KIMBERLY S. CAMPBELL

BARRISTER AND SOLICITOR
186 – 8120 No. 2 Road, Suite 814
Richmond, B.C., V7C 5J8
604-697-8800
kimberlyscampbell@live.com

VIA EMAIL

December 20, 2010

"Exemptions, Exemptions, wherefore art *Thow*?" (With apologies to Shakespeare.)

The November 17, 2010 decision of the Honourable Mr. Justice Burnyeat in Re Thow (2010) BCSC 1561 marks a significant departure from the way in which the exemptions from execution under the Court Order Enforcement Act have generally been understood to operate. Putting the implications of the case in simple, concrete terms, it is common for married or committed couples to go bankrupt together, simply because they tend to not only acquire their principal assets jointly, but also incur most of their debt jointly. Many such couples own a residence at the time they go bankrupt. The nature of the real estate market in the Lower Mainland in recent years has been such that the total equity in the property often exceeds the $24,000.00 amount which, prior to Thow, such couples were able to protect from the Trustee of their bankruptcy estates.

If Thow is correct, those couples will be able to retain none of that if they go bankrupt, while another couple with total equity of $23,999.00 will be able to retain the entirety of that amount. A similar result would follow for other kinds of assets which debtors had historically been free to retain despite going bankrupt. Application of Thow would thus result in debtors with any appreciable "asset base" at the time of bankruptcy finding themselves left virtually bereft of assets, while those whose circumstances are more modest will be able to retain most, or perhaps all, of what they have at the time they become bankrupt.

I. EXEMPTIONS 101.

Before dealing with the factual setting of Thow, a review of the pertinent statutory provisions is in order. The necessary starting place is s. 67 of the Bankruptcy and Insolvency Act (the "**BIA**"), which sets out those assets which a bankrupt must surrender as part of the price to be paid for obtaining a new financial start, and those which he or she can retain with which to undertake that new beginning. The material portions of the section provide as follows:

67. (1) The property of a bankrupt divisible among his creditors shall not comprise

> (*b*) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides; ...

For British Columbia, the general formulae for exemptions from execution are set out in ss. 71, 71.1, and 721.2 of the Court Order Enforcement Act. The material portions of those provisions are as follows (emphasis added):

> **71** (1) Subject to subsections (2) to (4) of this section and section 71.2, the following goods and chattels of a debtor, at the option of the debtor, are exempt from forced seizure or sale by any process at law or in equity:
>
> (a) necessary clothing of the debtor and the debtor's dependants;
>
> (b) household furnishings and appliances *that are of a value* ***not exceeding*** *a prescribed amount*;
>
> (c) one motor vehicle *that is of a value* ***not exceeding*** *a prescribed amount*;
>
> (d) tools and other personal property of the debtor, ***not exceeding*** *in value a prescribed amount*, that are used by the debtor to earn income from the debtor's occupation;
>
> (e) medical and dental aids that are required by the debtor and the debtor's dependants;
>
> (f) any personal property prescribed by the regulations *that is of a value* ***not exceeding*** *a prescribed amount.*
>
> **71.1** (1) Subject to section 71.2, the principal residence of a debtor is exempt from forced seizure or sale by any process at law or in equity *if the value of the debtor's equity in the principal residence* ***does not exceed a prescribed amount.***
>
> (2) This section does not apply to
>
> (a) a corporate debtor, or
>
> (b) a debtor who is party to a proceeding in respect of a mortgage.
>
> **71.2** (1) *If the value of the property referred to in section 71 (1) or 71.1 (1) exceeds the prescribed amount of the exemption for the property, that property is subject to seizure and sale under this Act.*

(2) *If property to which subsection (1) applies is sold under this Act*, a sheriff or other officer must, unless otherwise provided by law or by the agreement of all interested parties, distribute any of the proceeds of the sale as follows:

(a) pay firstly to a secured creditor the amount owed by the debtor to the secured creditor if the secured creditor

