2005 CarswellAlta 1558, 2005 ABQB 794, [2006] A.W.L.D. 8, [2006] A.W.L.D. 7, [2006] A.W.L.D. 6, 16 C.B.R. (5th) 88, 261 D.L.R. (4th) 221, 16 M.P.L.R. (4th) 263, 56 Alta. L.R. (4th) 354, 386 A.R. 350, [2006] 9 W.W.R. 363, 10 P.P.S.A.C. (3d) 107

Strathcona (County) v. Fantasy Construction Ltd. Estate (Trustee of)

Strathcona County (Applicant) and PricewaterhouseCoopers Inc., Trustee of the Estates of Fantasy Construction Ltd., Madison Development Corporation 1984 Ltd., John Van Leenen, and Irene Jean Van Leenen, Bankrupts (Respondents)

Alberta Court of Queen's Bench

Burrows J.

Heard: September 14, 15, 27, 2005
Judgment: October 26, 2005
Docket: Edmonton BK03-109703; BK03-109704; BK03-109685; BK03-109686

Counsel: Jeneane S. Grundberg, Daniel R. Peskett for Strathcona County

Michael J. McCabe, Q.C. for PricewaterhouseCoopers Inc.

R.H. Haggett for Carewest Capital Inc.

Jeremy H. Hockin for Sunrise Park Condominium Corporation

John M. Hope, Q.C. for John Van Leenen

Subject: Insolvency; Civil Practice and Procedure; Constitutional; Public

Bankruptcy and insolvency --- Proving claim — Disallowance of claim — Appeal from disallowance — General principles

Bankrupts, including F, were involved in development project — Municipality issued order finding that development was in violation of Safety Code Act regarding drainage violations — Certain work required to be performed immediately was completed by municipality or under direction of municipality — Bankrupts entered bankruptcy rather than obtain and fulfil new drainage plan — Municipality was not designated as creditor — Municipality appealed denial of claim — Appeal dismissed — Municipality was not creditor but enforcer of provincial regulation — Requirement to fix drainage issues affected only F, and F's estate alone responsible for related costs — Other bankrupts were not named in order, and did not have public obligation to address drainage issues — Obligation to address drainage problems did not extend to trustee — Municipality not entitled to superpriority for expenses already incurred — Municipality was entitled to $6500 previously paid into court — Contingency was amount of fee, which was determined before bankruptcy occurred.

Bankruptcy and insolvency --- Priorities of claims — Claims for municipal taxes and public utilities rates — Miscellaneous issues

Bankrupts, including F, were involved in development project — Municipality issued order finding that development was in violation of Safety Code Act regarding drainage violations — Certain work required to be performed immediately was completed by municipality or under direction of municipality — Bankrupts entered bankruptcy rather than obtain and fulfil new drainage plan — Municipality was not designated as creditor, as drainage obligations remained extant — Municipality appealed denial of claim — Appeal dismissed — Municipality was not creditor but enforcer of provincial regulation — Requirement to fix drainage issues affected only F, and F's estate alone responsible for related costs — Other bankrupts were not named in order, and did not have public obligation to address drainage issues — Obligation to address drainage problems did not extend to trustee — Municipality not entitled to superpriority for expenses already incurred — Municipality was entitled to $6500 previously paid into court — Contingency was amount of fee, which was determined before bankruptcy occurred — Stay of proceedings instituted by operation of Bankruptcy and Insolvency Act prevented municipality for adding expense for drainage to tax rolls.

Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — General principles

Bankrupts, including F, were involved in development project — Municipality issued order finding that development was in violation of Safety Code Act regarding drainage violations — Certain work required to be performed immediately was completed by municipality or under direction of municipality — Bankrupts entered bankruptcy rather than obtain and fulfil new drainage plan — Municipality was not designated as creditor, as drainage obligations remained extant — Municipality appealed denial of claim — Appeal dismissed — Municipality was not creditor but enforcer of provincial regulation — Requirement to fix drainage issues affected only F, and F's estate alone responsible for related costs — Other bankrupts were not named in order, and did not have public obligation to address drainage issues — Obligation to address drainage problems did not extend to trustee — Municipality not entitled to superpriority for expenses already incurred — Municipality was entitled to $6500 previously paid into court — Contingency was amount of fee, which was determined before bankruptcy occurred — Leaving stay in place did not result in inequitable prejudice.

2005 CarswellAlta 1558, 2005 ABQB 794, [2006] A.W.L.D. 8, [2006] A.W.L.D. 7, [2006] A.W.L.D. 6, 16 C.B.R. (5th) 88, 261 D.L.R. (4th) 221, 16 M.P.L.R. (4th) 263, 56 Alta. L.R. (4th) 354, 386 A.R. 350, [2006] 9 W.W.R. 363, 10 P.P.S.A.C. (3d) 107

Cases considered by *Burrows J.*:

Husky Oil Operations Ltd. v. Minister of National Revenue (1995), [1995] 10 W.W.R. 161, 35 C.B.R. (3d) 1, 128 D.L.R. (4th) 1, 137 Sask. R. 81, 107 W.A.C. 81, [1995] 3 S.C.R. 453, 188 N.R. 1, 24 C.L.R. (2d) 131, 1995 CarswellSask 739, 1995 CarswellSask 740 (S.C.C.) — considered

Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd. (1991), 8 C.B.R. (3d) 31, 81 Alta. L.R. (2d) 45, [1991] 5 W.W.R. 577, 81 D.L.R. (4th) 280, 7 C.E.L.R. (N.S.) 66, 117 A.R. 44, 2 W.A.C. 44, 1991 CarswellAlta 315 (Alta. C.A.) — followed

