National Insolvency Review

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VOLUME 28, NUMBER 5 Cited as (2011), Nat. Insol. Review OCTOBER/NOVEMBER 2011

• THE TRUE STATUS OF "TRUST FUNDS" IN BANKRUPTCIES IN THE TRAVEL INDUSTRY: THE DECISION IN *CONQUEST VACATIONS INC. (2010)* •

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Bankruptcy law and practice often involves a clash between modern business practices and traditional legal principles and requirements. Certainly that type of situation was the subject of a major decision of Registrar Diamond, released in late 2010, involving the bankruptcy of Conquest Vacations Inc. ("Conquest Vacations"), a large wholesaler and tour operator in the travel industry which had operated in the Toronto area since the late 1990s.[1] Conquest Vacations voluntarily filed for bankruptcy on April 24, 2009. The authors have represented the Trustee in bankruptcy of Conquest Vacations (the "Trustee") and legal counsel to the estate in bankruptcy, which is an ongoing administration.

In the *Conquest Vacations* case, the bankruptcy Court was called upon to consider the status of approximately one million dollars which were on deposit in three bank accounts which Conquest maintained at the date of bankruptcy. It was the position of the Trustee that these funds: (i) were not subject to a secured claim by the travel industry governing body; and (ii) did not constitute "trust funds" within the terms of the governing travel industry legislation in Ontario. In a comprehensive decision, Registrar Diamond agreed with the Trustee's position.

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NATIONAL INSOLVENCY REVIEW

The **National Insolvency Review** is published bi-monthly by LexisNexis Canada Inc., 123 Commerce Valley Drive East, Suite 700, Markham, Ontario L3T 7W8

ISBN: 0-409-91078-3 ISSN: 0822-2584
ISBN: 0-433-44393-6 (Print & PDF)
ISBN: 0-433-44694-3 (PDF)

Subscription rates: $385/year (Print or PDF)
$470/year (Print & PDF)

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The Wholesale Travel Business

Travel wholesalers, such as Conquest Vacations, typically buy travel services from businesses such as hotel and airline operators and then sell those services to consumers.

As noted, Conquest Vacations' operations were significant — to date, the Trustee has received more than $50 million worth of claims in the bankruptcy.

Ontario's Travel Industry Act *and the Travel Industry Council of Ontario*

Ontario's current *Travel Industry Act*, S.O. 2002, c. 30, Schedule D [(the *TIA*], came into force in 2005. At that time, a predecessor statute was repealed.

The Travel Industry Council of Ontario ("TICO") is an organization established by the Ontario government to administer the *TIA*. As noted by Registrar Diamond in his decision in the *Conquest Vacations* case, the *TIA* sets out a requirement "that travel wholesalers create and maintain a trust account for funds paid to them by consumers prior to the consumer actually consuming the travel service" and the *TIA* also establishes "an industry financed compensation fund [the "Compensation Fund"] which is funded by the travel businesses regulated and registered under the TIA and administered by TICO." As Registrar Diamond also discussed, the Compensation Fund allows TICO to reimburse consumers for travel services which were paid for, but not provided, prior to the insolvency of a wholesaler and also to allow TICO to pay for such things as flying people back when they are away on a trip and a wholesaler becomes insolvent.

The Status of Trust Claims and Government Claims in a Bankruptcy

One of the cornerstone principles of bankruptcy law is that assets held in trust do not form part of the bankrupt's estate: s. 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [the *BIA*]. The inherent fairness and logic behind this section of the *BIA* is obvious: in plain terms, assets which a bankrupt is holding in trust for someone else do not belong to the bankrupt (and therefore should not be realized on by the trustee for distribution to the bankrupt's creditors, in accordance with the distribution scheme set out in the *BIA*).

Naturally, in a bankruptcy scenario many people who feel that they are "owed" funds by the bankrupt would *like* to bring themselves within the ambit of s. 67 of the *BIA* — and thereby to recover "one hundred cents on the dollar" and to remove themselves from the fray of the bankruptcy.

