IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Branconnier (Re),*
2017 BCSC 1896

Date: 20171023
Docket: B160870
Registry: Vancouver

In the Matter of the Bankruptcy of Rene Joseph Branconnier

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Alberta Securities Commission:	D.A. Frenette
Counsel for Rene Branconnier:	C. Taliunas R. Roberts
Counsel for Sharon Branconnier:	J.D. West
Place and Date of Hearing:	Vancouver, B.C. July 14 and September 7, 2017
Place and Date of Judgment:	Vancouver, B.C. October 23, 2017

[1] The Alberta Securities Commission is a creditor of Mr. Rene Joseph Branconnier. On July 15, 2016 Mr. Branconnier attended an examination in aid of execution (the "Examination"). On or about October 18, 2016 Mr. Branconnier filed a proposal under s. 62 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*").

[2] The Alberta Securities Commission now seeks, pursuant to s. 163(2) of the *BIA*, to examine Mr. Branconnier's wife, Mrs. Sharon Faye Branconnier, as a person thought to have knowledge of the affairs of Mr. Branconnier and to compel her to produce various documents and records that relate to Mr. Branconnier, to his affairs and to his estate.

[3] The present application raises the following questions:

A. Does an implied undertaking of confidentiality extend to evidence obtained in an examination in aid of execution?

   (i) if so, does that implied undertaking have relevance in the circumstances of this case?

   (ii) if so, should the implied undertaking rule be waived?

B. Should Mrs. Branconnier be required, under s. 163(2) of the *BIA*, to attend at an examination under oath and to produce various specified documents or records?

[4] This application was heard over two days. Counsel for Mr. Branconnier did not attend on the second day and made no submissions before me.

History

[5] Some background facts are relevant to both issues that I have identified. Others pertain to only one of those issues. I have endeavoured to address specific facts within the context that they arise.

General Facts

[6] Mr. Branconnier resides in British Columbia.

[7] The Alberta Securities Commission is a creditor of Mr. Branconnier pursuant to a judgment which was filed on March 30, 2016 in the Supreme Court of British Columbia in Action No. L160113 (the "Supreme Court Proceedings") for the purposes of enforcement under the *Enforcement of Canadian Judgments and Decrees Act*, SBC 2003, c. 29.

[8] The judgment filed in the Supreme Court Proceedings related to two decisions issued by the Alberta Securities Commission, against Mr. Branconnier, pursuant to its statutory authority. In those decisions the Alberta Securities Commission found that Mr. Branconnier had breached the security laws of the Province of Alberta and ordered him to pay $415,000 in administrative penalties and costs.

[9] On July 15, 2016 Mr. Branconnier attended and was discovered at the Examination. A transcript emanating from that discovery was created (the "Transcript") and various documents were received and marked.

[10] On October 7, 2016 the Alberta Securities Commission filed an application in the Supreme Court Proceedings, to examine Mrs. Branconnier and to have her produce various documents. Those application materials included a copy of a portion of the Transcript.

[11] On October 18, 2016 Mr. Branconnier, as I have said, filed a proposal under s. 62 of the *BIA*.

[12] On October 20, 2016 the application to examine Mrs. Branconnier, in the Supreme Court Proceedings, was adjourned on account of the commencement of this proceeding.

[13] The first and second meeting of creditors took place on November 8 and November 28, 2016, respectively. Mr. Branconnier's proposal was not accepted and he entered bankruptcy.

[14] On April 20, 2017 the Alberta Securities Commission refiled its application, in this proceeding, to examine Mrs. Branconnier. Those application materials again included copies of portions of the Transcript.

[15] On May 8, 2017 the Application Response filed on behalf of Mrs. Branconnier asserted, *inter alia*, that the implied undertaking rule, which implies an undertaking on all parties engaged in civil litigation to use material obtained within the process of discovery strictly for the purposes of the specific action in issue, had been violated. Specifically, it was asserted that the Alberta Securities Commission had failed to obtain, as it was required to, a court order waiving the application of the implied undertaking that pertained to the Transcript. Furthermore, in her Application Response, Mrs. Branconnier argued that the Alberta Securities Commission's application, under s. 163(2), should be dismissed on account of its breach of the implied undertaking that related to the Transcript.