Strathcona (County) v. PriceWaterhouseCoopers Inc. (2005), 2005 ABQB 559, 2005 CarswellAlta 1018, 13 C.B.R. (5th) 145, 256 D.L.R. (4th) 536, 12 M.P.L.R. (4th) 167 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 14.06(4) [en. 1997, c. 12, s. 15(1)] — considered

s. 69.3 [en. 1992, c. 27, s. 36(1)] — referred to

s. 69.4 [en. 1992, c. 27, s. 36(1)] — referred to

Municipal Government Act, R.S.A. 2000, c. M-26

Generally — referred to

s. 348 — referred to

s. 553 — referred to

s. 553(2)(a) — referred to

Safety Codes Act, R.S.A. 2000, c. S-1

Generally — referred to

s. 55(2) — referred to

2005 CarswellAlta 1558, 2005 ABQB 794, [2006] A.W.L.D. 8, [2006] A.W.L.D. 7, [2006] A.W.L.D. 6, 16 C.B.R. (5th) 88, 261 D.L.R. (4th) 221, 16 M.P.L.R. (4th) 263, 56 Alta. L.R. (4th) 354, 386 A.R. 350, [2006] 9 W.W.R. 363, 10 P.P.S.A.C. (3d) 107

Workers' Compensation Act, R.S.A. 2000, c. W-15

Generally — referred to

APPEAL from denial of proof of claim by trustee in bankruptcy.

***Burrows J.*:**

1 Strathcona County appeals from the disallowance by the Trustee in Bankruptcy of claims it has made in the bankruptcies of Fantasy, Madison, and John and Irene Van Leenen. Counsel also addressed issues which were left unresolved in a decision I rendered on July 21, 2005 in these bankruptcies: (2005 ABQB 559 (Alta. Q.B.)).

2 Madison and Fantasy were developers of Sunrise Park, a condominium project in Strathcona County. The County issued development permits to Fantasy. Fantasy failed to comply with the terms of the permits in relation to drainage grading of the condominium site. There were also breaches of the *Safety Code Act* in the construction of some of the units in the project. The County commenced proceedings to enforce both the developer's obligations regarding drainage grading and to enforce compliance with the *Safety Code Act.*

3 The County obtained an Order (February 18, 2004) declaring all four bankrupts to be in breach of the *Municipal Government Act*, the County's Land Use Bylaw, the development permits and stop orders which the County had issued in an attempt to enforce the developer's drainage obligations. The Order required that the developer obtain County approval of a new drainage plan. This never occurred. Eventually the County obtained a further Order (July 22, 2004) which required Fantasy and Madison to pay $240,000 into Court so the County could do the required work itself and be reimbursed for the cost of doing so. The funds were not paid into Court. Rather, Fantasy, Madison and the Van Leenens filed assignments in bankruptcy. The County had at that point done some of the work. There still remains a substantial amount to do.

4 In my July 21, 2005 reasons I held, following the Alberta Court of Appeal's decision in *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.* (1991), 81 D.L.R. (4th) 280 (Alta. C.A.), that the developer's obligation to comply with the drainage requirements of the development permit was still extant and that the County in seeking to enforce that obligation was not a creditor in the bankruptcy. It was the public agency charged with enforcement of the obligation undertaken by the developer to the public. I held that the assets of the developer must be applied to the satisfaction of that public obligation even if that resulted in prejudice to secured creditors. I so held only in respect of Fantasy to which the original development permits containing the obligation had been issued. I left the question of whether the other three bankrupt estates were similarly affected undecided pending further submissions.

5 The Trustee has appealed my July 21, 2005 decision to the Alberta Court of Appeal. *BIA* s.

195 has stayed my decision pending the appeal.

6 Meanwhile in the *Safety Code Act* actions, the County obtained an Order (June 22, 2004) relating to construction deficiencies in two units of the condominium project owned by the Van Leenens. The Order required repairs, referred to as the "immediate work", to be completed by July 31, 2004 failing which the County was granted leave to do the work itself. Fantasy and Madison were ordered to pay $88,550 into Court as security for completion of the immediate work. The work was not done by the deadline. The security was not paid into Court. The County retained third parties to do the required immediate work at a cost to the County of $23,465.80. This work was completed before the bankruptcy assignments were filed.

7 The County obtained a further Order (August 26, 2004) requiring the developer to remedy construction deficiencies which breached the Safety Code. This Order covered a total of six two unit buildings — the one to which the June 22 Order related and five more. Fantasy and Madison were ordered to pay $750,000 into Court as security for the potential cost of the Safety Code work. $125,000 of that amount was to be paid by the Van Leenens in respect of the two unit building they owned. The funds were not paid into Court. Rather the bankruptcy assignments were made.

8 Further testing conducted since this Order has concluded that remedial work will not be required for five of these buildings. It has not been possible to determine whether the sixth building requires remedial work.

The County's Proof of Claim and Trustee's Response

9 The matters raised by the County in its Proof of Claim and the Trustee's response to each item may be summarized as follows:

a) *The anticipated cost of incomplete drainage work ......$ 200,000.00*

County's position: This work should be paid for out of the estates in application of the principal in the *Panamericana de Bienes y Servicios S.A.* case.

Trustee's response: Disallowed as against all four estates.

b) *The funds ordered to be paid into Court to secure performance of drainage and Safety Code obligations......$ 1,078,550.00*

County's position: The Court ordered these funds paid into Court. They have not been paid into Court. They are debts of the bankrupt estates.

