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BIA Preferences: Rebutting the Presumption of Intention to Prefer

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Case Commented On: *RPG Receivables Purchase Group Inc v American Pacific Corporation*, 2025 ONCA 371

One of the goals of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA) is to ensure a fair and equitable distribution of the bankrupt's assets to its creditors. To that end, the BIA preference provisions allow a trustee to claw back payments made by the debtor to a creditor if the payments result in a preference to one creditor over others. The debtor can make any payments it wants while solvent, but these payments become improper if they are made when the debtor is insolvent.

Several statutory requirements must be met in order to give rise to the rebuttable presumption that the debtor intended to prefer one of its creditors. This presumption can then be rebutted. One way is by raising a common law defence, that the debtor's dominant intent in making the payment was not to prefer the creditor, but to stay in business. The presumption *cannot* be rebutted by showing evidence that the creditor put pressure on the debtor to make the payment. Unlike the defence of staying in business, the prohibition against evidence of creditor pressure is statutory.

In *RPG Receivables Purchase Group Inc v American Pacific Corporation*, 2025 ONCA 371 (*RPG Receivables*), the Ontario Court of Appeal dealt with these aspects of preference law. It confirmed that the intention to stay in business defence must have been objectively reasonable, as in, the debtor's belief that the payment would allow it or assist it to stay in business must have been a reasonably held belief, and not simply "wishful thinking" (*Andrews (Trustee of) v Canada (Minister of National Revenue)*, 2011 MBQB 50 at para 47).

The Court also confirmed that evidence of pressure is inadmissible to rebut the presumption of intention to prefer but made clear that it can be used to provide context to the transaction. In this way, the Court seems to have found a way to consider creditor pressure in a way that is not inconsistent with the statute.

Facts

Specialty Chemical Industries Inc (Specialty) had one customer, Autoliv, a business relationship that generated several hundred thousand dollars' worth of revenue per month (at para 11). Specialty had three chemical suppliers, including American Pacific Corporation (AmPac). AmPac's product represented 21% of the products Specialty sold.
Specialty placed orders for chemical supplies with AmPac on a need-to-purchase basis; for each order, Specialty acquired on 45-day credit terms. In 2018, Specialty began defaulting on AmPac's

invoices; AmPac eventually warn Specialty that it was jeopardizing future chemical supplies. By June 2018, three of AmPac's invoices, totalling $412,664 USD, remained outstanding.

That same month, Specialty could not fulfill an order without obtaining two new deliveries from AmPac, representing about $100,000. AmPac maintained that it would not make additional deliveries to Specialty unless it paid its outstanding invoices and Specialty made payments to it totaling $400,000 USD. Two days later, AmPac filled Specialty's order for the delivery of chemicals.

Shortly after, AmPac terminated its relationship with Specialty. Specialty made a voluntary assignment into bankruptcy on June 25, 2018.

Decision Below

The bankruptcy judge found that the presumption of intent to prefer arose, as the required elements had been established: Specialty was insolvent at the time it made the payments to AmPac, the payments were made within the statutory period, and the payments had the effect of giving AmPac a preference over other creditors. In examining whether AmPac could rebut the presumption that the payments had been made "with a view to giving the creditor a preference", the judge found that Specialty had made the payments "out of a commercial necessity and to preserve Specialty's relationship with… Autoliv" (at para 24).

The judge noted that despite the payments not having preserved Specialty's relationship with Autoliv, from Specialty's perspective, the relationship could possibly have been sustained for at least a period of time during which Specialty could continue to keep its business afloat. From AmPac's perspective, the judge found that AmPac would view the payments as reasonably justified because they would preserve a relationship between Specialty and its only customer, without which the relationship would be severed, and Specialty would go out of business.

Ontario Court of Appeal Decision

The Ontario Court of Appeal had to decide whether the bankruptcy judge properly found that the presumption in section 95(2) of the BIA was rebutted.

The Court considered two arguments. First, that the judge erred by considering evidence of pressure, which, under the BIA, is inadmissible to rebut the presumption. Second, that the judge should not have treated the evidence as legally capable of rebutting the presumption because Specialty's intention to stay in business was not reasonable.

