DISCOVERY IN CRIMINAL PROSECUTIONS IN BANKRUPTCY MATTERS

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The basic principle of the Bankruptcy Act[1] is "creditor control". In accordance with this principle, prior to 1966 a trustee, acting under the instructions of the inspectors, had the prime responsibility for the prosecution of bankrupts who had committed criminal offences either under the Bankruptcy Act or the Criminal Code.[2] There were obvious weaknesses in this method of approach; to mention but one: if there were no funds or not sufficient funds in a bankrupt estate to carry out an investigation, a debtor often escaped prosecution. Knowing this, bankrupts frequently deliberately squandered their assets prior to bankruptcy in order to avoid being prosecuted.

By amendments made in 1966,[3] wide powers of investigation and inquiry were conferred upon the Superintendent of Bankruptcy; these were designed to overcome the weaknesses and deficiencies of the prior legislation. However, the trustee's rights and duties were in no way changed by the amendments and it was contemplated that trustees would continue to carry out the obligations previously performed by them in respect of criminal prosecutions, where possible, of course, working in co-operation with the department of the Superintendent.

In June 1970, a committee appointed to review and report on the bankruptcy and insolvency of Canada made its report to the Minister of Consumer and Corporate Affairs. This report recommended certain changes as regards the powers of the Superintendent in Bankruptcy in connection with criminal matters.

To facilitate the prosecution of fraudulent bankrupts, the Bankruptcy Act permits the examination of the bankrupt and other persons in aid of pending criminal proceedings. It is proposed to examine this power of discovery under three general headings —

(I) Examinations by the trustee;

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[1] R.S.C., 1970, c. B-3.

[2] R.S.C., 1970, c. C-34.

[3] S.C., 1966-67, c. 32, ss 3A and 3B.

(II) Examinations by the Superintendent of Bankruptcy, and

(III) The changes proposed by the Study Committee in the powers of the Superintendent.

I. *Examination of Bankrupt and Others by the Trustee in Criminal Proceedings.*

A. *Section 133(1) of the Bankruptcy Act.*[4]

Section 133(1) of the Bankruptcy Act confers the right upon a trustee in bankruptcy without an order to examine the bankrupt, any person reasonably thought to have knowledge of the affairs of the bankrupt, or any person who is or has been an agent, clerk, servant, officer, director or employee of the bankrupt, respecting the bankrupt, his dealings or property. The section provides that the trustee may order any person liable to be so examined to produce any books, documents, correspondence or papers in his possession or power, relating in all or part to the bankrupt, his dealings or property.

It will be obvious that the section confers a most unusual power of obtaining discovery in criminal matters. Where the trustee believes that a criminal offence has been committed, he can examine the bankrupt or any other person who may have knowledge of the facts and obtain their evidence on oath before laying an information.

B. *Examination After Criminal Proceedings Have Been Commenced.*

It is well established that a bankrupt may be examined under section 133(1) notwithstanding the fact that criminal charges have already been laid.[5] The more usual practice is, of course, to conduct the examination before an information is sworn out, but there is no reason why it cannot be held after, if it is so desired.

C. *Scope of Examination.*

Section 137 provides that any person being examined is bound to answer all questions relating to the business or property of the bankrupt, to the causes of the bankruptcy and the disposition of his property. The scope of the examination is thus very wide.[6] The examination is not restricted to questions permitted on examinations for discovery, but the witness may be cross-examined.[7]

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[4] *Supra*, footnote 1.

[5] *In re Ginsberg* (1917), 40 O.L.R. 136, 38 D.L.R. 261 reversing (1917), 27 C.C.C. 447; *In re Frilegh, Ex Parte Trustee* (1926), 7 C.B.R. 487, 29 O.W.N. 394.

[6] *Re D. W. McIntosh Ltd.* (1939), 21 C.B.R. 206.

[7] *Re Scharrer, Ex Parte Tilly* (1880), 20 Q.B.D. 518, 5 Mor. 79, 59 L.T. 188.

Under the powers given by section 133(1), a trustee may examine the wife of a bankrupt, but the wife is entitled to the protection given by section 4(3) of The Canada Evidence Act[8] and cannot be compelled to disclose information about communications made to her by the husband during their marriage.[9] The reverse would be true, of course, if it were the wife who were the bankrupt.