Trustee's response: Disallowed as against all four estates.

c) *Costs incurred for drainage work......$ 79,978.91*

County's position: The County is entitled to a charge on the assets of bankrupt estates in priority to secured creditors by application of the principal in the *Panamericana de Bienes y Servicios S.A.* case.

Alternatively the portion of these costs incurred after November 22, 2004 should be treated in the same manner as the cost of work yet to be done since those costs were incurred after an Order permitting the County to do some work without prejudice to its position.

Further, if the *Panamericana de Bienes y Servicios S.A.* principle does not apply to costs incurred by the County, the bankruptcy stay of proceedings should be lifted to permit the County to add the costs to the tax rolls of the property owned by the bankrupts in the condominium project

The County is entitled to payment out of Court of $6500 which was paid into Court in respect of a portion of these costs.

Trustee's response: The County is an unsecured creditor of Fantasy and Madison in respect of these costs. The claim was disallowed as against the estates of John and Irene Van Leenen.

The *Panamericana de Bienes y Servicios S.A.* principle, if it applies in any context, does not apply to costs incurred when the County elected to do the required work itself. The County then became a creditor in respect of that cost.

It would not be equitable to permit the County at this point to become a secured creditor by adding the costs to the tax rolls of the properties owned by the bankrupts in the condominium project.

The $6500 which was paid into Court vested in the Trustee and is part of the bankrupt estates to be administered. The County is not entitled to receive these funds.

d) *Costs incurred for Safety Code work......$ 79,277.47*

The County's position and the Trustee's response to it parallel those set out in respect of the drainage costs matter. The Trustee allowed this item as an unsecured claim against the estates of Fantasy and Madison but disallowed it as against the estates of John and Irene Van Leenen.

e) *Costs ordered in drainage action and Safety Code action......$ 59,330.33*

The County's position and the Trustee's response again parallel those set out in respect of the drainage costs matter. The Trustee allowed this item as an unsecured claim against all four estates because the costs were ordered against all four bankrupts.

f) *County's share of cost of Court appointed expert......$ 4,000.00*

Again the County's position and the Trustee's response parallel those set out in respect of the drainage costs matter. The Trustee allowed this item as an unsecured claim against the estates of Fantasy and Madison but disallowed it as against the estates of John and Irene Van Leenen.

g) *Costs for various Court appearances not yet set by the Court*

County's position: The County claims to be entitled to costs in respect of applications and case management meetings in the drainage and Safety Code actions in respect of which the Court made no costs orders and no costs have as yet been taxed.

Trustee's position: No debt exists until costs are either taxed or set by the Court. That cannot now occur because of the stay resulting from the bankruptcies. This item was disallowed as against all estates.

h) *2004 municipal taxes on certain units......$ 27,253.28*

This item was not in the County's original proof of claim. The County claims the priority to which a municipality is normally entitled in respect of property taxes. I understand the Trustee accepts this claim.

10 In the remainder of these reasons I will deal with each of these matters.

a) The anticipated cost of incomplete drainage work......$ 200,000.00

11 This item was the subject of my July 21, 2005 decision currently under appeal. I held that this work must be done, and that the assets of the estate of Fantasy must be used to pay for it, even though that will reduce the amount available for creditors in that estate. The item is not properly a claim in the bankruptcy. That, I think, is recognized by all parties. The County however included it in the claim formally submitted to the Trustee pending the determination of the question of whether the *Panamericana de Bienes y Servicios S.A.* principle applied. As mentioned, I held on July 21, 2005, that *Panamericana de Bienes y Servicios S.A.* applied and that Fantasy's assets must be used to ensure compliance with the drainage grading obligations imposed in the development permit.

12 On this application the Trustee and a secured creditor of Fantasy sought to revisit that determination. They indicated that there was Supreme Court of Canada authority affecting the

issue which had not been cited previously. Since the parties had not yet settled or filed a formal Order in respect of my July decision I permitted counsel to make further submissions.

13 Further, in my July decision, I left undecided, pending further argument, the question of whether the estates of Madison and the Van Leenens are also obligated to ensure completion of the drainage work.

14 In addition, on this application the Trustee also took the position that my July decision did not oblige the Trustee to see that the work was done and argued that such an obligation cannot be imposed on a Trustee. The Trustee also indicated he wished to address whether *BIA* s. 14.06(4) gives him the right to abandon the property and be relieved of the obligation to complete the drainage work.

15 In the midst of the application counsel requested time to consider whether an alternative route to resolving the issues arising in relation to the incomplete drainage work existed. This aspect of the application was adjourned to September 27, 2005 pending discussions among counsel. On September 27, 2005 I was advised that the exploration of other routes to resolution had failed. Accordingly counsel completed their submissions.

Has Panamericana been overruled?

16 The Supreme Court of Canada decision which counsel brought to my attention is *Husky Oil Operations Ltd. v. Minister of National Revenue*, [1995] 3 S.C.R. 453 (S.C.C.). In that case a majority of the Court held that provisions of the Saskatchewan *Workers' Compensation Act*, which had the effect of giving the Saskatchewan Workers' Compensation Board a higher priority for its claim against a bankrupt estate than would be the case under the *BIA*, were inapplicable in a bankruptcy context. Gonthier J. set out six principles which apply when provincial legislation appears to conflict with the federal bankruptcy legislation. The application of those principles in that case was not straight forward because the provincial legislation did not directly grant the Board a higher priority. It did so by a circuitous route, aspects of which appeared consistent with and permitted by the *BIA.* The majority of the Supreme Court looked behind the form in order to distill the substance, and found that the effect of the legislation was unconstitutional.