(i) has, at the time of seizure, a financing statement registered under the Personal Property Security Act, or

(ii) has a charge registered under the Land Title Act;

(b) *pay secondly to the debtor an amount* ***not exceeding the prescribed amount of the exemption.***

(3) *The sum received by the debtor under subsection (2) (b) is exempt from attachment.*

It will be noted that the legislation is written in consistent terms, with the applicable exemption in each case being described as "not exceeding a prescribed amount". Those "prescribed amounts" are found in the Regulations under the Act, as follows:

2 For the purposes of section 71 (1) of the Act, the prescribed amounts of exemption are as follows:

(a) $4,000 for household furnishings and appliances;

(b) $5,000 for one motor vehicle if the debtor is not a maintenance debtor;

(c) $2,000 for one motor vehicle if the debtor is a maintenance debtor;

(d) $10,000 for tools and other personal property of the debtor that are used by the debtor to earn income from the debtor's occupation.

3 For the purposes of section 71.1 (1) of the Act, the prescribed amount of equity is as follows:

(a) $12,000 if the debtor is a person whose principal residence is located within the boundaries of the Capital Regional District or the Greater Vancouver Regional District;

(b) $9,000 if the debtor is a person whose principal residence is located outside the boundaries of the Capital Regional District or the Greater Vancouver Regional District.

Because each individual debtor is entitled to claim the foregoing exemptions, a couple who own a home in the GVRD and who go bankrupt can claim a total exemption of $24,000.00 (2 x $12,000.00) on account of the equity in their residence. Each can also claim the full benefit f the other exemptions, such as a motor vehicle worth $5,000.00 or less.

The fundamental principle of statutory interpretation is Driedger's maxim that "the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament": see, e.g., Catholic Children's Aid Society of Metropolitan Toronto v. M. (C.) [1994] 2 S.C.R. 165 (Supreme Court of Canada). The object of exemptions from execution, such as those provided by the Court Order Enforcement Act and the Regulations thereunder, was made clear by the Supreme Court of Canada in Re Ramgotra [1996] 1 SCR 325; (1996) 37 CBR (3d) 1, in which the Court described them as a legislative means of ensuring that a debtor and his or her family be allowed to retain "the bare minimum" of assets and resources with which to support themselves.

Applying those concepts, the general pre-Thow understanding was that a non-maintenance debtor with a vehicle worth $5,000.00 could retain it, while a debtor with a vehicle worth $10,000.00 could claim $5,000.00 of the proceeds on account of the exemption before surrendering the balance to the Trustee of the bankruptcy estate. Similarly, a debtor living in the GVRD with $11,000.00 equity in his or her residence could simply retain the residence (assuming the mortgage-holder on the property allowed that so long as the mortgage was kept current), while a debtor with $100,000.00 of equity could, when the property was sold, claim $12,000.00 of the proceeds after payment of the mortgage debt, before surrendering the balance to the Trustee.

Consistent with that general pre-Thow understanding, it would be difficult to image language which contemplates more clearly than does s. 71.2(2)(a)(ii) of the Court Order Enforcement Act what is to occur where an asset, whether it be a motor vehicle or the equity in a residence, has a value in excess of the "prescribed amount". The clear wording of the section indicates that, in such a case, the debtor is entitled to receive the exempt value from the sale proceeds, after payment of whatever secured claim there may be on the asset, and before the Trustee of the bankruptcy estate recovers anything.

According to Thow, however, that is incorrect, and neither the debtor with the $10,000.00 vehicle nor the one with $100,000.00 of equity in his or her residence is entitled to receive anything. Using the language used by the Supreme Court of Canada in Ramgotra, there is no "bare minimum" allowed for those debtors, regardless of what the policy objective of the exemption provisions might be.

With all that as background, Thow can now be reviewed.