D. *Examination of Solicitor for the Bankrupt.*

The case of *Re Cirone, Sabato and Priori* (*Con-Form Construction Co.*); *Reisman* v. *Laker*[10] concerned the examination of a solicitor for a bankrupt under section 133(1).[11] The solicitor asserted that the information, which was sought, was of a privileged nature, and therefore, he was not obliged to answer. It is well-settled law that the privilege of the solicitor is actually that of the client, and the client can release the solicitor from refusing to answer or from divulging information that was received from the client. Building on this, McDermott J. held that, when a client becomes bankrupt, the trustee steps into the shoes of the client and has the right to release or waive the privilege. The *Cirone* case involved an action against a solicitor which alleged that he had received a preferential payment from his client, the bankrupt. Whether or not, it should be extended beyond these facts, is a difficult question. If, for example, a debtor shortly before his bankruptcy consults a solicitor and discusses with the solicitor, certain acts which the debtor has committed and which may involve a breach of the Criminal Code or the penal sections of the Bankruptcy Act, there seems no reason why the trustee should be able to waive the ordinary privilege of the client and obtain full details from the solicitor of the information which he received in confidence from his client.

It is submitted that a solicitor should not be required to disclose information given to him for the purpose of obtaining the solicitor's professional advice and assistance; otherwise, a debtor would be unable to obtain the full professional advice and assistance to which he is entitled.[12] If, however, it is not a communication made for the purpose of obtaining professional advice but merely information regarding the bankrupt's affairs, it should be disclosed.[13] If the solicitor has been a party to the offence or has advised

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[8] R.S.C., 1970, c. E-10.

[9] *Lortie* v. *Perras* (1954), 34 C.B.R. 211, [1954] Que Q.B. 568; *Re Triffon; Hunter Douglas Ltd.* v. *Freed* (1966), 8 C.B.R. (N.S.) 114.

[10] (1966), 8 C.B.R. (N.S.) 237.

[11] R.S.C., 1952, c. 14.

[12] See *In re Arnott, Ex Parte Chief Official Receiver* (1885), 5 Mor. 286, 60 L.T. 109, 37 W.R. 223; *Ex Parte Campbell, Re Cathcart* (1870), L.R. 5 Ch. App. 703, 23 L.T. 289, 18 W.R. 1056.

[13] *In re Wells, Ex Parte The Trustee* (1892), 9 Mor. 116.

as to its commission, then the situation will be entirely different and the solicitor will be required to submit to full examination.[14]

E. *Production of Documents.*

Section 133 (1) confers a broad authority upon the trustee to order a person, who is to be examined, to produce books, correspondence or papers in his possession or power, relating in all or in part to the bankrupt, his dealings or property. In this connection, section 12(4) of the Bankruptcy Act provides that no person is, as against the trustee, entitled to withhold possession of the books of account belonging to the bankrupt or any papers or documents relating to the accounts or to any trade dealings of the bankrupt, or to set up any lien thereon. As a result of section 12(4), a solicitor has no right to assert his lien upon books and records of the bankrupt; however, by Rule 64(4), documents that are subject to a solicitor's lien, are to be returned to the solicitor upon the completion of the administration of the estate.

F. *Examination to Be Conducted in Private.*

Creditors have no right to attend on the examination without the leave of the court.[15] The bankrupt has no right to be present when other persons are being examined.[16]

G. *Right to Be Represented by Counsel on Examination.*

The debtor or other person being examined is entitled to be represented by counsel on the examination.[17] In *re Inter-British Import Co.; Cohen* v. *Grobstein,*[18] the court did not decide whether counsel for the witness had the right to examine the witness at the close of the examination, or to object to questions during the course of the examination. However, in the case of *Re Cambrian Mining Co.,*[19] it was decided that counsel had the privilege of objecting to questions which he deemed to be improper and also the right, at the close of the examination, of asking questions to clear up matters which had been raised in the examination. The *Cambrian* case is in accordance with the practice followed in the Province of Ontario.

H. *Answers Tending to Criminate.*

Section 138 of the 1927 Bankruptcy Act,[20] provided that no

[14] *Russell* v. *Jackson* (1851), 9 Hare 387, 68 E.R. 558; *Gartside* v. *Outram* (1857), 26 L.J.Ch. 113, 28 L.T.O.S. 120, 5 W.R. 35.