17 The Trustee and one secured creditor, Carewest, argue that the case before me is governed by *Husky*. They submit that the effect of the application of the *Panamericana de Bienes y Servicios S.A.* principle is to give the County a priority it would not get under the *BIA*. They argue that *Husky* in 1995 must be taken to have overruled the Alberta Court of Appeal's 1991 decision in *Panamericana.*

18 I cannot accept this submission.

19 First I observe that in *Husky* all nine members of the Supreme Court recognized that it does not necessarily render provincial legislation invalid that it has an effect on the scheme of

distribution set out in the *BIA*. The minority, whose reasons were written by Iacobucci J., discussed this in assessing the argument that ". . . any time provincial law affects the final result of a bankruptcy, the province is improperly attempting to alter the priorities of distribution" (para. 139). This argument was labelled, "the bottom line approach". If provincial legislation affects the "bottom line", the amount available in the bankruptcy for distribution to a creditor or category of creditors, it is unconstitutional.

20 Iacobucci J. rejected the bottom line approach. He gave examples of provincial legislation which affects the bottom line in bankruptcy and yet does not conflict with the *BIA*. One of the examples he gave was the *Panamericana de Bienes y Servicios S.A.* case. He said: (para. 146)

> The Alberta Court of Appeal has, for its part, also demonstrated a reluctance to invalidate provincial legislation which simply touches upon bankruptcy proceedings. In *Panamericana de Bienes y Servicios S.A. v. Northern Badger Oil & Gas Ltd.*, [1991] 5 W.W.R. 577, the issue before the court was whether the *Bankruptcy Act* prevented a court-appointed receiver-manager of an insolvent and bankrupt oil company from complying with an order requiring that receiver-manager, in the interests of environmental integrity, carry out proper abandonment procedures on seven suspended oil wells. That work would be done at the expense of the secured creditors' entitlement under the *Bankruptcy Act*. At page 599, Laycraft C.J.A. held for the court:
>
>> In my view, there is no...direct conflict in this case. The Alberta legislation regulating oil and gas wells in this province is a statute of general application within a valid provincial power. It is general law regulating the operation of oil and gas wells, and safe practices relating to them, for the protection of the public. It is not aimed at subversion of the scheme of distribution under the Bankruptcy Act though it may incidentally affect that distribution in some cases. It does so, not by a direct conflict in operation, but because compliance by the receiver with the general law means less money will be available for distribution.
>
> *Northern Badger* thus echoes the proposition that provincial laws of general application continue to apply in bankruptcy even though they may incidentally alter the amount of proceeds available in the bankrupt's estate for distribution.

21 For the majority, Gonthier J. also considered the "bottom line approach". He said: (para 30)

> My colleague Iacobucci J. properly rejects the broader "bottom line" approach since, as he indicates, such an approach "risks nullifying the broad array of provincial legislation underpinning the *Bankruptcy Act*" (para. 142). It is trite to observe that the *Bankruptcy Act* is contingent on the provincial law of property for its operation. The Act is superimposed on those provincial schemes when a debtor declares bankruptcy. As a result, provincial law necessarily affects the "bottom line", but this is contemplated by the *Bankruptcy Act* itself. Indeed, it

is no exaggeration to say that there is no "bottom line" without provincial law.

22 In agreeing with Iacobucci J. on this aspect of the case, Gonthier J. did not mention the *Panamericana de Bienes y Servicios S.A.* case. He did not express, or even hint at, any disagreement with Iacobucci J.'s characterization of *Panamericana de Bienes y Servicios S.A.* as an example of a situation where provincial legislation could validly touch upon bankruptcy proceedings. He expressly agreed with the proposition for which Iacobucci J. had cited *Panamericana de Bienes y Servicios S.A.* as an example. I find it difficult, in these circumstances, to read *Husky* as overruling *Panamericana.*

23 Further, in my view, *Husky* does not speak to the fundamental basis of the *Panamericana de Bienes y Servicios S.A.* decision. Laycraft C.J.A. held, in *Panamericana de Bienes y Servicios S.A.*, that the public authority charged with enforcing a publicly owed obligation, in that case the ERCB, was not a creditor. It was an enforcer. For that reason the ERCB was not affected by Northern Badger's bankruptcy in its effort to enforce the publicly owed obligation. Its enforcement powers affected the interests of the secured creditor, Panamericana, but not because of a provincial interference with the scheme of priorities among creditors created by the *BIA.*

24 If Laycraft C.J.A.'s distinction between a creditor and an "enforcer" is valid, then none of the six principles listed by Gonthier J. for application where provincial property legislation appears to conflict with federal bankruptcy legislation, is engaged. They are engaged only where the effect of provincial legislation is to treat a creditor differently than he would be treated under the *BIA.* They have no application in a competition between an "enforcer" and a creditor. *Husky* cannot be read as making any statement about the validity of Laycraft C.J.A.'s distinction. It cannot in my view be read as overruling *Panamericana de Bienes y Servicios S.A.*

25 In my view *Panamericana de Bienes y Servicios S.A.* remains authoritative. Where it applies it is binding on me. As I held in July, it applies to the situation now before me.

26 I note in passing that the position taken by the Trustee and the one secured creditor appear to be a challenge to the constitutionality of the authority granted to the County to enforce the provisions of the development permit it issued to Fantasy — at least, to the constitutionality of the scope of that authority when considered in light of the *Panamericana de Bienes y Servicios S.A.* case. I expect that such a challenge would require notice to the Attorney General. I observe that the Alberta Attorney General was involved in the *Panamericana de Bienes y Servicios S.A.* case, separately from the ERCB. So far as I am aware no notice of a constitutional question has been given in this case.

