payment of debts.

[47] The application was made October 8, 2014. Thus the act relied upon must have occurred after April 8, 2014.

[48] The following incidents I think can be characterized as such a suspension.

- Mr. Furlotte was supplied on July 3, 2014 with a cheque for $400,000.00 by the company. He was advised to hold the cheque. Covering money was expected immediately. Shortly thereafter Mr. Matheson called him to hold

the cheque as an arrangement for funds to cover it had fallen through and there would be no funds to cover it. Mr. Furlotte presented the cheque for payment two months later. Still there were no funds to cover it.

- Payment dates were extended but by late September no money was available.

- A memorandum to Mr. Furlotte from Mr. Matheson and Mr. MacKenzie dated September 24, 2014 also referred to in [30] begins:

> "We are now at another deadline for your cash payout. Despite all our efforts it is not likely to occur by Friday."

Efforts to obtain financing now appear to have been in vain.

[49] The Concise Oxford Dictionary of Current English include in its entry for "suspend" the following:

> keep in undecided or inoperative state for a time, defer, temporarily annul, adjourn,

These words aptly describe what has happened.

[50] I am satisfied that this evidence proves that notice of suspension of payment has been given.

Ceasing to meet liabilities

[51] With respect to the second act, ceasing to meet liabilities generally as they become due, one must acknowledge that this is not a situation where there are several creditors who have not been paid. There is no specific evidence of whether there are other creditors. Evidence of nonpayment of various accounts owed by Flex is given, but these are not debts of WGG. It, however, suggests that WGG had no money to look after the expenses of what in effect has been its subsidiary. Consequently, we have a single creditor situation.

[52] Normally applications for bankruptcy orders involve insolvents who owe money to several creditors. The *BIA* is designed primarily to look after a multiple creditor situation. It is a form of creditor democracy. In the case of a single creditor, there are other remedies which can be used, such as a simple action for debt. There are decisions where the court has refused to grant an order to a single creditor. One is **re Atlantic Ova Pro Ltd.** 2006 NSSC 61 where the respondent was quite able to look after its other creditors, but had a serious contractual dispute with the applicant. An order was refused.

[53] However, the law on this point is found in **Re Holmes Re Sinclair** (1975), 20 C.B.R. (N.S.) 111 Ont., Henry J.) I quote paragraph 5:

> 5 I have carefully considered these decisions and it is clear that the Courts, in Ontario at least, have granted a receiving order on the basis of a default to one creditor in special circumstances. These circumstances are:
>
> > (a) the creditor is the only creditor of the debtor, and the debtor has failed to meet repeated demands of the creditor; in these circumstances he should not be denied the benefits of the Bankruptcy Act by reason of his unique character; or
> >
> > (b) the creditor is a significant creditor and there are special circumstances such as fraud on the part of the debtor which make it imperative that the processes of the Bankruptcy Act be set in motion immediately for the protections of the whole class of creditors; or
> >
> > (c) the debtor admits he is unable to pay his creditors generally, although they and the obligations are not identified.

[54] I think (a) applies. The record is a series of demands, negotiation, extensions, and amendments respecting payment during the six months before the application all too limited avail. Only $150,000.00 was paid on a $2,000,000.00 debt. The same records indicate that there is an implied admission that not only could it not pay Mr. Furlotte, it was without funds to address others though not specified.

[55] I am thus satisfied that (a) applies. The second act is thus proved.

Ambiguity

[56] WGG submits that there is ambiguity in paragraphs 4 and 5 of the Amending Agreement. Mr. Furlotte, as previously stated, says that these paragraphs merely

tell what he is entitled to do or may intend to do upon default under this agreement and should not be construed as the exercise thereof. WGG says that the wording is ambiguous and, as it was drafted by Mr. Furlotte's solicitor, following the *contra proferentem* rule, WGG's interpretation namely, that appropriate steps have been taken by Mr. Furlotte to cause title to the share to have vested in him in full satisfaction of the debt, should prevail.

[57] In this regard, I quote from **Eli Lilly & Co. v. Novapharm Ltd.** (1998), 227 N.R. 201 (S.C. C., Iacobucci, J.)

> 54 … The contractual intent of the parties is to be determined by reference to the words they used in drafting the document, possibly read in light of the surrounding circumstances which were prevalent at the time. Evidence of one party's subjective intention has no independent place in this determination.
>
> 55 Indeed, it is unnecessary to consider any extrinsic evidence at all when the document is clear and unambiguous on its face. In the words of Lord Atkinson in *Lampson v. The City of Quebec* (1920), 54 D.L. 4. 355 (P.C.):
>
> > "… the intention by which the Deed is to be construed is that of the parties as revealed by the language they have chosen to use in the Deed itself … [I]f the meaning of the Deed, reading its words in their ordinary sense, be plain and unambiguous it is not permissible for the parties to it, while it stands unreformed, to come into a Court of justice and say: 'Our intention was wholly different from that which the language of our Deed expresses …'".

[58] As well, I quote from *Geoff R. Hall, Canadian Contractual Interpretation Law,* 1st Ed *(*Markham, O NI Lexis Nexis, 2007 at pages 55 and 56*:*

> The first major restriction on use of the rule is the well-established requirement that a contract must be ambiguous before the rule can be applied.
>
> Since an ambiguity must exist before the *contra proferentem* rule is applied, it is an error for the analysis to go in the reverse order, with the rule applied first and an ambiguity being found as a result. As a result, the Supreme Court of Canada has described the application of the *contra proferentem* rule as the second step of a two-step interpretive process, the first step being the finding of an ambiguity. As a result of the requirement for ambiguity, it is not uncommon for consideration of a *contra proferentem* argument to stop abruptly as soon as the court finds that there is no ambiguity.
>
> Despite the clarity of the requirement that there be an ambiguity before the rule can be applied, it is somewhat less clear exactly what constitutes an ambiguity for purposes of invoking the rule. In general, ambiguity is considered only to exist if the provision in question can be read in either of two opposed senses. In other words, an ambiguity does not exist simply because there is a difficulty of interpretation or because a provision has an uncertain breadth. As a result, the rule is inapplicable where the two supposedly conflicting clauses can be reconciled.

[59] All that Paragraph 4 of the Amending Agreement does is acknowledge that, in the event of default, the Applicant has certain entitlements. Nothing in this paragraph constitutes an exercise of those entitlements.

[60] All that Paragraph 5 does is declares that in the future, if there is default under the Amending Agreement, Mr. Furlotte intends to rely on Section 62(1) of the *PPSA* and paragraph 8 (d) of the Pledge Agreement. It can only be once the Amending Agreement was executed that there can be default under it. An operative notice can only be given once the agreement is executed and there is default under it.

[61] I do not see that there is any ambiguity in these provisions. Thus the *contra proferentem* rule does not apply.

Conclusion

[62] I am satisfied that WGG owes Mr. Furlotte in excess of $1,000.00 and that it has committed two acts of bankruptcy. Thus the requirements for a bankruptcy order have been met. Such shall be issued.

R.