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Ian F. Fletcher

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BOOK REVIEW

Case Studies in Recent Canadian Insolvency Reorganizations: In Honour of the Honourable Lloyd William Houlden

EDITED BY JACOB S. ZIEGEL, WITH DAVID E. BAIRD, Q.C.

(Toronto: Carswell, 1997)¹ xl + 650 pages

During the closing decades of the twentieth century, a remarkable revolution has occurred in the secret and mysterious world of insolvency law and policy. The rehabilitation of financially ailing debtors, and the rescue of debt-burdened businesses, have become central themes in the administration and recasting of the law, where formerly they were accorded, at best, merely token acknowledgement by lawyers and legislators alike. Received wisdom—notably among those societies that draw their legal heritage from the English common law system—had previously tended towards the view that the maximum good was to be attained through the maintenance of insolvency laws that displayed a harsh and censorious attitude towards the predicament of the debtor (whether individual or corporate) who failed to meet all obligations incurred towards creditors. The draconian regimes to which insolvent debtors have traditionally been subjected, coupled with the stigma associated with bankruptcy, are the products of deeply ingrained social convictions about the morality of financial failure. Yet, it will readily be appreciated, the moral constituents of true-life situations are seldom so clear-cut, or so uniform, as to allow such inflexible and generalized judgements to be pronounced.

Financial failure can be brought about through many causes and misadventures, and it is a mark of maturity in a system of insolvency law that it not only recognizes the existence of the “honest but unfortunate” type of debtor,² but also prepares special strategies and procedures to ensure that such debtors are dealt with in alternative ways that are socially fruitful and positive. An orderly restructuring of the debtor’s financial affairs, rather than the immediate and comprehensive liquidation of all available assets, commends itself on several grounds, including the highly pragmatic one that the greater degree of value that is thereby likely to be preserved will ultimately provide a better return to

¹ [hereinafter *Case Studies*].

² See, for example, *Local Loan Co. v. Hunt*, 292 U.S. 234 at 244 (1934).

creditors than would be received from the proceeds of a “fire sale.” Where the debtor is engaged in business—as is self-evidently the case with the majority of corporate debtors—the pragmatic argument is reinforced by virtue of the wider economic benefits that should result from maintaining those parts of the business that are potentially, if not currently, viable and profitable.

Hence, “Business Rescue” and “Corporate Reorganization” have latterly been assimilated into the standard vocabulary of insolvency practitioners in many countries in and beyond the Anglo-American common law “family.” Legislative landmarks such as the increasingly-imitated Chapter 11 procedure of the United States *Bankruptcy Code*³ (first introduced in 1978) have radically transformed the possibilities for alleviating the problems of ailing businesses. Other countries have not always had the good fortune—or the resources—to be able quickly to refashion their insolvency laws in accordance with newly fashionable notions of how they should be constructed.

In Canada, the serious financial difficulties experienced by all sectors of business during the years of widespread economic recession in the late 1980s and early 1990s had to be addressed without the benefit of modernized insolvency laws. Some astute and imaginative practitioners began to explore new ways of utilizing existing procedures, particularly the provisions of the *Companies' Creditors Arrangement Act*.⁴ This statute was originally passed⁵ during the Depression of the 1930s to enable a company to vary the terms of trust deeds with the bondholders' consent, and thus effect an arrangement with them. The *Act* had been little used for many years, but in the 1980s was successfully adapted to serve as a vehicle for the rescue of insolvent corporations.

Perhaps the most remarkable feature of this extraordinary adventure in creative legal engineering was the readiness of the Canadian judiciary to respond to the challenges posed by the situations with which they were confronted. The cases were not only of great urgency, but invariably carried momentous financial implications for all the interests concerned. Judicial activism and an almost missionary zeal in refashioning the law's workings to enable it properly to serve the wider community interest, as well as the needs of the immediate parties, became a characteristic of Canadian insolvency law in both the domestic and cross-border contexts. Indeed, the collective fruits of the Canadian

³ See 11 U.S.C., ch. 11 (1998).

⁴ R.S.C. 1985, c. C-36 [hereinafter *CCAA*].

⁵ See *Companies' Creditors Arrangement Act, 1933* (Can.), 23-24 Geo. V, c. 36.

judicial achievement in this area of law have come to be celebrated internationally as setting the standard to which other systems, and judiciaries, should properly aspire.

The saga of the evolution of Canadian reorganizations law in the years since 1984 is therefore of more than merely parochial interest. It is entirely fitting that those planning a volume of essays in celebration of the distinguished career of Justice Lloyd William Houlden should have chosen to make it the occasion for gathering together a cognate series of analytical studies documenting no fewer than twenty-seven cases concerned with corporate reorganizations over which the learned Justice and his fellow judges presided during that brief span of time. As David Baird ably demonstrates in his introductory tribute,⁶ Lloyd Houlden has served his country's legal system with distinction for over half a century and, as the joint author of its leading text on the subject, *Bankruptcy and Insolvency Law of Canada*,⁷ has exercised a wide and continuing influence over its development both before and since his elevation to the Bench.