[16] On May 11, 2017 the Alberta Securities Commission refiled its application materials. The Alberta Securities Commission now sought an order that the implied undertaking of confidentiality be waived and that it be at liberty to make use of the Transcript in this proceeding.

Issue 1 (a): Does the Implied Undertaking Rule Apply in Relation to Evidence Obtained at an Examination in Aid of Execution?

[17] Counsel for Mrs. Branconnier and for the Alberta Securities Commission agree that only one case, the decision of Master Young, as she then was, in *Piche v. Chiu*, 2013 BCSC 747, has previously addressed the foregoing issue squarely. The issue was also raised in *Procon Mining and Tunnelling Ltd. v. McNeil*, 2010 BCSC 1184. In that case Harris J., as he then was, did not consider it necessary to address the issue and he declined to do so (at para. 17).

[18] Counsel also agree that Mrs. Branconnier has standing to object to the use of the Transcript even though that evidence was obtained at an examination of her husband. It is common ground that the implied undertaking that arises in relation to pre-trial discovery evidence is owed to the court: *Juman v. Doucette*, 2008 SCC 8 at para. 27.

[19] In order to properly address the question that has been raised by the parties, a better understanding of both the object and the ambit of the implied undertaking of confidentiality is necessary.

[20] The leading authority is *Juman*. In that case a child suffered a seizure while in the care of a daycare worker. It was determined that the child had suffered a brain injury. A civil action was commenced. The Vancouver Police Department commenced a police investigation. The defendant applied, prior to her examination for discovery, for an order that the police authorities could not access her discovery evidence without a further court order. After examinations for discovery were completed the civil claim was settled. The defendant's discovery evidence was never entered into evidence at trial.

[21] Because an aspect of the case dealt with potential criminal conduct, the various levels of court also addressed the interrelationship of the implied undertaking of confidentiality and the bona fide disclosure of criminal conduct as well as whether the police could seize the discovery transcript under a search warrant. Those sub-issues are not relevant to this application.

[22] In *Juman*, Binnie J., for the Court, said:

> [20] The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination.
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> …
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> A. *The Rationale for the Implied Undertaking*
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> [23] Quite apart from the cases of exceptional prejudice, as in disputes about trade secrets or intellectual property, which have traditionally given rise

> to express confidentiality orders, there are good reasons to support the existence of an implied (or, in reality, a court-imposed) undertaking.
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> [24] In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. *Rules of Court* compels a litigant to answer all relevant questions posed on …
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> [25] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker,* [1976] 1 S.C.R. 254. The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.
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> [26] There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more …
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> [27] For good reason, therefore, the law imposes on the parties to civil litigation an undertaking *to the court* not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).

[23] *Juman* addressed the basis for the implied undertaking in the context of "pre-trial oral and documentary discovery": para. 20. An examination in aid of execution arises post-trial. The question before me is whether, on a principled basis, that distinction should drive a different result. I emphasize that I am addressing the narrow issue of whether the implied undertaking arises in relation to evidence obtained at an examination in aid of execution. I do so because, for example, different authorities and principles apply to an examination undertaken under s. 163 of the *BIA*: see *Re Bowell Estate v. Gill*, 2008 BCSC 1270 at paras. 21-34.

[24] First, it is important to realize that an examination in aid of execution is also an "examination for discovery". Rule 13-4(2) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 provides:

> (2) If a judgment creditor is entitled to issue execution on or otherwise enforce an order of the court, the judgment creditor may examine the judgment debtor for discovery as to
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> (a) any matter pertinent to the enforcement of the order,
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> (b) the reason for nonpayment or non-performance of the order,
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> (c) the income and property of the judgment debtor,
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> (d) the debts owed to and by the judgment debtor,
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> (e) the disposal the judgment debtor has made of any property either before or after the making of the order,
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> (f) the means the judgment debtor has, had or may have of satisfying the order, and
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> (g) whether the judgment debtor intends to obey the order or has any reason for not doing so.