Are the estates of Madison, John Van Leenen and Irene Van Leenen to be used, in addition to the estate of Fantasy, to complete the drainage grading work?

27 As mentioned, in my July 21, 2005 decision I granted the declaration the County sought only in respect of Fantasy. I held that the assets of Fantasy must be applied to the completion of

the drainage work. I left undecided the question of whether the assets of Madison, John Van Leenen and Irene Van Leenen must also be so applied. Counsel returned to that question on this application.

28 Fantasy's assets must be so used because, in my view, it is beyond question that Fantasy owes the public obligation to do the drainage work which the County is charged to enforce. The issue to be addressed is whether the three other bankrupts also owe that public duty.

29 The development permits which impose the drainage work obligation were issued to Fantasy alone. There is therefore, in my view, nothing in them to impose a public duty on any of the other three bankrupts. Similarly the stop orders issued in November 2003 were issued only to Fantasy. The action they ordered was ordered only of Fantasy. It does not change that fact that Madison and the Van Leenens, as owners of units in the project, were issued copies of the stop orders. Neither does it change that fact that the County under s. 645 of the *Municipal Government Act* could have issued a stop order requiring action on the part of parties other than Fantasy including, probably, Madison and the Van Leenens. It did not do so.

30 The only doubt on this issue arises from the Order granted by Sanderman J. on February 18, 2004 in the drainage action. Madison, John Van Leenen and Irene Van Leenen were named respondents in that proceeding in addition to Fantasy. The Order declared "the Respondents" to be in breach of the *Municipal Government Act*, the development permits and the stop orders. I described the circumstances in which the Order was granted in some detail in my July 21, 2005 decision (paragraphs 52 to 57).

31 The question before me now is whether the effect of the February 18, 2004 Order was to impose a public obligation on Madison, John Van Leenen and Irene Van Leenen which the County can now enforce against the assets of those parties in application of the *Panamericana de Bienes y Servicios S.A.* principle.

32 I have concluded that no such public obligation exists.

33 The Originating Notice of Motion in the drainage action asked for the declarations of breach which were granted, and for several forms of consequent relief. The relief sought included a requirement that the Respondents provide satisfactory drainage plans and do the work contemplated in those plans, failing which the County could prepare the plans and enter upon the lands to do the work. It also included recovery of all costs of doing the work, failing which, addition of the costs to the tax rolls for any of the lands owned by the Respondents.

34 The Order which was granted did not go as far as the Notice of Motion. It granted the declarations of breach but the only remedial aspect of the Order was a requirement imposed on the Respondents to provide satisfactory drainage plans by March 31, 2004. The Order recorded, "The balance of the relief sought by the County in the Originating Notice is adjourned to the next case management conference . . .". The Order did not impose an obligation on anyone to do the

work contemplated by the plans. No doubt Fantasy still had that obligation pursuant to the original development permits. But the February 18, 2004 Order cannot, in my view, be read as imposing an obligation to do the work on Madison or the Van Leenens. Neither can any subsequent Order.

35 On July 22, 2004 the County obtained a further Order from Sanderman J. It permitted the County to enter on the lands to do the work and required Fantasy and Madison to pay $240,000 into Court as security for the completion of the work. It did not impose an obligation on Madison or the Van Leenens to do the work.

36 I conclude that the only party who was ever subject to an obligation to do the drainage work was Fantasy. It is the only party presently subject to such an obligation. It is the only party against whom the County, the party charged with the enforcement of the obligation, can seek to enforce it. The County can have no recourse against the assets of Madison, John Van Leenen or Irene Van Leenen as a resource for the completion of the drainage work yet to be done.

Trustee's rights under BIA s. 14.06(4)

37 The interpretation of *BIA* s. 14.06(4) and the significance to this case of the rights it gives a Trustee was briefly canvassed at the resumed hearing of this application on September 27, 2005. I indicated then that I do not understand how the section and the right it gives the Trustee to avoid personal liability for failure to comply with an environmental order by disclaiming the land has significance in this application. As far as I am aware the County does not contend that the Trustee is personally liable to complete the drainage work or to pay for its completion.

38 Whether or not Fantasy's obligation, or any Order I have made, is properly characterized as an Order within the description contained in the section, it does not appear to me to be an obligation that has any connection to land owned or, at least, to land owning by Fantasy. It is an obligation flowing from a development permit issued to Fantasy requiring it to ensure that certain land owned mainly, if not entirely, by others, be properly graded for drainage. On the face of it, if s. 14.06(4) could conceivably affect an obligation owed by Fantasy (as opposed to one owed by the Trustee personally), it is difficult to see how the Trustee abandoning whatever interest Fantasy has in units of the project could substitute for that obligation.

39 However, the question of the proper interpretation of s. 14.06(4) was not fully argued before me. If the Trustee continues to require directions as to its application in this case it should make application for those directions and provide complete materials. I should not be taken as having given any advice or direction as to the application of the section to this point.