As a result, over the years, trustees in bankruptcy and, to a lesser extent, the Courts, have had to consider a wide range of alleged trust claims in the context of a wide range of bankruptcy situations. Just as one example, many years ago one of the authors was involved with a bankruptcy of a company (the "Agency") which acted as an agent to arrange for the sale of certain advertising on various media outlets. Each advertiser and each media outlet had their own agreements with the Agency. Generally speaking, in the long period of business activity before the bankruptcy of the Agency, a media outlet would "run" a particular ad and provide proof to the Agency that the ad had run. In turn, the relevant advertiser would pay certain funds to the Agency and in practice the Agency would "keep" a portion of those funds and pay the rest over to the media outlet as their remuneration for having run the ad.

When the Agency lapsed badly into bankruptcy, the media outlets wanted "their" portion of those funds to be recognized as being held, by the Agency, in trust for the benefit of the media outlets. However, unfortunately, among other things, the contracts running both ways were not well written — also, the Agency had not segregated all of the funds which it had received from the various advertisers. Without getting any further into the facts of that old case, suffice to say that it was not possible for the media outlets to make out clear trust claims when the Agency went bankrupt and their efforts to gain access to funds held by the Agency on the basis of a trust claim were not successful.

As that case and many other cases over the years have made clear, in order for someone to fit within the protection afforded by s. 67 of the *BIA*, it is necessary for a claimant to establish all of the necessary attributes of a true trust.[2] As noted by Registrar Diamond in his decision in the *Conquest Vacations* case, that requirement has commonly been described as a requirement to demonstrate the presence of the following "three certainties" so as to establish the existence of a trust:

(a) certainty of intent — that is, it must be clear that the person establishing the trust used imperative language;

(b) certainty of subject matter — that is, the property to be held in trust must be established with complete certainty; accordingly, the property must be identifiable or traceable; and

(c) certainty of object — which is to say that the beneficiaries of the trust must be certain.

Of course, the enhanced status afforded to successful trust claimants in a bankruptcy did not go

unnoticed by all levels of government and the *TIA* is only one of many statutes which speak, in various terms, of trusts. Indeed, for many years, federal and provincial governments used the somewhat crude approach of "deeming" various amounts to be held in trust by taxpayers under the terms of various statutes by bankrupt corporations in order to satisfy various amounts owing to a particular government agency in the event of the insolvency of the taxpayer in question.

The subject of deemed trusts in a bankruptcy reached the Supreme Court of Canada in 1989 in a case called *British Columbia v. Henfrey Samson Belair Ltd*.[3] In that case a car dealership (Tops Pontiac Buick Ltd.) failed — falling first into receivership and then also into bankruptcy. At the time of the bankruptcy, it owed $58,763.23 of provincial sales tax and the British Columbia provincial sales tax statute in question deemed the funds necessary to satisfy that debt to be held in trust — with the attendant priority over the secured claim of the Bank who placed Tops Pontiac into receivership and "all other creditors."

All of the funds which came into Tops Pontiac had been commingled and accordingly, it was not possible to trace or identify exact funds representing $58,763.23 being "the amount of the sales tax collected but not remitted." In other words, as Justice McLachlin noted, "there is no property which can be regarded as being impressed with a trust," and one of the three certainties was "missing."

The Supreme Court held that only trusts which can satisfy the requirements of "general principles of law" — *i.e.* each of the three certainties — should qualify for the benefits of (what is now) s. 67 of the *BIA*. Accordingly, the statutory deemed trust in the *Henfrey Samson Belair* case failed.