[25] Similarly, Rules 13-4(3) and 13-4(5) respectively provide:

> (3) An officer or director of a corporate judgment debtor, or a person liable to execution on the order in the case of a partnership or firm judgment debtor, may, without an order, be examined for discovery on the matters set out in subrule (2).
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> …
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> (5) On being satisfied that any other person may have knowledge of the matters set out in subrule (2), the court may order that other person to be examined for discovery concerning the person's knowledge.

[26] Rule 13-4(7) confirms that various subrules in Rule 7-2, which deal with "Examinations for Discovery", are directly applicable to Rule 13-4.

[27] Finally, numerous authorities confirm that an examination in aid of execution is an examination for discovery, albeit a discovery directed to enabling a judgment creditor to obtain information that may be useful in execution proceedings: *Advance Magazine Publishers Inc. v. Fleming*, 2002 BCSC 995 at para. 19 and *Bagash and Ansari v. Burns*, 2005 BCSC 213 at paras. 4-6.

[28] Second, the twin “rationales” for the implied undertaking rule that are advanced in *Juman* at paras. 24-26 apply with equal force to an examination in aid of execution. Thus, judgment debtors are compelled, notwithstanding any privacy interest, to attend at the examination and to disclose information that is relevant as determined by Rule 13-4(2).

[29] Furthermore, a judgment debtor who has some assurance that the documents and answers that he or she provides will not be used for any collateral purpose is more likely to provide complete and honest responses to the questions that they are asked.

[30] Still further, the potential for misuse of evidence obtained at post-trial discovery, in the form of an examination in aid of execution, is as significant as it is for pre-trial discovery.

[31] These various conclusions align closely with the views expressed by Master Young in *Piche*:

> [17] There is no binding authority before me to say that the implied undertaking of confidentiality does not apply to post-judgment examinations. There is a strong policy argument in favour of finding that the implied undertaking of confidentiality does survive judgment. If the rationale for the implied undertaking is that any statutory examination is an invasion of the privacy rights and that there is a public interest in getting at the truth in a civil action which outweighs examinees’ privacy interests, then I am not certain that the existence of a judgment erases those policy considerations. Is it not equally important to compel a party to honestly disclose information about its assets, liabilities and ability to pay, in the context of executing a court order? The Supreme Court rules impose a statutory duty on the judgment debtor to disclose this information under oath so that the judgment creditor may use this information to execute the judgment. I think the fact that one party obtained a judgment against a judgment debtor does not mean that judgment debtor loses all its privacy rights against unrelated members of the public.

[32] Accordingly, I am satisfied that, absent considerations that I will turn to, the implied undertaking of confidentiality applies to the evidence and documents obtained at a discovery or examination in aid of execution.

Issue 1 (b): Does the Implied Undertaking Rule have Relevance in this Case?

[33] The Alberta Securities Commission argues that Rule 13-4(8) displaces the implied undertaking in this case. Rule 13-4(8) provides:

> (8) Any part of an examination for discovery under this rule may be given in evidence in the same or any subsequent proceeding between the parties to the proceeding or between the judgment creditor and the person examined for discovery.

[34] The foregoing rule does not appear to have been judicially considered in this jurisdiction. Neither McLachlin and Taylor, *British Columbia Practice* (3d ed.) F.M. Irvine, nor Fraser Horn and Griffin, *Conduct of Civil Litigation in British Columbia*, (2d ed.) Lexis Nexis, provide any commentary on Rule 13-4(8) or on its predecessor provisions. In Seckel and MacInnis, *British Columbia Supreme Court Rules Annotated 2017*, Thomson Reuters, the authors, albeit without reference to authority, state:

> The evidence obtained through the examination in aid can be used to assist in execution and can also be used in any subsequent proceeding between the parties to the proceeding between the judgment creditor and the person examined. This would include actions alleging fraudulent preference or conveyance.

[35] Counsel for the Alberta Securities Commission directed me to *Canadian Bank of Commerce v. Kern*, [1941] S.J. No. 65 which addressed a similar rule in *The Queen's Bench Rules* of Saskatchewan. The language of that rule is, however, sufficiently different that I do not consider the case helpful.