Mechanism for Completing the Drainage Work

40 I have held that the County has a right to enforce Fantasy's obligation to do the drainage work and to have Fantasy's assets applied to the cost of that work regardless of the bankruptcy

and regardless of the effect on Fantasy's creditors, including secured creditors. It will be necessary to determine the mechanics for getting the work done and paid for. If the parties are not able to agree to the mechanics they may apply further.

b) The funds ordered to be paid into Court to secure performance of drainage and Safety Code obligations......1,078,550.00

41 There were three separate Orders requiring funds to be paid into Court:

a) June 22, 2004 Order, paragraph 11. Fantasy and Madison were ordered to pay $88,550 into Court as security for the completion of the immediate work required in respect of the Safety Code breaches on the units owned by the Van Leenens.

b) July 22, 2004 Order, paragraph 4. Fantasy and Madison were ordered to pay $240,000 into Court as security for the completion of the drainage work.

c) August 26, 2004 Order, paragraph 1.a) iii. Fantasy and Madison were ordered to pay $750,000 into Court as security for the completion of the Safety Code work on six buildings. This was calculated on the basis of $125,000 per building. The Van Leenens, as owners of one of the buildings, were ordered to pay $125,000 of this amount.

42 As mentioned previously, the anticipated problem in respect of which the third Order directed $750,000 be paid into Court, has not in fact arisen, at least in respect of five of the six buildings. I understand it has not been possible to obtain access to the sixth building to determine whether or not any concern remains about it. As to the security ordered in respect of the drainage work, the County claims the actual costs of doing drainage work that has been done and seeks to have the work that has not yet been done paid for using the assets of the bankrupt estates. Similarly the County claims for the cost of the Safety Code work that was actually done.

43 In these circumstances the County no longer seeks to have the ordered security paid. In effect it has abandoned its claim in relation to these items.

c) Costs incurred for drainage work......79,978.91

d) Costs incurred for Safety Code work......79,277.47

Does the Panamericana principle apply to incurred expense?

44 In respect of these items, the County submitted that the *Panamericana de Bienes y Servicios S.A.* principle should be applied in respect of the cost of the work that has been done at its expense, not just the work that is yet to be done.

45 As noted above, it appears to have been pivotal to Laycraft C.J.A.'s reasoning in

Panamericana de Bienes y Servicios S.A. that the ERCB was not a creditor seeking to recover a debt but rather was a public agency seeking to enforce the general law of the province. He said: (page 290)

> The statutory provisions requiring the abandonment of oil and gas wells are part of the general law of Alberta, binding every citizen of the province. All who become licensees of oil and gas wells are bound by them. Similar statutory obligations bind citizens in many other areas of modern life. Rules relating to health, or the prevention of fires, or the clearing of ice and snow, or the demolition of unsafe structures are examples which come to mind. But the obligation of the citizen is not to the peace officer, or public authority which enforces the law. The duty is owed as a public duty by all the citizens of the community to their fellow citizens. When the citizen subject to the order complies, the result is not the recovery of money by the peace officer or public authority, or of a judgment for money, nor is that the object of the whole process. Rather, it is simply the enforcement of the general law. The enforcing authority does not become a "creditor" of the citizen on whim the duty is imposed.
>
> It is true that this board has the power by statute to create in its own favour a statutory debt if it chooses to do so. It may, under s. 92(1) and (2) of the *Oil and Gas Conservation Act* (discussed above) do the work of abandonment itself and become a creditor for the sums expended. But the board has not done so in this case. Rather, it is simply in the course of enforcing observances of a part of the general law of Alberta.

46 Clearly, it is essential to this reasoning that the public agency charged with enforcing the general law of Alberta not have taken steps to make itself a creditor. If it has exercised a statutory authority or authority obtained from some other source, such as a Court Order, to do whatever ought to have been done by the party with the obligation and to recover the cost of doing so, it has become a creditor. From then on, the object of the whole process has changed. The public agency is no longer seeking to require the party with the general law obligation to comply. It is seeking to recover money. If the party with the obligation is in bankruptcy, collection of the money, its debt, by the public authority must be subject to the scheme of distribution created by the *BIA*.

47 The County does not have any form of super priority over other creditors in respect of the expenditures it has made in relation to the drainage work or the Safety Code work. The principle in *Panamericana de Bienes y Servicios S.A.* does not apply to the recovery of funds expended by the County in this context.

The drainage work expense incurred after November 25, 2004

48 In the fall of 2004 the County believed it was necessary to complete a portion of the drainage work as soon as possible. The County's Coordinator of Development Engineering swore that five aspects of the work were of an urgent nature, were "required to prevent flooding and property damage" and, in the case of one unit, were required to eliminate a safety hazard in rela-

tion to an excavation. The officer swore that he was concerned that the work be completed prior to the spring 2005 thaw to avoid a significant risk of flooding of basements of units in the development. The urgent work was labelled, "the Immediate Works".

49 On November 25, 2004 I granted an Order containing the following paragraph:

> 3. It is hereby ordered that the performance of the Immediate Works by the Strathcona County and its agents performed after the granting of the within Order does not, in any way, prejudice the ability of the Strathcona County or any other party, to claim and have determined that the Trustee ought to have performed or should perform the Immediate Works, or prejudice or affect any claim or right Strathcona County has or might have for recovery of any costs and charges incurred in doing the Immediate Works.

50 The Trustee did not oppose this Order. His position was described in the recitals of the Order as follows:

> AND UPON being advised that the Trustee agrees to not argue that the stay under the *Bankruptcy and Insolvency Act* operates in relation to the Immediate Works.

51 My understanding of the intention at the time was, that given the urgency attached to the Immediate Works, and given that it was not possible to determine the merits of the County's claim that the Trustee was obliged to use estate assets to do the incomplete work before it needed to be done, the parties agreed that when that determination was made, it would apply to the work done after November 25, 2004. The effect of the agreement and Order is that my July 21, 2005 determination applies to the work done after November 25, 2004 even though the County has paid for it and is seeking to recover the cost.