[15] *In re Grey's Brewery* (1883), 25 Ch.D. 400, 53 L.J. Ch. 262, 50 L.T. 14.

[16] *In re Beall; Ex Parte Beall,* [1894] 2 Q.B. 135, 63 L.J.Q.B. 425, 1 Mans. 203.

[17] *Re Inter-British Import Co.; Cohen* v. *Grobstein* (1954), 34 C.B.R. 68, [1954] Que. Q.B. 361.

[18] *Ibid.*

[19] (1881), 20 Ch.D. 376, 51 L.J.Ch. 221.

[20] R.S.C., 1927, c. 11.

person was excused from answering any question on a section 131 (1)[21] examination on the ground that the answer might tend to criminate the person being examined. When the present Bankruptcy Act was enacted in 1949, section 138 was replaced by section 125 which reads:[22]

> Any person being examined is bound to answer all questions relating to the business or property of the bankrupt, to the causes of his bankruptcy and the disposition of his property.

Section 5 of the Canada Evidence Act[23] and section 9 of the Ontario Evidence Act[24] have, of course, abolished the privilege against self-incrimination. In the case of *In re Frilegh, Ex Parte Trustee*[25] Fisher J. was of the opinion that even without the provisions of former section 138, a debtor was not entitled in view of the Evidence Acts to refuse to answer on the grounds that his answer might criminate him. Perhaps, this is the reason that the provisions of section 138 were not carried forward in the 1949 Act.

In a section 133(1) examination, it is customary for a witness to claim the protection afforded by the Canada and Ontario Evidence Acts in respect of questions which may prejudice him, and this protects the witness from having his answers used against him in subsequent criminal or civil proceedings, other than a prosecution for perjury in giving such evidence. The witness must answer the questions subject to this protection.[26]

The Bankruptcy Act creates certain criminal offences.[27] The former section 138 provided that any of the questions and answers upon a section 131(1) examination could be given in evidence against the person so examined on any charge of an offence against the Bankruptcy Act. The neat question is whether or not this has been affected by the passing of section 125 in 1949.[28] Section 5(2) of the Canada Evidence Act provides that, if by reason of the Canada Evidence Act or by reason of an Act of any provincial legislature a witness is compelled to answer, the answer for which protection has been claimed, shall not be used or receivable in evidence against him in any criminal trial, or other criminal proceedings against him thereafter taking place, other than a prosecution for perjury in giving such evidence. In *Re Inter-British Import Co.; Cohen* v. *Grobstein*,[29] Rinfret J. of the Quebec Court of Appeal said:[30]

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[21] Now see s. 133(1).
[22] Now see s. 137.
[23] *Supra*, footnote 8.
[24] R.S.O., 1970, c. 151.
[25] *Supra*, footnote 5.
[26] *Re Grande Textiles and Drunker* (1954), 34 C.B.R. 213.
[27] Ss 169-179. [28] Now s. 137. [29] *Supra*, footnote 17.
[30] *Ibid.*, at pp. 71 (C.B.R.), 369 (Que.Q.B.).

> It is noticeable that section 5 refers to the Act itself or the Act of any provincial legislature, but does not refer to any other. It might be argued, I do not venture to say with what success, that this examination is not conducted under the Canada Evidence Act or the Act of any provincial legislature, but under the Bankruptcy Act and as such admissible in evidence in a "criminal proceeding . . . thereafter taking place".

In the subsequent case of *Re Grande Textiles and Drunker*[31] Montpetit J. of the Quebec Superior Court, in ordering a witness to attend and answer questions provided that the answers should not be used or receivable in evidence in any criminal trial or other criminal proceedings against the bankrupt, but made no exception of criminal proceedings for offences against the Bankruptcy Act.

Section 133(3) of the Bankruptcy Act provides that the evidence of any person examined under section 133(1) may be read in any proceedings before the court under this Act to which the person examined is a party. However, "Court" is defined by section 2 of the Bankruptcy Act to mean the court having jurisdiction in bankruptcy or a judge thereof. Prosecutions for bankruptcy offences take place, of course, in the ordinary criminal courts, not in the Bankruptcy Court, so that section 133(3) does not appear to be relevant to this problem.

