

IN THE SUPREME COURT OF THE YUKON TERRITORY

**IN THE MATTER OF THE BANKRUPTCY OF
15526 YUKON INC.**

**REASONS FOR JUDGMENT OF
MR. JUSTICE HUDSON**

[1] This is an application by Joni MacKinnon, the Applicant, for the hearing of her appeal. Her appeal is pursuant to s. 135(4) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended, and was filed on December 5, 2000.

[2] It is an appeal from the disallowance by R.B. Hagen Associates Limited, the Trustee in the Bankruptcy of 15526 Yukon Inc., which disallowance is dated October 2, 2000. Notice was duly served on Joni MacKinnon.

[3] The Notice of Disallowance of Claim stated:

15526 YUKON INC.

SUMMARY ADMINISTRATION

TAKE NOTICE THAT, as Trustee of the above estate, we have this day disallowed your claim in the estate to the extent of \$66,196.78 for the following reasons:

- (a) \$30,387.78 – legal costs for defence against 15526 Yukon Inc. – not awarded by the court against 15526 Yukon Inc.;

- (b) \$28,000.00 – wages – no contract by 15526 Yukon Inc. to pay wages
- (c) \$6,620.00 – use of property – no contract by 15526 Yukon Inc. for use of property.
- (d) \$1,192.00 – legal costs for defence against Black Sheep Aviation – not awarded by the court against 15526 Yukon Inc.

[4] A Notice of Motion was filed December 5, 2000 in the Supreme Court of the Yukon Territory stating:

This Appeal is pursuant to s. 135(4) of the *Bankruptcy and Insolvency Act*, S.C. 1992 c. 27, (the "Act").

[5] The orders sought were as follows:

1. An Order that the decision of the Trustee to disallow the Applicant's claim of \$30,384.78 for legal costs be reversed;
2. A Declaration that the Applicant's claim of \$30,384.78 for legal costs is a valid unsecured claim;
3. An Order that the decision of the Trustee to disallow the Applicant's claim of \$28,000.00 for wages be reserved;
4. A Declaration that the Applicant's claim of \$28,000.00 for wages is a valid unsecured claim;
5. An Order that the decision of the Trustee to disallow the Applicant's claim of \$6,620.00 for use of property be reversed;
6. A Declaration that the Applicant's claim of \$6,620.00 for use of property is a valid unsecured claim;
7. An Order that the decision of the Trustee to disallow the Applicant's claim of \$1,192.00 for legal costs for defence against Black Sheep Aviation be reversed;

8. A Declaration that the Applicant's claim of \$1,192.00 for legal costs for defence against Black Sheep Aviation is a valid unsecured claim;
9. In the alternative, an Order that the matter of Joni Mackinnon v. 15526 Yukon Inc., S.C. 99-A0090, be allowed to proceed pursuant to s. 69.4 of the Act;
10. An Order restraining the Trustee from distributing the assets of the Bankrupt's estate pending resolution of this matter;
11. Costs.

[6] After some adjournments and the filing of comprehensive affidavits, one by Joni MacKinnon having 48 paragraphs, and 16 exhibits, and another affidavit by Joni MacKinnon having 49 paragraphs and 20 exhibits, counsel made their submissions on December 17, 2001.

[7] These affidavits and a file containing five authorities were before the chambers judge on April 17, 2001, when the application (read "appeal") came on for hearing before Wachowich J. of the Supreme Court of the Yukon Territory. A best estimate from the clerk's notes is that submissions from both sides took approximately one hour in total. Bearing in mind that the extensive affidavits had been before the hearing judge for some period before chambers opened, it is not necessarily surprising that he gave his ruling from the Bench. The order in its entirety reads:

UPON THE APPLICATION of the Applicant, coming on for hearing the 17th day of April, 2001 and upon hearing J. Robert Dick, counsel for the Applicant and Richard Buchan, counsel for the Respondent,

THIS COURT ORDERS THAT:

1. The Trustee reconsider the claim of Joni MacKinnon

2. Mr. Robert Dick may serve as Joni MacKinnon's appointee to the Committee of Inspectors in the Bankruptcy.

Below (and this is meaningful):

APPROVED AS TO THE ORDER MADE:

J. Robert Dick (Signature)
Counsel for the Applicant

Richard Buchan (Signature)
Counsel for the Respondent

[8] On May 16, 2001 the Trustee wrote to the Applicant's solicitor, Mr. Dick, and stated:

Respecting the claim of Joni MacKinnon I advise that I have reconsidered it again and have revised the allowance from \$17,499.69 to \$19,239.40 which represents the total of the particular items allowed rather than deducting the amounts disallowed from the total of her claim as originally filed. Otherwise I have concluded that there is no basis upon which to change my original decision respecting the matters allowed.