52 I do not understand the Trustee to dispute my understanding of this arrangement. It does, however, dispute that the determination I made of the issue in my July 21, 2005 decision is correct and its appeal is pending.

53 I understand that it is not at this point clear whether a portion of the work the County paid for was done before or after November 25, 2004. If the parties are unable to agree to a resolution of that point, they may apply further.

Should the bankruptcy stay be lifted to permit the incurred costs to be added to the tax roll?

54 The County submitted that if it was not entitled to a "super priority" in respect of the drainage and Safety Code work it did prior to November 25, 2004, it should be allowed to exercise the authority granted to it by statute to add the costs it has incurred to the tax rolls for units of the condominium development owned by Fantasy, Madison and the Van Leenens. It argued first that the stay of proceedings imposed by the *BIA* when the assignments in bankruptcy were filed did not prevent it from doing so. In the alternative it sought a lifting of the stay.

55 *BIA* s. 69.3 imposes a stay of all proceedings for the collection of a claim provable in bankruptcy from the time of bankruptcy. *BIA* s. 69.4 permits a creditor affected by a stay to apply for a declaration that the stay no longer operates in respect of that creditor. The Court may grant such a declaration where it is satisfied: a) that the creditor is likely to be materially prejudiced by the continued operation of the stay, or, b) that it is equitable on other grounds to make the declaration.

56 Under *Municipal Government Act* s. 553 the County had the authority to add the expense it incurred in doing drainage work to the tax roll of the land upon which the work was done. Similarly, *Safety Code Act* s. 55(2) permits the County to add the expense it incurred in remedying the Safety Code violations to the tax roll of the land concerned. The *MGA* provision says that the amount added "forms a special lien against the parcel of land in favour of the municipality from the date it was added to the tax roll" (s.553(2)(a)). The Safety Code provision says the amount added to the tax roll is deemed to be taxes imposed and assessed on the land and in arrears "from the date the amount was placed on the tax roll".

57 Once the expense has been added to the tax roll, the municipality has a form of charge against the land. It has become a secured creditor with priority over the claims of every person except the Crown. (*MGA* s. 348) However, the provisions are clear that the security does not arise when the expense is incurred. Rather it arises when the amount of the expense is added to the tax roll.

58 In this case, the County had not added any portion of the expense it had incurred to any tax roll before the bankruptcies. If the *BIA* s. 69.3 stay applies, the County is prevented from adding the expense to the tax roll and becoming a secured creditor now. It argues, if the stay applies, it is inequitably prejudiced and the Court should exercise its discretion to lift the stay.

59 The argument that the stay of proceedings does not prevent the County from adding the cost of the work it has done to the tax rolls is a variation of the argument that the *Panamericana de Bienes y Servicios S.A.* principle applies even though the County is pursuing money and is therefore a creditor. For the reasons previously stated, I reject this argument.

60 In support of its submission that the operation of the stay causes it inequitable prejudice, the County observes that:

- It now appears that the chief, if not the only, beneficiary of the stay will be John Van Leenen who has a secured charge on the assets of Fantasy in an amount exceeding the value of those assets. The record of the proceedings in relation to the drainage and Safety Code actions demonstrates that the individual responsible for the failure of the developers to comply with the development permit and for the Safety Code violations was John Van Leenen. It is inequitable that the County should lose the priority the tax roll charge would give it to the person chiefly to blame for its having incurred the expense.

• When the County did the work it expected that the Court ordered security would be posted. Had it known it would have to rely on the tax roll security it would have acted earlier to put that form of security into effect.

• It is inequitable that the County should be prejudiced by the timing of the bankruptcy given that the timing was entirely in control of John Van Leenen.

• Immediately before the filing of the assignments in bankruptcy the County had circulated a form of Order permitting it to add the Safety Code work costs to the tax roll of the units affected.

• The County was delayed in adding its expense to the tax rolls by the need to await receipt of invoices from the contractors who did the work.

61 The purpose of the *BIA* is "to provide for the orderly and fair distribution of the property of a bankrupt among his creditors on a *pari passu* basis". The purpose of the stay is to "prevent proceedings by a creditor which might give the creditor an advantage over other creditors". (Houlden & Morawetz, F§53). The County submits that the achievement of that purpose in this case would be inequitable.

62 I disagree.

63 As to the first element of inequity raised by the County, I observe that sometimes a bankruptcy stay is lifted to permit an action in which the equities will be determined to continue. Here the practical effect of lifting the stay would be to determine the equities. Whether or not it is unjust for John Van Leenen to realize the benefits of the security he holds against the assets of Fantasy given his part in the creation of the problem which the County stepped in to rectify, and whether the County should have a remedy if it is unjust, cannot, in my view, be properly assessed in an application of this nature.

64 As to the other points submitted by the County, they do not, in my view, justify the exercise of the discretion to lift the stay. One of the unfortunate features of bankruptcy is that creditors are caught in the state of affairs as they exist at the time of bankruptcy. That unfortunate feature will always disadvantage a creditor who would have taken steps to improve his position had the bankruptcy not intervened. However the operation of the bankruptcy system requires a "cut off date". The consequences may be harsh but they are not inequitable.

65 I decline to lift the stay as requested by the County.

66 Counsel for the Trustee and Carewest, a secured creditor, observed that it would be inequitable to permit the County to add the costs it has incurred to the tax rolls of property owned by Fantasy (and Madison and the Van Leenens, if they are liable) when the benefit has also been

realized by the owners of units in the project which are not owned by those parties. In the circumstances, since I decline to lift the stay, it is not necessary for me to address this point.