Evidence of Pressure

Section 95(2) provides that the presumption that the debtor intended to give the creditor a preference applies "even if [the payment] was made… under pressure – and evidence of pressure is not admissible to support the transaction".

The ONCA found that this provision does not render evidence of pressure inadmissible. The provision does prevent that evidence from being used to justify the transaction, but it could be used to obtain a proper understanding of the entire circumstances.

The bankruptcy judge had "used this evidence to situate the demands of [the creditor] – that its prior invoices had to be paid as a condition of supplying additional product – within the overall circumstances that bore on the intent of Specialty… [which was] to stay in business" (at para 35). The ONCA found that the bankruptcy judge had used the section properly, and not to justify the transaction.

Objectively Reasonable Belief

The Court found that in attempting to rebut the presumption, it was not enough for a debtor to simply assert that it had made the payment to stay in business; rather the debtor must also have a reasonable basis for its belief. Otherwise, the intent to stay in business cannot displace the intent to prefer the creditor.

The Court found that the bankruptcy judge, in finding that Specialty had made the payment because it believed that doing so would allow it to stay in business, did not consider whether that belief was reasonable. Failing to find a reasonable basis for the belief, the Court concluded that the judge had erred in failing to find the payments void as preferences.

My Analysis

In *Re Norris* (1996), 1996 ABCA 357, the Alberta Court of Appeal said that a preference is not illegal because a debtor intends to defraud its creditors. What makes it illegal is that it undermines the distribution scheme of the BIA, as well as the goal of fairly and equitably distributing the debtor's estate. Specifically, the Court said, "[i]t is called fraudulent because it prejudices other creditors who will receive proportionately less, or nothing at all, and upsets the fundamental scheme of the Act for equal sharing among creditors." (at para 16)

Several elements must be established for the presumption to prefer to arise, which I outlined in an earlier post (see here). Once the presumption arises, the creditor that received the preference can rebut the presumption if it can prove that the debtor made the payment for other reasons, namely, to stay in business or in the ordinary course of business. Under the statute, the creditor cannot rebut the presumption by showing it pressured the debtor into making the payment, though courts' treatment of this statutory prohibition has not been consistent (see Clayton Bangsund, But I Didn't Mean to: The Role of Intent in American and Canadian Anti-Preference Law, 50 Alta L Rev 815 (2013)).

Evidence of Pressure

The BIA states that when the presumption of intent to prefer arises, evidence of pressure by the creditor cannot be admitted to rebut the presumption. Specifically, the statute says that if the transaction has the effect of giving the creditor a preference, it is "presumed to have been made…

with a view to giving the creditor a preference – even if it was made… under pressure – and evidence of pressure is not admissible to support the transaction" (section 95(2)).

The problem, as courts recognized, is that the provision creates an unworkable paradox. The provision hinges on the debtor's intent, yet if the pressure exerted by a creditor to pay its debts is strong enough, it can effectively negate any genuine intent to prefer that creditor. In other words, creditor pressure can undermine the very intent the rule seeks to identify, yet evidence of pressure is not admissible to support the payment. Lord Cairns addressed this issue over a century ago when he maintained that a voluntary preference, "implying an act of free will", would be negated by pressure from a creditor (*Butcher v Stead*, (1875) LR 7 HL 839, cited in *Stephens v McArthur*, 1891 CanLII 63 (SCC) at p 452)). This was known as the "doctrine of pressure".

But our *Bankruptcy Act* of 1919 included a variation of the provision we have now, likely because Parliament feared creating the perverse incentive of having creditors argue the doctrine of pressure, rebutting the presumption, which would allow them to keep the preferential payment, by presenting evidence of their own pressure.

Courts have understandably had a difficult time with this internally inconsistent provision and have attempted to find ways around it. One way is through the "creditor diligence" defence, which they developed in response to this provision. The other way is to consider evidence of creditor pressure but in a way that is not contrary to the statute.