With some refinements, the *Henfrey Samson Belair* decision was later codified in the *BIA* in the amendments enacted in the early 1990s. From that time, the *BIA* has provided:

(a) Generally speaking, all government claims rank as unsecured claims in a bankruptcy.[4]

(b) There are three (3) main exceptions to that general rule for:

  (i) claims (that have been described as relating to the "Big Three" federal claims) for amounts owing with respect to unremitted withholdings pertaining to the Canada Pension Plan, employment insurance premiums and income tax;[5]

  (ii) claims which relate to a security interest (*i.e.*, as opposed to a trust claim) established by statute where the security "is registered under a prescribed system of registration before the … bankruptcy";[6] and

  (iii) trust claims which are created by federal or provincial statute but which also satisfy the three certainties.[7]

The *Henfrey Samson Belair* case was also considered by the Ontario Court of Appeal in 2005 in a case called *GMAC Commercial Credit Corp. – Canada v. TCT Logistics.*[8] TCT was a large logistics company based in Calgary and the receivership proceedings initiated by GMAC ultimately gave rise to a number of important reported cases concerning insolvency law.[9] One of those cases involved a claim by certain carriers that they were entitled to the benefit of a trust as a result of a provision in the Load Brokers legislation[10] that deemed certain funds coming into the hands of load brokers to be in trust for carriers. Speaking for the Court and citing both *Henfrey Samson Belair* and the legislative changes to

the *BIA* which followed it, Justice Feldman of the Ontario Court of Appeal held that in a bankruptcy of a load broker such a submission was "wrong in law." Justice Feldman made clear that in order for a trust claim to succeed all of the three certainties — including the subject matter of the trust — needed to be established. In short, just because a statute may refer to the fact that certain funds are *supposed* to be held in trust by someone who becomes bankrupt doesn't mean that the bankruptcy court will respect that the funds actually *were* held in trust when the person becomes bankrupt.[11]

The "Trust Accounts" Established by Conquest Vacations

In the case of the *TIA*, the "deeming" provisions of the legislation are limited in scope — s. 27 of *Ontario Regulations 26/5* of the *TIA* simply states:

> *Trust accounts*
>
> *27. (1) A registrant shall maintain a trust account for all money received from customers for travel services. [O. Reg. 26/05, s. 27(1)].*
>
> *(2) The trust account shall be designated as a Travel Industry Act trust account. [O. Reg. 26/05, s. 27(2)].*
>
> *(3) A registrant shall hold all money received from customers for travel services in trust and shall deposit all such money into the trust account within two banking days after receiving it. [O. Reg. 26/05, s. 27(3)].*
>
> *(4) No registrant shall maintain more than one trust account under subsection (1) without the registrar's written consent, obtained in advance. [O. Reg. 26/05, s. 27(4)].*
>
> *(5) A registrant shall file with the registrar,*
>
> *(a) a copy of the trust agreement with the financial institution, within five days after establishing a trust account; and*
>
> *(b) a copy of any changes to the trust agreement, within five days after making the changes. [O. Reg. 26/05, s. 27(5)].*
>
> *(6) No registrant shall disburse or withdraw any money held in a trust account under subsection (1), except,*
>
> *(a) to make payment to the supplier of the travel services for which the money was received;*
>
> *(b) to make a refund to a customer; or*
>
> *(c) after the supplier of the travel services has been paid in full, to pay the registrant's commission. [O. Reg. 26/05, s. 27(6).*

Section 28 of this Regulation allows for security to be posted instead of the operation of the trust account(s).

Conquest established four bank accounts at The Royal Bank of Canada. One account bore the name "general" and the other three accounts, it may be noted, contained the word "trust" in their name. In turn, Conquest provided letters and other signed material to TICO which indicated that Conquest had read and understood certain terms of the *TIA Regulations*, including terms relating to Trust accounts.

However, the paperwork relating to these three bank accounts established no trust obligations of any nature on the part of the Bank or anyone else (including Conquest Vacations) and the fact was that — notwithstanding their "name" — none of these accounts were actually operated as a trust account.