Of which estates is the County a creditor?

67 The Trustee has accepted the County's claim regarding the costs it has incurred in doing drainage and Safety Code work as unsecured claims against the bankrupt estates of Fantasy and Madison only. The County submits that John Van Leenen and Irene Van Leenen are jointly liable with Fantasy and Madison for all the debts for which it is a creditor of Fantasy and Madison.

68 I expect but am not certain that the considerations relevant to this question are not entirely the same as those I have already assessed in determining that the assets of Madison, John Van Leenen and Irene Van Leenen are not available for enforcement of the development permit obligation concerning the as yet not done drainage work, since that obligation is not owed by Madison, John Van Leenen or Irene Van Leenen but is owed only by Fantasy.

69 The County observes that it has an outstanding application for an Order annulling the bankruptcies of John Van Leenen and Irene Van Leenen. It submits that the issue of whether John Van Leenen and Irene Van Leenen are indebted to the County for the costs it has incurred for the completed drainage and Safety Code work should not be decided before the annulment application.

70 I agree. I leave that issue do be determined, if necessary, at a future date.

Is the County entitled to the $6500 paid into Court?

71 On May 6, 2004 Sanderman J. issued an Order in the drainage action which contained this provision:

> The Respondent shall pay into court by Wednesday May 12, 2004 the amount of $6500; the County has received a rough estimate from Stantec Geomatics Ltd. that surveying the as-builts for Stage I will cost approximately $6500, and the amount to be paid into court is representative of this sum.

72 Fantasy paid these funds into Court as ordered.

73 On June 9, 2004 Sanderman J. ordered that the $6500 ". . . be paid out upon a true copy of the invoice for the surveying of the as-builts for Stage I being furnished to the offices of Brownlee LLP."

74 Stantec issued its invoices for this work, which totalled $9,095.00, on June 15 and September 8, 2004. Before the money in Court could be requisitioned, the bankruptcy assignments

had been filed.

75 The Trustee takes the position that, since the funds are still in Court, the contingency applicable to this money had not been resolved prior to the bankruptcy, so the funds in Court continued to belong to Fantasy right up to the date of the bankruptcy, and that they therefore form part of the bankrupt estate. The County has no greater call on them than any other unsecured creditor.

76 I disagree. The only contingency which prevented the payment out of Court was the determination of whether the cost they were paid to cover would be as much as $6500. That contingency was eliminated prior to the bankruptcy. Property in the money passed to the County the moment the contingency was eliminated, if it did not pass earlier.

77 The funds in Court do not belong to Fantasy. They belong to the County. The County's claim for them is not properly made in the bankruptcy. It need do no more than file a praecipe for payment of the funds out of Court. I direct the funds be paid to the County upon such a praecipe being filed.

e) Costs ordered in drainage action and Safety Code action......$ 59,330.00

78 The Trustee allowed this item as an unsecured claim against all four estates because the costs were ordered against all four bankrupts. The County, as it did in the context of the costs of the remedial work, sought priority on the basis of the *Panamericana de Bienes y Servicios S.A.* principle, or a lifting of the bankruptcy stay so as it could add these costs to tax rolls. For the reasons given previously, in my view the County is not entitled to such priority or a lifting of a stay. I confirm the Trustee's disposition.

f) County's share of cost of Court appointed expert......$ 4000.00

79 The Trustee allowed this claim as an unsecured claim against the estates of Fantasy and Madison. In my view the Trustee's disposition in that regard is correct. I dismiss the County's appeal of that aspect of the Trustee's disposition.

80 The Trustee also denied this claim as against the estates of John and Irene Van Leenen. In my view the County's appeal of that determination should not be dealt with until the application for the annulment of the bankruptcies of John and Irene Van Leenen has been dealt with. I adjourn that aspect of the appeal.

g) Costs for various Court appearances not yet set by the Court

81 As noted above, the County claims to be entitled to costs in respect of applications and case management meetings in the drainage and Safety Code actions in respect of which the Court made no costs Orders and no costs have as yet been taxed.

82 The County claimed the same priority for those costs and, alternatively, the same lifting of the stay so as to permit the costs to be added to the tax rolls, as it did in the contexts previously discussed. In my view the Trustee was correct in disallowing those aspects of the County's claim.

83 The Trustee denied the claim, even as an unsecured claim, because no debt exists until costs are either taxed or set by the Court. In my view that is also correct.

84 The Trustee observes that the bankruptcy stay of proceedings prevents the County from making cost applications or taxing costs to which it is entitled. It seems to me that this may be the type of situation where a lifting of a stay would be just. However no application in that regard has been made.

85 In dismissing the County's appeal in respect of this item, I grant the County leave to bring an application, if so advised, for a lifting of the bankruptcy stay to permit it to seek Orders for costs for proceedings completed before the bankruptcy or permitting it to tax costs to which it may already be entitled either because of an Order for costs or because of the automatic costs rule. I do not intend to imply that such leave would be granted. I intend only to give the County the opportunity to raise the issue if it wishes to.

h) 2004 municipal taxes on certain units......$ 27,253.28

86 As indicated above, the Trustee accepts the position advanced by the County in respect of this item.

Formal Order

87 There was some discussion when counsel last attended upon me as to whether one formal Order should issue encompassing the determinations I made on July 21, 2005 and the determinations made in these reasons or whether there should be two. I make no attempt to resolve that point now. There is, I expect, a significant possibility that counsel will not be able to agree on the terms of the formal Order or Orders in any event. I leave that aspect of the matter to be determined in the usual way.

Appeal dismissed.

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