II. THE FACTS AND ANALYSIS IN *THOW*.

The debtor in Thow became bankrupt after unsuccessfully making a Proposal under to his creditors pursuant to the BIA. Shortly beforehand, he had gifted a motor vehicle to his father. The Trustee of the bankruptcy estate took the position that the gift was a "settlement" as defined

by s. 91 of the BIA (when that provision was still in force) and therefore void. The debtor's father voluntarily surrendered car to the Trustee, and the vehicle was sold, realizing a total of $15,000.00. The debtor claimed $5,000.00 of that amount, in keeping with the then-existing general understanding of how exemptions under the Court Order Enforcement Act operated. When the Trustee declined to pay the $5,000.00 claimed, the debtor applied for an Order compelling the Trustee to do so. The Court dismissed that application and awarded the entirety of the proceeds to the Trustee.

In the course of setting out the circumstances of the case, Burnyeat, J., made express reference to s. 71.2 of the Court Order Enforcement Act. He referred to the section on several other occasions, in the course of addressing other issues raised by the parties. However, his Lordship made no reference to the section at all, despite the apparently determinative nature of its language, in considering the extent to which the debtor was entitled to receive the exemption amount when total proceeds from the sale of the vehicle in question exceeded the prescribed amount provided by the Regulations.

Instead, at Paragraphs 31 – 36 of his Reasons for Judgment, Burnyeat, J., focused on the "value not exceeding a prescribed amount" language of s. 71(1)(c) and the treatment that similar language had apparently received from the Alberta Court of Queen's Bench in Re Pearson (1997) 46 CBR (3d) 257 and from the Ontario Court of Appeal in Re Fields (2003) 2 CBR (5^{th})179. Pearson allowed the debtor involved to recover the exemption amount from the proceeds, while Fields did not.

His Lordship's treatment of Pearson was quite brief, mainly consisting of the fact the issue had been considered by the Alberta Court and that the debtor in that case had been permitted to claim the amount of the exemption. The bulk of his Lordship's analysis focused on Fields.

In discussing that case, Burnyeat, J., referred various passages from the Ontario Court of Appeal's decision, including one noting that it was counter-intuitive to reach a conclusion that a proper interpretation of the Ontario legislation served to deprive a debtor of funds which are generally considered essential to rebuilding life following bankruptcy. A passage which seemed to guide Burnyeta, J.'s, ultimate decision was the following, from Paragraphs 27 – 30 of the Ontario Court of Appeal's decision (emphasis added):

> 27 Although the same issue arose in the Alberta case of Pearson, Re (1997), 203 A.R. 109 (Alta. Q.B.), respecting the interpretation of the comparable exemption provision in the Alberta Civil Enforcement Act (R.S.A. 1980, c. C-10.5) to s. 2.6, the wording of that Act is different from the Ontario Execution Act and therefore the analysis of the court in that case does not assist. After prescribing the exempt values in s. 88, s. 89(1) provides:
>
> > 89(1) Where the enforcement debtor's *equity* in the property referred to in s. 88 exceeds the prescribed value of the exemption for that property, that property is subject to sale pursuant to writ proceedings.
>
> 28 Based on s. 89, the Alberta court was able to conclude that the exemption applied to the debtor's equity in the motor vehicle even if the value of the vehicle

was higher than the prescribed value.

29 Although it would give the section the interpretation that makes the most common sense, would be most helpful to debtors and would fit with the intent and purpose of the philosophy of exemptions, the court cannot read into s. 4 [the analogue to s. 71.2(3) of the British Columbia legislation] a reference that is not there. Nor can it be justified either by implication or by analogy. *Although it is likely that the failure of the legislature to amend s. 4 when it added s. 2.6 was an oversight, if it was, it is only the legislature and not the court that can make the correction.*

30 Therefore, I conclude that reading the section as worded, because the value of the motor vehicle in this case is over $5,000, it is not exempt under s. 2.6.