This *festschrift*,⁸ conceived and also edited by Jacob S. Ziegel, not only succeeds superbly in its first and obvious objective of honouring the dedicatee, but also achieves the sometimes more elusive purpose of furnishing a unique reference source that will be of enduring value to scholars and practitioners who wish to study the nature and process of legal problem-solving under "real time" conditions and pressures. This they can do thanks to the inspired plan of execution of this work, which allocates each case study to an author who is able to write from first-hand experience of the case in question. So many vivid details are thereby brought into the narrative that would never be discoverable from a reading of the official report of the proceedings as ultimately resolved in court.

This book is essential reading for anyone who wishes to absorb the lessons that are only to be learned through the experience of acting in a "live" case: although the same situation may never recur in quite the same circumstances, the cumulative wisdom contained inside these covers is an invaluable resource from which future generations of practitioners can draw inspiration and guidance. One can also envisage its use in the context of an academic course of study of corporate rescue

⁶ See D.E. Baird, "A Tribute to Lloyd W. Houlden" in *Case Studies*, *supra* note 1 at xxiii.

⁷ See L.W. Houlden & C.H. Morawetz, *Bankruptcy and Insolvency Law of Canada*, 3d ed., looseleaf (Toronto: Carswell, 1989).

⁸ *Festschrift* is translated in the Forward of *Case Studies*, *supra* note 1 at v, as "a collection of articles by the colleagues, former students etc. of a noted scholar published in his honour."

and restructuring, set against the background of the past and current legislative provisions.

The twenty-seven case studies are conveniently grouped into four categories of unequal size, by reference to the principal sector of activity with which the insolvent corporation was associated. The four groupings are: Property Development and Hospitality; Resource and Manufacturing; Retail Industry; and Miscellaneous. Each case study is constructed in accordance with a structural plan that allows the reader some scope to make cross-references between cases in search of features that may be of personal interest. Sensibly, the editor has not sought to impose too rigid a plan of treatment, which might have had an inhibiting effect on the writers' ability to convey the essential features of their subject. After all, it is a truism that no two cases are alike; this is conspicuously so with large corporate insolvencies, where the multiplicity of interests gives rise to special problems that need to be understood in context if the reader is to appreciate the rationale underlying the various elements of the solution that is gradually put together.

Although the cases are all of relatively recent vintage, the legislative background against which they were originally conducted and decided has not been entirely static, and certain key considerations that were prominent at the time of those events would be handled in a different manner were they to arise in the present day. For example, Barry Goldberg explains that an important consideration in planning the Cadillac Fairview restructuring was the need to effect a binding resolution of a significant claim against the company by the Canadian Broadcasting Corporation, in circumstances where the Crown was not bound by the *CCAA*.⁹ There is a helpful note to the effect that subsequent amendments to the *CCAA* have altered the law so that the Crown is now bound by the statute.¹⁰

To the non-Canadian reader, this book is especially welcome as a convenient means of appraising the strengths and virtues of judicial activism in a cross-border setting. Many of the cases involved a "foreign" dimension in the sense that some of the company's activities extended southwards from Canada into the United States. In the early phase of the saga, courts and practitioners were faced with the need to gain a

⁹ See B.I. Goldberg, "Cadillac Fairview, A Vulture's Lean Cuisine!" in *Case Studies, supra* note 1, 41 at 55.

¹⁰ However, this point is not mentioned later in the study of the Nu-West Group restructuring, in which the same issue of the inability of the *CCAA* to bind the Crown was a factor: see R.H. Tesky, Q.C., "The Restructuring of Nu-West Group Limited" in *Case Studies, supra* note 1, 129 at 136-37.

proper understanding of the different legal cultures in which the two systems of insolvency law were operating, and to assess the relative impact of the one country's law on the process of a case mainly running in the other jurisdiction. (Ralph McRae's graphic account of the Northland Properties case¹¹ is particularly instructive on such matters, as is Barry Goldberg's discussion of the Cadillac Fairview restructuring.¹²)

As experience and sophistication progressively deepened, the Canadian judiciary (along with a number of their American counterparts) became increasingly convinced of the necessity to transcend traditional notions of the restricted scope for inter-court contact and cooperation in international cases. The slow and cumbersome formalities of the written letter of request for assistance, while useful in the context of contentious litigation between otherwise solvent parties, is disastrously unsuitable for achieving synchronized judicial cooperation under the conditions of urgency that are typical of a multi-state insolvency where interested parties and corporate assets are dispersed across different jurisdictions (and time zones). In a world where electronic commerce enables funds to be transmitted abroad with great rapidity, judges need to be willing to avail themselves of modern means of direct communication—such as an open telephone link between their respective courts or chambers—to ensure that the action they each take is ultimately effective.