At the most elemental level, funds from various sources were commingled in these accounts — such that, in other words, it was not possible to say that the accounts contained solely funds paid to Conquest by consumers prior to those consumers actually consuming the relevant travel services. For example:

- the accounts contained funds paid from consulting companies belonging to, or controlled by, a principal of Conquest Vacations;
- payments were made from the accounts to a company belonging to a principal of Conquest Vacations;

- the accounts contained funds from such "non consumer" parties as airlines, other vacation packagers and commissions for the sale of insurance; and
- payments were also made to fund payroll and other office expenditures.

It was also not possible to reconcile the amounts deposited to this account from the credit card processing company that Conquest Vacations dealt with.

The Claim by TICO in the Conquest *case*

The Director under the *TIA* issued an Order on April 15, 2009 freezing the various bank accounts of Conquest Vacations and Conquest Vacations also ceased operations and surrendered its operating licence to the Registrar of TICO on that day.

As noted, Conquest subsequently filed for bankruptcy on April 24, 2009.

Initially, TICO submitted a claim in the bankruptcy of Conquest Vacations as an alleged secured creditor vis-à-vis the funds held in the three Conquest trust accounts.

The basic subject matter of the TICO claim was approximately $950,000.00 which TICO paid from the Compensation Fund to allow people to complete trips[12] and in relation to other claims arising from the Conquest Vacations bankruptcy. As a procedural matter, TICO required anyone who received such funds to sign a form whereby, among other things, they agreed that TICO was subrogated to their position vis-à-vis Conquest Vacations.

The Trustee disallowed that claim and TICO appealed that decision to the Bankruptcy Court.

In the Court materials which TICO filed in support of that appeal, TICO re-characterized their claim as being in the nature of a trust claim — as opposed to a secured claim. In the circumstances, the Trustee agreed to respond before Registrar Diamond as if the TICO claim had originally been submitted as a trust claim in order to allow for an adjudication of the matter and to avoid unnecessary and additional expense and delay which would have arisen if the Trustee required TICO to resubmit its claim as a trust claim.

The Position of the Trustee in Bankruptcy

The Trustee's position was that a trust had not been established with respect to any of the three bank accounts. Among other things, the Trustee argued that:

- the funds in the accounts could not be traced to particular consumers or travel service providers — indeed, the evidence showed that funds typically were not received directly from consumers and were instead received through a credit card intermediary (although there was often a significant delay in the processing of credit card transactions vis-à-vis Conquest Vacations);
- the funds in the accounts were commingled with funds from non-trust sources; and
- the funds were depleted by Conquest Vacations to pay operating and other costs — in that regard the Trustee argued that the requisite "certainty of intent" is missing where the alleged trustee of a trust can effectively do whatever it wants with the alleged trust funds.

The Trustee also noted that there was no trust agreement or trust declaration with respect to the Conquest bank accounts. As noted, Conquest Vacations provided letters referring to the accounts by account number and name and the

names referred to the trusts contemplated by the *TIA* — however, the Trustee argued that those facts fell short of establishing a true trust.

TICO's argument that a Trust Claim Could Still Be Established

TICO argued that the effective beneficiaries of the "trust" were the consumers who paid Conquest Vacations for travel services which they did not receive as a result of the bankruptcy and that by having paid those people (from the Compensation Fund) TICO effectively stepped into their shoes as a beneficiary of the alleged trust.

In turn, TICO acknowledged that the funds in the bank accounts were not "pure"[13] and that "Conquest [Vacations], particularly in its dying days, dipped into the accounts labelled as 'trust accounts' in order to fund its ongoing operation"[14] but TICO argued that the trust could still be established.