The "creditor diligence" defence puts the focus on the extent of the pressure by / the conduct of the creditor. Under this defence, creditors who exerted forceful pressure were seen as making a diligent effort to collect payment, and they were permitted to keep it. In *Legall (Trustee of Estate of Krawchenko) v Minister of National Revenue*, 2005 MBQB 97, the court found that the creditor had been pursuing the debtor "vigorously" and concluded that the debtor's dominant intention in making the payment was "to get the CCRA off her back" (quoting *Re Houston and Thornton*, [1973] OJ No 1315 (Ont SC – High Court of Justice) at p 103); here, the court found the presumption rebutted. See also *Re Norris*, 1994 CanLII 5263 (AB KB).

The problem with this defence is that it undermines the rule that evidence of pressure is inadmissible, and for that reason, it has been seen as reintroducing the doctrine of pressure by the back door. The other way courts have developed, which we see implied in the cases that relied on the creditor diligence defence, is to use evidence of pressure, but not to justify the transaction.

In *RPG Receivables*, the Ontario Court of Appeal did not mention the diligent creditor defence as a way to bring the evidence in, nor did it rely on the cases that used it. Rather, it seems to have recategorized the creditor diligence defence by bringing it under the staying in business defence. The Court maintained that while it could not use the evidence of pressure to justify the transaction, it could consider it to gain a broader understanding of the circumstances in which it was made and possibly the intention behind the transaction (at para 32). The Court affirmed the bankruptcy judge's findings, that Specialty paid AmPac "out of commercial necessity and to preserve Specialty's relationship with its only customer", and concluded that the payments had been made because of Specialty's intent to stay in business (at para 35).

Similarly, in *Orion Industries Ltd (Trustee of) v Neil's General Contracting Ltd*, 2013 ABCA 330, the Alberta Court of Appeal affirmed the lower court's use of evidence of pressure. There, the debtor's plan, which included a preferential payment to a creditor who had exerted pressure, was meant to avoid bankruptcy. The Alberta Court of Appeal found that a preference was not intended. In his book, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), Rod Wood argued that the creditor diligence defence is "essentially a sub-variant of transactions that are necessary to stay in business" (at 197). In these cases, we see how that can be accomplished.

Objectively Reasonable Belief

If a preferential payment is made with the belief that it would allow the debtor to stay in business, that belief must be objectively reasonable.

In this case, Specialty maintained that it had made the preferential payment to AmPac because it believed that by doing so, it could stay in business. Specialty had paid $400,000 USD to AmPac to facilitate the supply of a $100,000 USD product to be sold. The Court, in considering the specific benefits of the transaction to Specialty, found that Specialty's historic margin on sales was between 2% to 10%, and that this payment of $400,000 USD was done for the chance to recoup a mere $2000 to $10,000.

The Court maintained that the payment of $400,000 USD was not a plan that was objectively reasonable, as it "far exceeded any benefit" Specialty could receive from supplying the customer $100,000 USD worth of product it hoped to obtain from AmPac (at para 8). After the payment, Specialty had less than $35,000 left in its bank account and $11 million of unpaid liabilities due and owing to its creditors.

Other cases have also required that the debtor's plan be objectively reasonable. In *Keith G Collins Ltd, as Trustee of the Estate of Dubois-Vandale, a Bankrupt v MBNA Canada Bank*, 2006 MBQB 258, Henssen J found that the presumption of intent to prefer had not been rebutted because the debtor's plan was not objectively reasonable. The judge was satisfied that the debtor did try to secure financing to consolidate her debts to avoid bankruptcy but given her state of insolvency and level of income, she could not "service a loan of the magnitude she required to consolidate her debts" (at para 18). See also *Forbes (Bankrupt), Re*, 2011 MBCA 41 (at para 60).

In *Andrews (Trustee of) v Canada (Minister of National Revenue)*, 2011 MBQB 50, the court maintained that the "however honestly the debtor may hold [the intention to continue in business]", the presumption would not be rebutted if it was simply "wishful thinking" on the debtor's part (at para 47). In this case, the court undertook to determine "whether the Debtor was so far underwater at the time of the payment that her intention, however honestly held, to repay her other creditors in the fulness of time was simply not a viable option" (at para 48).

Conclusion

The preference provisions in the BIA have caused some debate over the years. By bringing the creditor diligence defence under the intention to continue in business and confirming that the

intention to stay in business defence requires the belief to be objectively reasonable, the Ontario Court of Appeal has helped to clarify the application of the provision.

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