If the suggestion of Rinfret J. in the *Inter-British* case[32] were correct, it would mean that in the prosecution of a bankrupt for offences against the Bankruptcy Act and the Criminal Code, a section 133(1) examination of the bankrupt could be used in respect of offences against the Bankruptcy Act, but would not be admissible as regards offences against the Criminal Code. It is submitted that regardless of the wording of the Canada Evidence Act, the answers would not be receivable in evidence if the protection were claimed, as they would have been given under compulsion and, hence, would not be admissible.[33]

I. *Use of the Examination.*

Section 133(3) provides that the evidence of any person examined under section 133(1), if transcribed, shall be filed in the court and may be read in any proceedings before the court under the Bankruptcy Act to which the person examined is a party. As has been pointed out, the examination could not be used in criminal proceedings, as they are not conducted in the Bankruptcy Court. However, the examination can be used in obtaining leave by a trustee from the Bankruptcy Court to institute criminal proceedings.[34]

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[31] (1954), 34 C.B.R. 213.
[32] *Supra*, footnote 17.
[33] *R.* v. *Garbett* (1847), 1 Den. 236, 169 E.R. 227.
[34] S. 176(3).

J. *Practice.*

The trustee must obtain an ordinary resolution of the creditors or a written request or resolution of a majority of the inspectors in order to conduct an examination under section 133(1).[35] The usual procedure is to obtain a resolution of the inspectors. If the written request or resolution of inspectors is not obtained and the examination takes place, the evidence may still be used in subsequent proceedings in the Bankruptcy Court.[36]

It is customary for the inspectors to first authorize an investigation by an accountant of the books and records of the bankrupt. When the accountant's report is completed, it is reviewed by the inspectors with the trustee and the solicitor for the estate, at a duly called meeting of the inspectors. If further action is required, the trustee will request the approval of the inspectors for the examination of certain named individuals under section 133(1) and the necessary resolution is passed. If it is a summary administration bankruptcy without inspectors, the trustee can examine without an order or without a resolution of the creditors.[37]

The form of appointment used in ordinary civil matters is not used in this type of examination. The Bankruptcy Act provides its own form[38] and this form must be followed.[39]

Section 133(1) provides that the examination may be held before the Registrar in Bankruptcy or other authorized person. Under Rule 98, any person who is qualified or authorized to hold examinations for discovery or examinations of judgment debtors in accordance with the rules of court in civil actions or matters is an authorized person. The usual practice in the Province of Ontario is to conduct the examination not before the Registrar, but before a Special Examiner or other authorized person in the county where the person to be examined resides.

The appointment is prepared by the solicitor for the trustee in duplicate and taken to the examiner to have the date and time of the examination filled in. It is then served on the person to be examined. The appointment must be served two clear days before the time of the examination.[40] Conduct money must be paid to the witness.[41]

Ordinarily an examination will be held in the county where the witness resides, but Rule 99(1) permits it to be held in the bank-

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[35] *In re Fairlie & Co. Ltd., Trustee* v. *Standard Stock & Mining Exchange* (1934), 15 C.B.R. 278.

[36] *Re Houlding* (1921), 1 C.B.R. 505, [1921] 2 W.W.R. 521, 14 Sask. L.R. 277; 59 D.L.R. 238.

[37] *In re Zalken* (1960), 1 C.B.R. (N.S.) 168.

[38] Form 64.

[39] Rule 3(1).

[40] Rule 100.

[41] *In re Arrow Fluorescent Co.* (1960), 1 C.B.R. (N.S.) 169.

ruptcy district or division in which the person to be examined resides, and this is a wider area than the county.[42] In special circumstances, the court may order a person out of the province to be examined in the province where the trustee carries on business.[43] If there are voluminous books and records in a bankruptcy, and the trustee wishes to have the use of these documents at the examination, it is customary to apply for an order permitting the examination to be held where the trustee has his place of business. An application for such an order may be made *ex parte*.[44]

K. *Failure to Attend for Examination or Refusal to Answer Question.*

If the witness fails to attend for examination and has been properly served and paid conduct money, the court has power under section 136 by warrant[45] to cause the witness to be apprehended and brought up for examination. A party cannot refuse to attend for examination under section 133(1) on the grounds that an action is pending by the trustee against the witness whom it is proposed to examine.[46]