[9] The next that the Trustee heard from Mr. Dick was on November 7, 2001, when a letter was written to the Trustee by Mr. Dick stating, *inter alia*:

To my knowledge, you have not yet produced this reconsideration.

[10] At this time, the position of the parties would appear to be as follows: The Applicant would say that whatever Wachowich J. did, it fell short of deciding the appeal under s. 135(4) of the *Bankruptcy and Insolvency Act*, and was some sort of interlocutory ruling. The Trustee asserts that the hearing before Wachowich J. was the hearing of the appeal and that the appeal was successful and that the Trustee complied with the ruling, reconsidered and altered his award, and communicated it to the

Applicant in good time. He further argues that the Applicant, from approximately May 16, 2001, or whenever the letter was deemed to have been received by Mr. Dick, until November 7, 2001, did nothing. Therefore, no appeal was filed against the order of Wachowich J. and no appeal or other application was made from the determination on the reconsideration by the Trustee. The matter of the claim of Joni MacKinnon to have the determination by the Trustee reversed is at an end, there being no rights of appeal surviving.

[11] On October 29, 2001, the Trustee gave notice of an intention to apply for final distribution, such application to be brought on to the Supreme Court of the Yukon Territory on November 30, 2001 at the hour of nine o'clock in the forenoon or so soon thereafter as the motion can be heard for an order of discharge.

[12] On November 13, 2001, Mr. Dick prepared and filed a Praecipe asking:

The Applicant, Joni MacKinnon, requests that the matter of her Appeal, filed herein on December 5, 2000, be set down for hearing on November 27, 2001 at 10:00 a.m.

[13] The *Bankruptcy and Insolvency Act* is a statute containing a complete code of dealing with the fact of bankruptcy, and the law of bankruptcy and insolvency.

Therefore, if the relief sought or the remedies sought is not to be found in the statute, then it is not in the court's power to order it.

[14] After deliberating over the affidavits, submissions and the court clerk notes, I make the following comments:

1. On the basis of the volumes of material which were before Wachowich J. on April 17, 2001, and in that it was a hearing of the motion, which describes itself as an appeal under s. 135(4), and notwithstanding the fact that the order made gives relief not sought in the Notice of Motion and fails to give other relief which was sought in the Notice of Motion, the order of Wachowich J. can only be considered as the hearing of the appeal of the Applicant.
2. The Applicant did nothing in the ensuing seven months to indicate objectively that this was not the case.
3. The Trustee, on the other hand, complied with the direction given in the ruling by Wachowich J. On May 16, 2001, he rendered his conclusions in writing and increased the allowance by approximately \$1,800.00 in favour of the Applicant.

[15] It is my finding that, there being nothing done by the Applicant or her solicitor within the appeal period from April 17th and, indeed, from then until this moment, and no application having been received to extend the time, I find the appeal from the disallowance by the Trustee was heard April 17, 2001 and this court is *functus*.

[16] Argument was made that the appeal under s. 135(4) should be by trial *de novo*. I do not find that a trial *de novo* grants a greater right of hearing or a fuller procedure than in the first instance, but would only repeat the procedure.

[17] I have concluded, therefore, that if the appeal pursuant to s. 135(4) is, in fact, an appeal by way of trial *de novo* then that has occurred since the original hearing, and the general hearing or reconsideration by the Trustee of the claim was on the basis of the contents of the proof without a hearing and with no submissions on behalf of the claimant as is provided by the *Act*.

[18] The applicant states that the right of appeal under s. 135(4) stayed alive throughout the period from May 16, 2001 to November 7, 2001. The case of *Points of Call Holidays Ltd. et al*, [1991] B.C.D. Civ. 530-01 (B.C.C.A.) is relevant to this point. In this case, an application to extend the time to appeal was under consideration, the reason being that the appeal notice time was 10 days shorter than the normal 30 days and inadvertence was the reason for the delay. The court is quoted as saying in the head note:

That is a factor to be taken into consideration when the Court is being asked to extend the time in an action in which the short time limit has been inadvertently overlooked. But it is not the only – nor the deciding – factor and the “considerable delay” in administering the bankrupt’s estate looms large in that regard for such delay, although inadvertently caused, “will occur to the ultimate prejudice of those making claims in the bankruptcy proceedings.”

[19] I also consider this factor in making the ruling that the appeal of Joni MacKinnon is no longer alive.

[20] The Trustee shall have its costs, to be paid out of the sums due the Applicant (claimant).

Hudson J.

Counsel for the Applicant

J. Robert Dick

Counsel for the Trustee

Richard Buchan