As examples of such judicial responsiveness multiplied, the precedential effect began to operate, and increasingly bold solutions became feasible thanks to the burgeoning "network" of cross-border judicial alliances based upon mutual confidence and trust. Thus, in resolving the vast and complex Olympia & York restructuring during 1992-1993, Justice Blair was involved in a three-way interplay of concurrent legal proceedings with the United States and the United Kingdom that involved the approval of a joint plan filed under both the *CCAA* and Chapter 11 of the United States *Bankruptcy Code*. This solution, in broad concept, echoes the one that had been devised slightly earlier in *In Re Maxwell Communications Corporation*,¹³ which involved

¹¹ See R.D. McRae, "Northland Properties, Ltd." in *Case Studies*, *supra* note 1, 99.

¹² See Goldberg, *supra* note 9.

¹³ 93 F.3d 1036 (2d Cir. 1996) [hereinafter *Maxwell*].

simultaneous proceedings under Chapter 11 of the *Bankruptcy Code* and the United Kingdom administration order procedure.¹⁴

These precedents, in turn, served as powerful demonstrations of “the art of the possible,” and were much invoked during the movement towards the conclusions of the United Nations Commission on International Trade Law (UNCITRAL) Model Law on Cross-Border Insolvency¹⁵ (elaborated between 1993 and 1997), and in the parallel process undertaken by the Insolvency and Creditors’ Rights Committee (“Committee J”) of the International Bar Association (IBA) to develop a Cross-Border Insolvency Concordat to serve as a model for use in future international cases.¹⁶ As Bruce Leonard relates in his discussion of the Everfresh Beverages restructuring,¹⁷ the Cross-Border Insolvency Concordat was employed within weeks of its adoption by the IBA in May 1996 as the basis for the coordinated solution agreed between Justice Farley, exercising jurisdiction from Ontario, and members of the judiciary of the Bankruptcy Court of the Southern District of New York.

With the enactment in 1997 of the provisions of Part XIII of the *Bankruptcy and Insolvency Act*,¹⁸ Canadian judges gained enhanced powers in relation to the conduct of international cases,¹⁹ and in the provision of assistance to foreign representatives in proceedings commenced outside Canada. Further consolidation of the statutory basis for cross-border cooperation may be expected if, as seems likely, Canada formally adopts the UNCITRAL Model Law and assimilates its provisions into national legislation.

¹⁴ *Maxwell*, a non-Canadian proceeding, is not the subject of a case study in the work here reviewed. For an account of the inter-jurisdictional cooperation in that case, see, for example, E.D. Flaschen & R.J. Silverman, “The Role of the Examiner as Facilitator and Harmonizer in the Maxwell Communication Corporation International Insolvency” in J.S. Ziegel, ed., with S.I. Cantlie, *Current Developments in International and Comparative Corporate Insolvency Law* (New York: Oxford University Press, 1994) 621.

¹⁵ See *Report of the United Nations Commission on International Trade Law on the Thirtieth Session*, UN GAOR, 52nd Sess., Supp. No. 17, UN Doc. A/52/17, Annex 1 (1997) [hereinafter “Model Law”], adopted by resolution of the General Assembly, GA Res. 52/158, UN GAOR, 40th Sess., UN Doc. A/52/649 (1997).

¹⁶ See generally, A. Nielsen, M. Sigal & K. Wagner, “The Cross-Border Insolvency Concordat: Principles to Facilitate the Resolution of International Insolvencies” (1996) 70 Am. Bankr. L.J. 533.

¹⁷ See E.B. Leonard, “The Everfresh Reorganization: Advancing Co-Operation in Cross-Border Insolvencies” in *Case Studies*, *supra* note 1, 325 at 330-34.

¹⁸ *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [hereinafter *BIA*], as am. by *An Act to amend the Bankruptcy and Insolvency Act, the Companies’ Creditors Arrangement Act and the Income Tax Act*, S.C. 1997, c. 12, s. 118.

¹⁹ See *BIA*, *supra* note 18, s. 268(3).

The ground-breaking initiatives embarked upon by the judges and practitioners whose collective achievements are documented in the pages of this book have already borne remarkable fruit within the space of less than two decades. This *festschrift* is both a fitting monument to those achievements, and a valuable reservoir of stored wisdom and experience, upon which the pioneers' successors will gratefully draw in the future.

Professor Ian F. Fletcher
Centre for Commercial Law Studies
Queen Mary & Westfield College
University of London