The Decision of Registrar Diamond

In considering the *Conquest Vacations* case, Registrar Diamond put great weight on the decision in *TCT Logistics* and *Henfrey Samson Belair*. Registrar Diamond held that

> *this is not a case where there … was a large segregated fund and either additional funds were deposited into it or … small amounts were withdrawn for inappropriate purposes. Instead these were accounts that had tremendous flow in and out with tremendous mixing ... [with regard to] the … test of certainty of subject [matter] ... Co-mingling is in and of itself fatal to a true trust required by the BIA.*[15]

As such, Registrar Diamond reached the conclusion that

> *[f]rom the evidence and caselaw referred to me, I am unable to conclude, in the face of the admitted co-mingling and lump sum deposits by the credit card processor, that there is sufficient certainty of subject [matter] for the funds to be deemed a trust at common law.*[16]

Summary

This case was novel in that the matter of the *TIA*-mandated trust account in a bankruptcy scenario had not come before the Ontario Courts before this matter. Although Registrar Diamond did not need to decide this matter, the Trustee argued that the provisions of the *TIA* (and *Regulation 26/5*) in and of itself is insufficient to establish trust property in the context of a bankruptcy.

However, the authors are of the view that if TICO had obtained security in lieu of the trust accounts, or alternatively, had entered into a comprehensive tri-party Agreement with Conquest Vacations and the Bank, whereby the trust obligations were clearly delineated in the operation of these accounts, the outcome could have been very different.

TICO initially appealed Registrar Diamond's decision, but then soon abandoned its appeal. So, the Registrar's Decision stands and the Trustee now has the funds that were contained in the accounts for the benefit of the unsecured creditors of Conquest Vacations.

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1 *Conquest Vacations Inc. (Re)*, [2010] O.J. No. 5406 [*Conquest Vacations*].

2 Subsection 81(3) of the *BIA* makes it clear that the onus of establishing the necessary attributes of a true trust rests on the claimant. In other words, the onus of

proof is not on the trustee in bankruptcy to "disprove" the trust claim.

3 [1989] S.C.J. No. 78, (1989) 75 C.B.R. (N.S.) 1.

4 Section 86(1) of the *BIA*.

5 Section 86(3) of the *BIA*.

6 Section 87(1) of the *BIA*.

7 Section 67(2) of the *BIA*.

8 [2005] O.J. No. 589, 194 O.A.C. 360, 7 C.B.R. (5th) 202.

9 Among other things, the *TCT Logistics* case went to the Supreme Court of Canada over the important issue of whether the Bankruptcy Court can insulate a receiver from potential liability as a successor employer of the employees of the company in receivership.

10 The rough equivalent of the *TIA* in the *TCT Logistics* case was the *Truck Transportation Act* [Repealed], R.S.O. 1990, c. T.22, of Ontario.

11 Another way of looking at that reality is that in a bankruptcy, for better or worse, everything about the bankrupt's situation comes into focus and if certain things should have been put in place, or certain procedures should have been followed, but were not, it becomes too late to "fix" the situation from the perspective of how claims rank.

12 At the time that TICO submitted its claim, some of these amounts were for "pending."

13 *Supra* note 1.

14 *Ibid.* at para. 20.

15 *Ibid.* at para. 25.

16 *Ibid.* at para. 27.

• ONTARIO COMMERCIAL COURT RULES PROCEEDS OF *BIA* PREFERENCE ACTION SUBJECT TO RIGHTS OF SECURED CREDITORS •

Kevin J. Morley
Norton Rose OR

On August 18, 2011, Mr. Justice Morawetz, of the Ontario Superior Court of Justice, released an important decision in regard to preference actions in the matter of *Tucker v. Aero Inventory (UK) Limited*, [2011] O.J. No. 3816, (together with Aero Inventory plc, "Aero").

Background

Administration proceedings were commenced against Aero on November 11, 2009, in the High Court of Justice of England and Wales. Norton Rose OR obtained recognition of the joint administrators appointed in the U.K. proceeding (the "Administrators") as foreign representatives under Part IV of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36. Subsequently, over the objections of Air Canada, the Ontario court authorized the Administrators to assign Aero in bankruptcy in Canada for the express purpose of pursuing any reviewable transactions, settlements and preferences ("Preference Actions") that may have taken place in Canada. The trustee in bankruptcy subsequently asserted Preference Actions under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, against Air Canada seeking to recover approximately US$75 million in respect of a number of transactions between Aero and Air Canada in the months before the commencement of the U.K. proceedings. In its materials, the trustee reported that the secured creditors of Aero were likely to suffer a significant shortfall in the recovery of their secured claims such that there was not likely to be any recovery for unsecured creditors (beyond certain statute-prioritized entitlements).