After noting the close resemblance between the Ontario description of exempt motor vehicle assets as "not exceeding ... $5,000.00 in value" and what is provided in the British Columbia legislation, Burnyeat, J., concluded that he could not distinguish Fields from the case before him and elected to follow that decision rather than that in Pearson. He did not note that the legislation at issue in Pearson also referred to a motor vehicle "of a value not exceeding an amount prescribed by the regulations".

III. ANALYSIS, CONCLUSIONS, AND FOREBODINGS.

With the greatest of deference to Burnyeat, J., it seems to us Thow is incorrect and that a closer review of Fields shows that to be so. To our reading, the crucial passage of Fields is not that cited by his Lordship, but rather that found at Paragraphs 17 – 18, as follows (emphasis added) rather than that relied on by Burnyeat, J.:

17 The effect of ss. 3(1) and (2) in the case of business or farming chattels where the value exceeds the prescribed exempt value is that they can be sold and the sum representing the exempt value can be given to the debtor. Then s. 4 protects from seizure the sum that is paid to the debtor. ...

18 *Unfortunately, when the new s. 2.6 was added in 2000, ss. 3 and 4 were not amended to make them applicable to motor vehicles that became exempt under that subsection.* The appellant submits that those sections should be applied by analogy in order to maintain the intent and purpose of the Act.

On review, the simple reason the Ontario Court of Appeal could not reach a conclusion which it intuitively considered to be the correct one was that it found itself confronted with a clear legislative oversight which, as noted in the passage relied on by Buryeat, J., it did not have the jurisdiction to correct. With respect, Burnyeat, J.'s., reference to the similarity of the description

of motor vehicles in the Ontario and British Columbia legislation misses the point. What drove the outcome in Fields was the fact there was an exemption which did not come within the protective envelope of the Ontario analgue to s. 71.2(3) of the British Columbia Court Order Enforcement Act. No such legislative lacuna of the kind confronting the Ontario Court of Appeal arises here, however, since the protection afforded by s. 72.1(3) expressly extends to all property mentioned in ss. 71(1) and 71.1(1), including motor vehicles and the equity in residences. It was on the basis of the legislative gap then before it that the Ontario Court of Appeal distinguished Pearson. Again, because there is no such gap in the British Columbia legislation, there is no reason for a British Columbia Court to consider it necessary to dispose of Pearson the way the Court in Fields was required to do.

The obvious practical difficulty flowing from Thow is that the amount involved in the case did not justify the taking of an appeal. As noted at the beginning, however, its implications are much more far-reaching than the motor vehicle in issue in that case. Given the parallel language of the stature, there is no logical basis on which to confine its operation to motor vehicles.

The workings of the doctrine of stare decisis are such that, although not binding on Burnyeat, J.'s, fellow Judges, Thow is fully binding on all Masters and Registrars. The workings of the doctrine and the practical "bind" it can create was perhaps explained most delightfully by Master Funduk in South Side Woodwork (1979) Ltd. v. R. C. Contracting Ltd. (1989) 95 A.R. 161, at Paragraphs 54 – 56, as follows:

> 54 Any legal system which has a judicial appeals process, inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder.
>
> 55 I am bound by decisions of Queen's Bench Judges, by decisions of the Alberta Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial Court occupy the bottom rung of the superior Courts' judicial ladder.
>
> 56 I do not overrule decisions of a Judge of this Court. The judicial pecking order does not permit little peckers to overrule big peckers. It is the other way around.

Thow therefore has to be considered to represent the law of British Columbia until another Supreme Court Judge or the Court of Appeal says otherwise in a different case. One would assume that the issue would be revisited at the instance of a bankrupt couple with total equity exceeding the $24,000.00 which the Regulations prescribe for a residence in the GVRD. In the meantime, Trustees in bankruptcy may wish to consider the extent to which they should now consider themselves obliged to claim assets, and equity in residences, which in former times they would have simply allowed the debtor to retain.

We trust the foregoing is of some interest to you. Should you have any questions, comments, or concerns, regarding the issues discussed above or any other matter, you should not hesitate to contact the writer at your convenience.