# TAB 6

**Ontario Supreme Court**
**Shirley (Re)**
**Date: 1995-09-26**

Re Shirley



Court File No. 35-055335T

*Ontario Court (General Division), Kennedy J. September 26, 1995.*

*A.D. Grace, for trustee, Ernst & Young.*

*Susan G. Ficek, for Ministry of the Environment.*

*M. Prince, for GMS Mortgage Investment Corporation, trustee, and North American Trust Company.*

[1] KENNEDY J.:—This is a motion for directions brought by the trustee to determine whether a claim by Her Majesty the Queen in right of Ontario as represented by the Ministry of Environment (MOE) is a provable expense which falls within the scheme of the *Bankruptcy Act*, R.S.C. 1985, c. B-3. The sole issue before me is whether the expense of clean-up of the bankrupt's property falls under s. 121 of the *Bankruptcy Act*.

[2] It is clear that the bankrupt contaminated the realty of concern in Port Stanley during its period of occupation and ownership from 1970 until 1987 and is responsible for a considerable portion, if not all, the clean-up. The bankrupt was involved in the development and manufacture of chemical fertilizers. The property was purchased in 1987 by a new owner, but it has been essentially unoccupied and abandoned since the date of purchase.

[3] The bankrupt used the property for the purpose of stockpiling waste in large volumes in steel and plastic tanks. During its occupation there were nine spills classified as significant.

[4] The expense of the clean-up as yet remains undetermined but it will be in the millions of dollars. It is clear that the effect of my decision will dramatically reflect on the recovery of the creditors if the MOE is entitled to share in the proceeds of the bankruptcy. It will be by far the largest creditor.

[5] The position of the trustee is that although it has no interest in the outcome, it prefers the argument of the MOE.

[6] The MOE, of course, wishes to share in the proceeds. It submits that the particular facts in addition to the nature of the notice makes this a provable claim. The MOE on the facts had decided to do the work at the time of the bankruptcy and to look to the bankrupt for payment. At least part of the claim was liquidated at the time of the bankruptcy. If the government agency goes on the property and enforces a clean-up order, it should be a creditor.

[7] The MOE submits that as an agency of the government it does not need a judgment to rank in the bankruptcy. Once the MOE decided to do the clean-up that is conclusive of its entitlement. A s. 150 order is enforceable as if it is an order of the court.

[8] The clean-up order of July 16, 1993, was never challenged. The notice dated January 12, 1994, was clearly before the bankruptcy.

[9] The MOE has assumed the obligation to clean up and has made it clear that it intends to look to the debtor. Once a notice is enforceable, then the order has the effect of a court order and adds the cost of clean-up to municipal taxes.

[10] The position of the opposing creditor GMS Mortgage Investment Corporation, trustee and North American Trust Co., trustee creditor of the estate of Samuel John Shirley is *contra* this argument.

[11] The order does not crystallize until after the date of the bankruptcy. The decision in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280, 8 C.B.R. (3d) 31, 7 C.E.L.R. (N.S.) 66 (Alta. C.A.), supports its position because the status of the debt at the time of the bankruptcy remains unclear.

[12] The extent of the debt is too remote to be recoverable in bankruptcy.

[13] The form of notice given under the legislation to the debtor is not definitive because at no time did MOE indicate that its intention to exercise its option was a certainty.

*Facts*

[14] (1) On July 16, 1993, the MOE issued an order pursuant to ss. 7, 17, 18 and 43 of the *Environmental Protection Act,* R.S.O. 1990, c. E.19 (the "EPA"), ordering the bankrupt to clean up the property.

[15] (2) The bankrupt did not comply with the terms of the order and on January 12, 1994, the MOE issued a notice pursuant to s. 147(1) of the EPA of its intention to fill the orders of the order. The notice of intention is found in vol. 4, tab. C, tab. 4.

[16] Paragraph 9 of the form indicates that the public interest desires it appropriate to proceed with the clean-up in a timely manner and in para. 10 the director indicates his intent to proceed with the work outlined in the previous notice.

[17] (3) The work commenced on the clean-up operation in January, 1994, under the direction of the MOE.

[18] (4) On February 11, 1994, the petition for a receiving order was issued against the bankrupt. The petition was disputed and after a trial, the bankrupt was adjudged bankrupt by a receiving order dated March 24, 1994.