Air Canada subsequently brought a motion seeking, among other things, orders declaring that any proceeds of the Preference Actions were not subject to the rights of the secured creditors. Air Canada asserted that it would be entitled to participate in any recoveries from the Preference Actions against it as an unsecured creditor.

The result

The court noted the apparent inconsistency in Canadian and Commonwealth jurisprudence and

academic commentary but accepted that the jurisprudence could be resolved by correctly applying insolvency principles and personal property security principles. Norton Rose OR argued that, in this case, the secured creditors had the equivalent of fixed charges in the transferred property rather than uncrystallized floating charges found in jurisprudence cited by Air Canada. Norton Rose OR pointed to the potentially anomalous result that would follow if an insolvent person could defeat such rights of a secured creditor by simply granting a preference immediately prior to assigning itself into bankruptcy if the subsequent reversal of the preference would be such that the proceeds would benefit only unsecured creditors (including, in this case, Air Canada, who purported to settle its unsecured claims through the transactions sought to be challenged).

The Ontario Court ruled that the proceeds of Preference Actions recovered by the trustee are brought into the estate and distribution is subject to the rights of secured creditors. The court further ruled that the bringing of Preference Actions and recovery of proceeds by the trustee does not preclude the secured creditors from pursuing other remedies they may have. The court noted that, while the secured creditors might have other remedies, at the outset of the proceedings, when investigations may not be complete, it may be difficult to pinpoint any specific remedy. Secured creditors will be aware that remedies under contract or statute would involve different factual elements and burdens of proof and might very well have involved significant costs and lengthy time periods to resolve outside the insolvency proceedings.

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• IN THE MATTER OF THE RECEIVERSHIP OF SCANWOOD CANADA INC., COURT FILE NO. HFX 342377 (ORAL REASONS FOR DECISION JUNE 29, 2011) •

Renée Brosseau and Andrea Rush
Heenan Blaikie LLP

This is an interesting case that pits insolvency law against trademark law… and the latter prevailed! The Court's distinction between patent and trade-mark rights, in terms of underlying policy and subsistence in an insolvency is significant.

A Brief Overview

Scanwood Canada Inc., a manufacturer of the Malm dressers for IKEA, located in Nova Scotia was placed into a receivership pursuant to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*].

In this case, the receivership order borrowed heavily from the Ontario Commercial List model receivership order. The appointment order provided the Receiver with the ability to sell the assets of the insolvency company for the benefit of creditors. This is in keeping with the liquidating aspect of receiverships.

The twist in this case stems from the fact the Receiver was seeking the court's direction to either: (a) require IKEA to purchase the inventory; or (b) if IKEA would not purchase the inventory by a particular date, to be permitted to

sell this inventory to third parties, notwithstanding that the inventory was marked with IKEA trademarks and was designed and built using the IKEA design specifications and other intellectual property.

The agreement between the manufacturer and IKEA contained a provision that dealt with the purchase by IKEA of inventory and raw materials upon the insolvency of the manufacturer. In its simplest terms, IKEA agreed to buy the inventory subject to IKEA's usual quality requirements. The relevant provision of the agreement is as follows:

> *To the extend the buyer does not acquire the raw material stock of the seller, the Receiver or other person in lawful control of the seller's stock may (a) sell any of the IKEA fittings or products with IKEA markings only, to other IKEA suppliers of the Malm product, and (b) sell any of the wood, veneers, glue, boxes and other generic product, provided that such do not contain any IKEA markings or fittings to any person.*

The Receiver argued that the provisions of s. 243 of the *BIA* coupled with the inherent jurisdiction of the Court provided the broad discretion to either: (a) force IKEA to buy all of the inventory and raw materials; or (b) to direct the Receiver to sell the inventory to third parties notwithstanding IKEA's trademark rights. By extension, the Receiver argued that if IKEA would not buy the inventory, and the Receiver could not sell the inventory to a third party due to the restrictions created by the IKEA trademarks, the result would deprive the creditors of a recovery.