[36] I am satisfied that the clear language of Rule 13-4(8) establishes that it has no relevance to the circumstances of this proceeding or to this application. Specifically, it cannot be said that the Alberta Securities Commission seeks to use evidence obtained from Mr. Branconnier in the same or any subsequent proceeding between "the parties to the proceeding". Though the Alberta Securities Commission was a party to the Supreme Court Proceedings it is not a party to the present proceeding. For the same reason the second branch of Rule 13-4(8) has no application.

Issue 1 (c): Should the Implied Undertaking be Waived?

[37] Once again *Juman* is instructive:

> [32] An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation. …
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> …
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> [34] Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings (see *Queen's Bench Rules,* M.R. 553/88, r. 30.1 (Manitoba); *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194, r. 30.1 (Ontario); *Rules of Civil Procedure,* r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:
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> > If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.
>
> [35] The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted.
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> [36] On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (F.C.T.D.), at p. 51. In *Livent Inc. v. Drabinsky* (2001), 53 O.R. (3d) 126 (S.C.J.), the court held that la non-party to the implied undertaking could in {unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).
>
> [37] Some applications have been refused on the basis that they demonstrate precisely the sort of mischief the implied undertaking rule was designed to avoid. In *755568 Ontario,* for example, the plaintiff sought leave to send the defendant's discovery transcripts to the police. The court concluded that the plaintiff's strategy was to enlist the aid of the police to discover further evidence in support of the plaintiff's claim and/or to pressure the defendant to settle (p. 655).

[38] It is Mr. Branconnier whose evidence is captured in the Transcript. Accordingly it is his interests, and not those of Mrs. Branconnier, that are at issue when deciding whether it would be appropriate to waive the implied undertaking that

is attached to his earlier discovery evidence. In this case I am satisfied that the interests of justice outweigh any prejudice that would result to Mr. Branconnier from such a waiver.

[39] This is so for several reasons. The Transcript is intended to be used in connection with “the same or similar issues”. From a broader perspective the Alberta Securities Commission sought, in the Supreme Court Proceedings, to enforce the judgments that it had earlier obtained. In the present case, though a non-party, it continues to be one of the many creditors of Mr. Branconnier. At a more focussed level, a central issue or test on the application that the Alberta Securities Commission brings under s. 163(2) of the BIA is whether Mrs. Branconnier is likely to have information relevant to the business or the affairs or the estate of Mr. Branconnier. Thus, the central focus of both the Supreme Court Proceedings and the present proceedings, at least from the perspective of the Alberta Securities Commission, is the property or estate of Mr. Branconnier *qua* judgment debtor or *qua* bankrupt.

[40] In a similar vein, though the Alberta Securities Commission is not a party to these proceedings, I consider it pertinent that both Rule 13-4(5) and s. 163(2) of the *BIA* provide a creditor with the ability to apply to examine a third party who may have information about, in the one case, the assets of the judgment debtor or, in the other case, the administration of the estate of the bankrupt.

[41] I also consider that the history of the interactions between the parties directly informs the question of whether the implied undertaking should be waived in this case. The Alberta Securities Commission obtained the Transcript in the Supreme Court Proceedings. It then filed an application, appending portions of the Transcript to a supporting affidavit, seeking to examine Mrs. Branconnier in the Supreme Court Proceedings.

[42] On the heels of that being done Mr. Branconnier filed a proposal under the *BIA.* Thereafter, the Alberta Securities Commission refiled the same or substantially

the same materials as it had filed in the Supreme Court Proceedings, again seeking to examine Mrs. Branconnier, but now seeking relief under s. 163(2) of the *BIA*.

[43] This history addresses a number of concerns and issues raised by counsel for Mrs. Branconnier. First, it is argued, correctly, that what the Alberta Securities Commission now seeks is a "retroactive waiver" because it filed its application materials, including parts of the Transcript, without having first obtained, as it ought to have, either a waiver from the court or the agreement of opposing counsel.

[44] In *Professional Components Ltd. v. Rigollet*, 2010 BCSC 688 the defendants sought to strike out a copyright action on the basis that the plaintiff had breached its implied undertaking to the court by misusing information obtained, by way of an *Anton Piller* Order, in a separate action, to commence the current copyright action. It was clear that the plaintiff had been aware that the implied undertaking prevented the use of the material it had obtained but it nevertheless moved forward because it was concerned about an imminent limitation period.

