IN FACT AND IN LAW EXPRESS

APRIL 2010

Restructuring, Insolvency and Banking Law

lavery
LAW ▸ BUSINESS

THE PARTNERSHIP AND THE INDEPENDENT PATRIMONY OF ITS THE BANKRUPTCY OF FERME C.G.R. ENR. S.E.N.C.

By Jean Legault and Pierre M. Lepage

On April 16, 2010, the Quebec Court of Appeal issued a judgment concerning the right of a general partnership ("S.E.N.C.") to file for assignment under the *Bankruptcy and Insolvency Act* (the "*BIA*") without its partners having also filed for the assignment of their assets, themselves.

By responding affirmatively to this question, the Court has not only rejected the long-established practice of the Superintendent of Bankruptcy, but went further and affirmed the independent character of the patrimony of the S.E.N.C. with respect to that of the partners as individuals. The Court therefore distinguished earlier jurisprudence, based on the *Civil Code of Lower Canada*, which had decided that in the absence of a legal personality, a partnership may not own assets, its property being divided between the partners.

The facts

Ferme C.G.R., a general partnership, filed with the Official Receiver ("OR") an assignment of its assets under the *BIA*. The OR refused the assignment stating that a partnership may not assign its assets unless the partners also assign their assets. The Quebec Superior Court ordered the Official Receiver to accept the assignment nevertheless, the main motive being that the *BIA* does not authorize the OR to refuse to file an assignment, and one that, furthermore, respects all formalities imposed by the *BIA*.

The Superintendent of Bankruptcy appealed this decision, arguing that an S.E.N.C. has no legal personality nor patrimony distinct from that of its partners and that in consequence, it is an obligation for an assignment on the part of the partnership to be accompanied by an assignment on the part of the partners involved.

The S.E.N.C. and the BIA

The Court of Appeal decided that, under the terms of the *BIA*, an S.E.N.C. is a person that, should it become insolvent, may assign its assets. This being said, it recognized that *BIA* is unclear and ambiguous about whether such an assignment necessarily implies the assignment of the partners as well. The Court of Appeal notices that the virtually unanimously held doctrine and the jurisprudence required the concomitant assignment of the partners' assets.

However, the Court noted that this doctrine and jurisprudence is based on earlier provisions of the *BIA* and its regulations and that, additionally, they ignored the legal nature of an S.E.N.C. in the *Civil Code of Quebec* ("CCQ"). The Court also noted that a very similar question came before the Supreme Court of Canada and was examined in the light of the *Partnership Act* in Nova Scotia[1], and its decision went in the opposite direction. The Superior Court of Quebec declared itself to be of the same opinion in two recent decisions: one recognized the right of assignment of a limited partnership company without the general partner being obliged to file for assignment, the other deciding that an S.E.N.C. may be subject to a receiving order without leading to the personal bankruptcy of its partners.

The S.E.N.C. and the CCQ

The Court observed that it is now well established that the *CCQ* does not accord a legal personality in any real sense. However, according to the *CCQ*, it is nevertheless the case that this entity enjoys certain attributes of a legal personality including that of possessing a patrimony that is autonomous and distinct from that of its partners, and the right to bring suit.

Noting the fact that the Court had reached the opposite conclusion in *Québec (Ville de)* v. *Compagnie d'immeubles Allard Ltée*[2] on the basis of the *Civil Code of Lower Canada*, it considered that the basis of this decision had been weakened in light of the *CCQ* provisions.

After analyzing these provisions, the Court concluded:

> [Translation] "*[71] This social patrimony* [that of the partnership] *is distinguished from the patrimony of the partners. In this regard, it no longer appears possible to treat the patrimony of the partnership as if it belonged, by indivision, to the partners. As we have seen, it is rather a patrimony which enjoys its own autonomy.*"[3]

In conclusion, the Court expressed the opinion that a partnership, including an S.E.N.C., possesses an autonomous patrimony susceptible of being liquidated for the benefit of its creditors according to the system established by the *BIA* and, in consequence, it may assign its assets without it being mandatory for the partners involved to also assign their assets.

The *BIA* is sufficiently flexible to leave it up to [translation] "*the initiative of the creditors to provoke, either the bankruptcy of the partnership, or that of one or more partners but excluding the partnership, or that of both the partners and the partnership*[3]."

The Court of Appeal therefore upheld the decision of the Superior Court ordering the OR to file assignment for the partnership Ferme C.G.R. Enr. S.E.N.C.

At the present time, we do not know whether or not the Superintendent of Bankruptcy intends to address the Supreme Court of Canada to have this decision reviewed.

To be continued...

---

1 - *Langille* v. *Toronto-Dominion Bank*, [1982] 1 R.C.S. 34
2 - [1996] R.J.Q. 1566 (C.A.)
3 - Paragraph 81 of the decision