The Court's Decision

In dismissing the Receiver's motion, Madam Justice Hood reviewed the agreement and s. 82 of the *BIA* which was also put forward by the Receiver as a basis for permitting the sale of the goods.

Section 82 of the BIA refers to the unfettered discretion of a trustee in bankruptcy to sell or dispose of patented articles free and clear of restrictions or limitations. However, this provision, does not mention "trade-marks". Madam Justice Hood dismissed the application of s. 82 to this case. She reasoned that a clear distinction was apparent as the section deals with patents. Thus, it could not be extended from patents (expressed) to cover trade-marks (unexpressed).

Her Honour then reviewed the agreement and the principals of trademark law. While she had sympathy for the general body of creditors, Hood J. would not extend the wording of s. 82 to cover trade-marks and thus override IKEA's trademark rights. To do so would result in a (at para. 46)

> *serious infringement of the purpose of the trade-mark protection, that is, differentiating products and the quality of products from others. The second purpose of trademark protection is to allow the consumer to buy with confidence from a source that they trust.*

Madam Justice Hood concluded that the Court lacked the discretion or jurisdiction to permit the sale under the provisions of s. 243 of the *BIA*, or otherwise at law. She agreed that "there's good reason for IKEA to be concerned, in particular, about quality of the product produced". (para. 20)

Why does the *BIA* mention patents and not trade-marks? On one hand, the nature of each statute-based right is the reason for the distinction. Absent control by the registered owner, a trade-mark would lose its raison d'être post sale. On the other hand, if patented articles are sold, the patent still exists and the purpose for which patents are granted is not disturbed. (para. 41)

As an added bonus, this case helps resolve the source-**or**-quality debate raging over the basis of

trade-mark rights: source or quality? According to Hood J., the answer is both! (para 46).

This case also represents a practical application of Mr. Justice Binnie's remarks in the leading decision of the Supreme Court of Canada, *Mattel v. Irwin Toy*:

> *Trademarks are something of an anomaly in intellectual property law. Unlike the patent owner or the copyright owner, the owner of a trademark is not required to provide the public with some novel benefit in exchange for the monopoly. By contrast, a patentee must invent something new and useful. To obtain copyright a person must add some expressive work to the human repertoire. ... The trade mark owner('s) ... claim to monopoly rests not in conferring a benefit on the public in the sense of patents or copyrights, but on serving an important public interest in assuring consumers that they are buying from the* ***source*** *from whom they think they're buying and receiving the* ***quality*** *which they associate with that particular trademark.*

Conclusion

This case provides a number of practical tips for intellectual property law practitioners concerning trade-mark licensing and enforcement.

First and foremost, ensure your agreements contain a provision similar to that highlighted in this case. Whether during the ordinary course of business transactions or thereafter, a trade-mark license should ensure that the registered owner of the trade-mark is in a position to be seen as the source of the goods or services, and that all use is pursuant to the terms of quality control which are set out in an agreement.

Secondly, it is not enough to paper this understanding: it must be enforced in fact by way of ongoing monitoring on the part of the registered owner or its designate, duly authorized for this purpose.

Thirdly, in terms of client management, it is important to explain that product and service bundle multiple rights. Insolvency is a good example of a situation in which there will be multiple rights holders, each of which has different strategic objectives. Co-coordinating those rights and the disposition of the property is as challenging as the proverbial herding of cats. Any one rights holder may be in a position to stalemate the efforts of the others.

The moral of the story comes as no surprise to intellectual property lawyers — although it may well to their clients. Receivers beware — what you see is not always what you get.

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