[45] In *Professional Components* Macaulay J., in addressing the plaintiff's submission that had it sought a waiver earlier it would have been successful, said:

> [21] *Crest Homes* does not support the plaintiff's argument primarily because the court there found that leave was required for the use of the documents. The plaintiff would have breached the undertaking had leave not been sought. A similar opinion was expressed in both *Edgeworth Construction Ltd. v. Thurber Consultants Ltd.,* 2000 BCCA 453, 190 D.L.R. (4th) 89 at para. 15, and *Chonn* at para. 59.
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> [22] In *Edgeworth*, Newbury J.A. wrote:
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> > Nor am I minded to create an exception to the rule to permit procedural "shortcuts". If it is clear that the Court's consent would have been given had it been sought, then it simply should have been sought.
> >
> > And in *Chonn*:
> >
> > The outcome of the application to obtain the courts' leave to use the documents was largely assured. Nevertheless, the plaintiff could not simply circumvent the requirement of obtaining leave from the court and move on its own initiative.

[46] Macaulay J. then addressed the plaintiff's application to retroactively amend its breach and said:

> [34] The plaintiff applies for a retroactive order to remedy the breach. I propose to proceed by first considering the likelihood that the court would have granted leave if the plaintiff had applied initially. If leave would have been granted, I will then address whether leave should now be granted *nunc pro tunc*.

[47] Macaulay J. thought that it was "difficult to imagine the court would not have granted leave had the plaintiff originally applied": para. 38. He also considered that the waiver order the plaintiff sought should be granted *nunc pro tunc*, saying:

> [55] While the defendants are correct that the process of requiring leave is important, I endorse the response in *Chonn* where a similar argument was made. There, Voith J. stated at para. 57:
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> > ... I expect that lawyers who understand the ambit and content of the implied undertaking rule and who appreciate the breadth and potential severity of the remedies available to the court to address a breach of the rule will act appropriately.
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> In the present case, it would have been preferable for the plaintiff to ask permission rather than arguing now for forgiveness, but I doubt that a *nunc pro tunc* order here will have the effect of encouraging lawyers to use disclosed material without first seeking the consent of the other party or leave of the court.
>
> [56] I am satisfied that the interests of justice favour granting the plaintiff leave to use the discovery evidence, including the meta data in the expert's report, *nunc pro tunc* for the purposes of the Copyright Action. The plaintiff may not use the disclosed information outside of the two proceedings without the defendants' consent or leave of the court.

[48] Counsel for Mrs. Branconnier also relied on *Glenayre Manufacturing Ltd. v. Pilot Pacific Properties Inc. et al*, 2004 BCSC 864. In that case, the plaintiff, who had obtained documents which it knew were impressed with an implied undertaking of confidentiality, used those documents as the basis for commencing a separate action against another defendant called Ecourt V Holdings Inc. ("EVC").

[49] Melnick J. determined that it was not open to the plaintiff to use those documents without leave of the court or the agreement of counsel: para. 18. He was also unwilling to grant a *nunc pro tunc* order to the plaintiff and struck the action that

had been commenced against EVC: para. 19. Melnick J., however, allowed the plaintiff to join EVC to an existing action: para. 21.

[50] The circumstances of this case are very different from those in both *Professional Components* and *Glenayre*, in multiple respects, counsel for the Alberta Securities Commission said, and I accept, that he did not turn his mind to the implied undertaking that pertained to the Transcript when he filed the Alberta Securities Commission's application materials in this proceeding. He was unaware of any potential difficulty until the issue of the implied undertaking was raised in the Application Response filed by counsel for Mrs. Branconnier.

[51] This is not then a case of a party seeking to take a "procedural shortcut" or of being lax about its obligations. It follows that I do not accept, as counsel for Mrs. Branconnier suggested, that the Alberta Securities Commission chose not to seek a waiver from the court "as a matter of convenience". Rather, I am satisfied that the Alberta Securities Commission's conduct was in the nature of an error or an oversight.