[19] (5) On July 12, 1994, the MOE filed a proof of claim claiming the bankrupt was indebted to the MOE in the amount of $676,178.76 plus unliquidated amounts for further costs of remedial work.

[20] (6) On October 3, 1994, the director of the MOE issued an order against the bankrupt pursuant to s. 150 of the *Environmental Protection Act* for indemnity and reimbursement for all costs incurred by the MOE to clean up the property.

[21] It is clear to me that the activity of clean-up was well underway at the direction of the MOE before the petition for the receiving order was made. Staff from the MOE met with environmental consultants, Proctor and Redfern, to discuss the nature of the work to be performed.

[22] The s. 150 order was never taken further. By that I mean that prior to the petition the director had not issued the order to pay costs. The accumulated total to date remains uncertain. The order has never been filed with the Ontario Court (General Division). The municipality has not yet been directed to recover the clean-up costs under s. 154(2).

[23] However, the nature of the tasks had been identified and work to be done had commenced before the receiving order was issued.

[24] Invoices for services provided from Proctor and Redfern to the MOE for the period January 8, 1994 to February 25, 1995, totalled in excess of $46,000.

[25] The debtor did not dispute the obligations claimed against him by the MOE. His real defence is stated to be impecuniosity.

[26] There is no doubt the debtor knew in his own mind that he had been called upon to account for his past environmentally irresponsible deeds and that he would be required to pay the complete costs of clean-up once he received the director's notice dated January 12, 1994. There was no doubt about the intentions of the MOE at this time.

*The law*

[27] The *Panamericana* case is cited by all parties in this case as leading authority. I am also assisted in this case by the dicta of Harvey J. in the decision of *Re Lamford Forest Products Ltd.* (1991), 86 D.L.R. (4th) 534, 10 C.B.R. (3d) 137, 8 C.E.L.R. (N.S.) 186 (B.C.S.C.).

[28] In the *Panamericana* case the court differentiated between the two different measures which were available to the Crown agency to rectify the damages of the debtor polluter.

[29] In *Panamericana,* the Crown agency under the *Waste Management Act* had elected to proceed to issue an order requiring the receiver of a bankrupt to seal seven abandoned oil wells. Abandonment means seal a drill hole to render it environmentally safe.

[30] Under s. 92 of the *Oil and Gas Conservation Act* the Crown agency had the option and authority to enter onto the lands of the bankrupt and abandon the wells itself. The Crown agency had chosen not to go that far.

[31] As a general principle the court recognized the following statement [at p. 291]:

> None of the cases is authority for the proposition that a public office ordering a citizen to obey the general law thereby becomes a creditor for any amount the citizen may ultimately be required to spend in complying.

[32] Had the authority chosen to exercise its option to enter the lands of the bankrupt and seal the wells itself under the *Oil and Gas Conservation Act,* then the costs would have become a debt payable to the board and provable in bankruptcy.

[33] The Crown agency had not entered the property and had not abandoned the wells itself.

[34] The Crown itself was therefore not a debtor and not entitled to participate in the proceeds of the bankruptcy.

[35] In the *Lamford* decision Harvey J. held that because there was not a debt-creating provision in the *Waste Management Act* in British Columbia, the Crown could not be considered a creditor under the *Bankruptcy Act.*

[36] The distinction made by the New York District Court under their bankruptcy code in *Re Chateaugay Corp,* 112 B.R. 513, 58 U.S.L.W. 2580 (1990), is also quoted by Harvey J. [at p. 540]:

> Yet even under the American legislation, the New York District Court said that the government had no claim against the bankrupt unless the statute provided that the government could enter onto the bankrupt's land and perform the removal or remedial action, and then seek to recover those costs from the responsible parties.

[37] It is clear that in this case the MOE prior to the issuance of the receiving order entered the land of concern and was actively engaged in clean-up. Where there is a right for payment for clean-up and the Crown agency or its contractors are on site and actively involved in clean-up operations, then the expense should be included in the bankrupt's estate.

[38] When the director issued its s. 147(1) notice in January, 1994, and served it on the debtor on January 26, 1994, then the effect was to secure a lien on the realty with the authority of a binding court order. Any doubt about the resolve of the MOE intent to realize upon its authority ended when it began to incur expense from operations which was no later than January 25, 1994, when the "meter began to run".

[39] The issue of extent of the indebtedness and its relevance to the blatant disregard of the bankrupt to its environmental obligations long ago will be left to another proceeding.

[40] Order accordingly

*Judgment accordingly.*