If a witness refuses to answer questions, a motion to compel the witness to answer is the proper remedy. This application may be made to the Registrar,[47] although the usual practice is to bring the application before the Bankruptcy Judge. If a witness other than the bankrupt has refused to answer proper questions, costs of the motion may be awarded against the witness.[48]

II. *Examination of the Bankrupt and Others by the Superintendent of Bankruptcy Pursuant to Section 6.*

In 1966, very wide powers were conferred upon the Superintendent of Bankruptcy by sections 6 and 7[49] of the Bankruptcy Act to investigate and inquire into situations where there were indications of an offence having been committed either under the Bankruptcy Act or any other Act of the Parliament of Canada. As has been pointed out, these sections were added to overcome the difficulties that were encountered where an investigation was not carried out by the trustee by reason of a lack of funds in the estate or some other reason.

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[42] S. 8(1).
[43] Rule 99(1).
[44] Rule 99(2).
[45] Form 75.
[46] *In re Fairlie & Co. Ltd.; Trustee* v. *The Standard Stock & Mining Exchange, supra,* footnote 35.
[47] S. 162(1) (k); *Re Highfield Motor Products Limited; General Motors Acceptance Corporation of Canada Ltd.* v. *Clarkson Co. Ltd.* (1969), 12 C.B.R. (N.S.) 305.
[48] *Re D. W. McIntosh Ltd.* (1939), 21 C.B.R. 206.
[49] Former ss 3A and 3B.

Among the powers conferred by section 6 is a section[50] almost identical in wording to section 133(1) permitting the Superintendent to conduct examinations. Section 6(4) is similar to section 137 and requires a witness to answer questions. However, a new section 6(5) was enacted similar in form to section 138 of the 1927 Bankruptcy Act. This section provides that a person being examined, has no right to object upon the ground that his answers may tend to criminate him. But, unlike old section 138, it states that the answer so given cannot be used or received in evidence in a criminal proceeding thereafter taking place. Section 6(5) does not, like former section 138, give the right to use the evidence where the charge involves an offence created by the Bankruptcy Act.

Unlike a section 133(1) examination, it would appear from the reading of sections 6 and 7 that the Superintendent's examination must take place before a charge is laid. It would be possible for the Superintendent with the co-operation of the trustee, to have the trustee conduct an examination after a prosecution has been commenced.

When the right of examination under section 6 is combined with the wide powers of search and entry and production of documents conferred by the section, the Superintendent is possessed of ample powers to investigate fully, alleged criminal activities on the part of bankrupts.

III. *Changes in the Powers of the Superintendent of Bankruptcy Recommended by the Report of The Study Committee on Bankruptcy and Insolvency Legislation 1970*

In June 1970, the committee appointed to review and report on the bankruptcy and insolvency legislation of Canada made its report to the Minister of Consumer and Corporate Affairs. Part of the report dealt with criminal law remedies.[51]

Under the present Bankruptcy Act, the Superintendent cannot launch an investigation until after a receiving order has been made or an assignment has been filed. The committee felt that this was unduly restrictive as circumstances may exist where, in the public interest, an investigation should be initiated before bankruptcy occurs. The committee, therefore, recommended that the Superintendent should be permitted to start an investigation whenever there are reasons to believe that an offence has been, or is likely or is about to be committed. The report spells out the conditions that would have to exist before the Superintendent could exercise this power. Unfortunately, the report is not clear whether or not

[50] S. 6(3).
[51] Paras 3.4.06 to 3.4.27.

the Superintendent would have the right at this stage to conduct examinations, but, presumably, the powers given by section 6 would be extended back to this earlier period of time.

Conclusion

Bankruptcy frauds are complex and involved and the successful prosecution of them is an arduous and time-consuming job. While it runs counter to our customary views of criminal law to permit discovery in criminal matters, without this power the effective enforcement of this branch of the law would be most difficult.

It must be remembered that the answers given by the bankrupt cannot be used against him if he claims the protection of the Evidence Acts, but the carrying out of the examinations enables the investigator to obtain necessary information which would otherwise be unavailable to him. In practice, the right of examination has proven to be a most useful tool in dealing with fraudulent bankrupts, and so far as the writer is aware, has not been unduly oppressive to those being examined.