[52] It is relevant that that error or omission arose in circumstances where the issue of whether an implied undertaking exists in relation to post-trial discovery, in the form of an examination in aid of execution, had not yet been considered by a judge of this Court. Similarly, neither the application nor the potential purview of Rule 13-4(8) had been judicially considered.

[53] Finally, this is not a case where the Alberta Securities Commission improperly commenced an action with the information it had received in the Supreme Court Proceedings. It was Mr. Branconnier who filed for bankruptcy and who, in a sense, gave rise to the current proceedings. The Alberta Securities Commission, albeit in hindsight incorrectly, simply refiled the materials it had earlier filed in the Supreme Court Proceedings.

[54] Accordingly, I am satisfied that the interests of justice are served by granting the Alberta Securities Commission leave to use the Transcript *nunc pro tunc* for the purposes of its s. 163(2) of the *BIA* application.

Issue 2: Should Mrs. Branconnier Attend at an Examination under s. 163(2) of the BIA?

a) The Facts Which are Relevant to This Issue

[55] Mr. and Mrs. Branconnier have been married since 1978 and have resided together continuously since that time. Until recently they resided together at 8412 Armstrong Road in Langley (the "Property").

[56] In or about 2015, the Property was listed for sale for $13.9 million. In the listing, the Property was described as "The "Trophy Farm" of the Fraser Valley", being comprised of "108.45 acres with large home, observatory, office/shop, barn & cattle/horse shelter". On September 16, 2016 the Property was sold to a third party for $13,358,465. Prior to its sale, the Property had been registered in Mrs. Branconnier's sole name since 1979.

[57] On July 15, 2016 counsel for the Alberta Securities Commission, as I have said, conducted an examination in aid of execution of Mr. Branconnier in the Supreme Court Proceedings. Pursuant to the terms of a Consent Order, entered in the Supreme Court Proceedings on August 11, 2016, Mr. Branconnier was, *inter alia*, ordered to produce documents to the Alberta Securities Commission concerning his assets, both legal and beneficial, before the Examination. Though the foregoing dates appear accurate, they do not, on their face, make sense to me.

[58] During the Examination, Mr. Branconnier gave, *inter alia*, the following evidence:

(a) Mr. and Mrs. Branconnier had resided together at the Property since 1997.

(b) Mr. Branconnier confirmed the Property was listed for sale at the price of $13.9 million.

(c) Mr. Branconnier had never made a financial contribution to the Property, including mortgage payments, insurance, maintenance and upkeep, or capital improvements to the Property.

(d) Mr. Branconnier had participated in certain companies in the past as a director, including Dynasty Farms Ltd. (“Dynasty”). He could not recall if he had been a director of Sanclair Holdings Ltd. (“Sanclair”) which he described as “Mrs. Branconnier’s company”.

(e) Mr. Branconnier was not a director or shareholder of any company as at the date of the Examination.

(f) Mr. Branconnier was not a trustee of any property, nor was any property held in trust for him.

[59] After the Examination, the Alberta Securities Commission discovered that Mr. Branconnier is in fact a director of Dynasty together with Mrs. Branconnier.

[60] Mr. Branconnier had been a director of Sanclair, but ceased acting as a director in 1999. Mrs. Branconnier is currently listed as the sole director of Sanclair. Notwithstanding his apparent resignation as a director of Sanclair, Mr. Branconnier executed a transfer, as Sanclair’s authorized signatory, of a property owned by Sanclair to Mrs. Branconnier on December 17, 2004.

[61] It appears that Mr. Branconnier’s evidence that he was not a trustee or a beneficiary of a trust, though accurate, may not be complete. There is evidence to suggest that Mr. Branconnier is a replacement trustee of the Branconnier Family Trust.

[62] On July 22, 2016, counsel for the Alberta Securities Commission requested production of the information and documents requested at the Examination from Mr. Branconnier’s counsel. On September 21, 2016, counsel for the Alberta Securities Commission sent a follow up letter requesting production of the information and documents requested at the Examination from Mr. Branconnier’s counsel. No

response was forthcoming, and none of the requested documents or information was produced.

[63] By letter dated September 21, 2016 counsel for the Alberta Securities Commission requested that Mrs. Branconnier agree to be examined pursuant to Rule 13-4(5). No response was forthcoming.

[64] On October 7, 2016, as I have said, the Alberta Securities Commission filed a Notice of Application in the Supreme Court Proceedings seeking an order, pursuant to Rule 13-4(5), to examine Mrs. Branconnier under oath.

[65] Shortly thereafter, counsel for the Alberta Securities Commission learned that these bankruptcy proceedings had been commenced. On October 20, 2016 the Alberta Securities Commission filed a Requisition to adjourn its application.

b) The Legal Framework

[66] Section 163(2) of the *BIA* provides:

> (2) On the application to the court by the Superintendent, any creditor or other interested person and on sufficient cause being shown, an order may be made for the examination under oath, before the registrar or other authorized person, of the trustee, the bankrupt, an inspector or a creditor, or any other person named in the order, for the purpose of investigating the administration of the estate of any bankrupt, and the court may further order any person liable to be so examined to produce any books, documents, correspondence or papers in the person's possession or power relating in all or in part to the bankrupt, the trustee or any creditor, the costs of the examination and investigation to be in the discretion of the court.

[67] Section 163(2), and its individual requirements or components, has been extensively considered. In Houlden and Morawetz, *Bankruptcy and Insolvency Law in Canada*, 4th ed., Carswell, Thompson and Reuters, vol. 3, the authors, starting at p. 6-36.4, examine and explain these various requirements at length.

[68] On this application many of these requirements are not an issue. There is no question, for example, that the Alberta Securities Commission is a creditor and has standing to bring this application. There is similarly no question that the Alberta Securities Commission has properly effected service of its application. Still further,

there is no question that Mrs. Branconnier is a person, in concept, to whom s. 163(2) applies.

[69] The central question is whether the Alberta Securities Commission has shown "sufficient cause" to support the order that it seeks. Whether it has shown "sufficient cause" is in part, informed by the object or purpose of s. 163(2).

[70] The following propositions establish the legal framework for the application of s. 163(2):

i) the onus is on an applicant to demonstrate that there is sufficient cause to justify the examination being sought: *Ellis (Re*), 2013 SKQB 225 at para. 4;

ii) the examination must be for the general benefit of creditors and it must relate to the general administration of the bankrupt's estate: *Assaf (Re)* (1976), 23 C.B.R. (N.S.) 14 (Ont. SCJ) at para. 6;

iii) as a necessary corollary to the foregoing principle a creditor cannot seek to conduct an examination for a collateral purpose or for reasons connected with other litigation: *Assaf* at para. 5 and *Thomson Kernaghan & Co. (Re)* [2003] O.J. No. 5300 at para. 9;

iv) the person to be examined is someone who has a factual connection to the bankrupt's estate or to estate issues and is someone who may shed light on those issues: *Ellis* at para. 6;

v) the bar for showing or establishing "sufficient cause" is low: *Ellis* at para. 7, *Kane (Re)*, 2011 NBQB 142 at para. 26 and *Josipovicz (Re)*, 2012 ONSC 5361 at para. 14;

In *Black v. Ernst & Young Inc.* (1997), 47 C.B.R. (3d) 129 the Nova Scotia Court of Appeal stated that orders for examination under s. 163(2) "usually issue as a matter of course": at para. 20. Respectfully, this may set the required standard too low. It is clear that the applicant must provide some evidence in support of its application and that the court must be satisfied that

the application is neither frivolous or oppressive or in the nature of a fishing expedition: *NsC Diesel Power Inc. (Re)* [1998] N.S.J. No. 303 (N.S.C.A.) at para. 17 and *Ellis* at para. 6.

In *Josipovicz* the court said that a creditor is required to file evidence that demonstrates that the person sought to be examined likely possesses information "which may shed some light on the estate or its administration": at para. 17.

Some cases have suggested that the evidence adduced must establish or show "something being amiss" and that the named party has the ability to shed light on that matter. In *Josipovicz*, however, Brown J. said:

> [15] Although some of the cases have suggested that an order should not be granted under section 163(2) unless the creditor demonstrated that something was "amiss", that word risks deflecting the focus of the judicial inquiry on such a motion. Certainly, if something is "amiss", further investigation may be merited. But, equally, an investigation may be appropriate where an examination is required to reconcile, or shed further light on, conflicting information gathered by the trustee. In such a case nothing may be "amiss", but an inquiry is needed. So, where an order is sought under section 163(2) against a third party – i.e. neither the bankrupt nor the trustee – the focus should be on whether the examination likely will secure information required by the trustee to continue with or complete the administration of the estate of the bankrupt.

vi) The scope of the eventual examination is "quite wide but not infinite": *McDonough (Re)*, 27 C.B.R. (4th) 279 at para. 7 and *McDonald (Re)*, 2014 BCSC 2076 at para. 26.

Analysis

[71] I accept, as did counsel for the Alberta Securities Commission when the question was put to him, that the fact that Mrs. Branconnier owned the Property, which had a value in excess of $13 million, would not, without more, support the present application.

[72] In the present case, however, both aspects of the evidence that Mr. Branconnier gave on the Examination and various other circumstances support the present application.

[73] The Form 82 Report of the Trustee (the "Report") on Mr. Branconnier's application for discharge, dated June 30, 2017, identified various concerns. The Report identified that it was determined that Mr. Branconnier earned $2,900 monthly on a net basis. Thereafter, the Report identifies that Mr. Branconnier claimed he only earned approximately $778 monthly net and that that sum was paid to him on a cash basis. In the Examination Mr. Branconnier stated that his sole source of income was from working for his wife's company, shovelling manure from various barns and stalls, on the Property.

[74] The Report further confirms that the Trustee opposes Mr. Branconnier's discharge and that there are circumstances that would justify a court refusing an absolute order of discharge.

[75] Further, there is in some cases a lack of clarity and in others actual inaccuracy in the responses Mr. Branconnier provided at the Examination. His status and his ongoing role in each of Dynasty and Sanclair is unclear and warrants further investigation.

[76] In addition, Mr. Branconnier appears to have some role, albeit a contingent role, in the Trust.

[77] The fact that the Alberta Securities Commission indicated, in its Notice of Application, that the Examination of Mrs. Branconnier might subsequently support a fraudulent preference action does not, without more, indicate that her examination is being sought for collateral purpose. The Alberta Securities Commission seeks to examine Mrs. Branconnier as a person who has knowledge that might shed light on her husband's assets or estate. This is a legitimate and proper purpose. It is a purpose that advances the interests of all creditors. Whatever information Mrs. Branconnier may provide at her examination will be made available to the Trustee

and the Trustee will determine whether or not to use that information. Thus, the fact that Mrs. Branconnier may provide answers that may or may not give rise to other proceedings does not transform the purpose of the Alberta Securities Commission's application. Nor does it mean that that application is being brought to pursue a private remedy.

[78] In addition, the fact that the results of an examination may be of particular benefit to the examining creditor is not an issue so long as the examination is conducted with a view to being for the benefit of creditors generally: Houlden and Morawetz at 6-38.

[79] I am satisfied that sufficient cause has been shown by the Alberta Securities Commission to support the order it seeks under s. 163(2) of the *BIA*. I am further satisfied that the discovery of Mrs. Branconnier has the prospect of benefiting the general body of creditors and that it is not in the nature of a fishing expedition. Accordingly, I order Mrs. Branconnier to attend at an examination at a time and place to be fixed by counsel. I further order her to produce all non-privileged documents or materials that are in her possession or control and that are identified in para. 2 of the Alberta Securities Commission's Notice of Application dated April 20, 2017.

[80] A few further matters arise:

a) Counsel for Mrs. Branconnier suggested that I make various orders curtailing the scope of Mrs. Branconnier's examination. I do not consider this prudent, appropriate or feasible. There is a significant body of case law that addresses the proper scope of an examination under s. 163(2). I expect that both counsel will be mindful of and be guided by that authority. If not, such matters can be addressed, if necessary and with the proper foundation, at a later time.

b) Counsel for Mrs. Branconnier argues, that as a third party, Mrs. Branconnier should be paid the costs of attending at her examination.

The Alberta Securities Commission takes no position on the issue. I am satisfied that an order that provides Mrs. Branconnier with the reasonable costs of her attendance at her examination is appropriate.

"Voith J."