Law Society of Alberta v Higgerty: Non-creditors appointments under the Judicature Act

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In *Law Society of Alberta v Higgerty*, the Alberta Court of King's Bench allowed for the appointment of a receiver and manager under the *Judicature Act*, RSA 2000, c J-2 (the Judicature Act). The Court also ruled that solicitor-client privilege must be given primacy when in conflict with the interests and entitlements of secured creditors. This decision underscores that the Court will permit non-creditors to apply for the appointment of a receiver in special circumstances.

What you need to know

- The Judicature Act can be used to appoint a receiver or receiver and manager.
- Non-creditors can be granted standing to bring an application for the appointment of a receiver or receiver and manager.
- Solicitor-client privilege may displace the interests and entitlements of secured creditors if the two are at odds.

Background

In early 2023, Higgerty Law was placed under custodianship pursuant to a court order. Mr. Harrison (the Custodian) and the Law Society of Alberta (LSA) brought an application to appoint a receiver or a receiver and manager over Higgerty Law pursuant to section 13(2) of the *Judicature Act.* What made this application contentious was (i) the desire of a secured lender (ELFCo) to enforce its security rights over the assets held by Higgerty Law; and (ii) the desire of the LSA to ensure that the parties are acting in the public interest and to protect solicitor-client privilege related to the files of Higgerty Law.

The security rights of ELFCo included all present and after-acquired personal property, including any proceeds of class actions. ELFCo challenged the appointment of a receiver and manager as it asserted that such an appointment would negatively impact its ability to realize on its secured interest. In turn, ELFCo provided an alternative method to the Court that would have the case files of Higgerty Law transferred to another law firm and protected by establishing an information wall or barrier.

The Court was called upon to decide whether an appointment of a receiver and manager of Higgerty Law was just or convenient. In order to do so, the Court had to balance the rights of Higgerty Law's clients to have their solicitor-client privileged communications protected against the rights of ELFCo to enforce its legal and beneficial rights.

As neither of the applicants were creditors, the Court stated that unlike certain provisions in the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3, a receivership order may be granted under the *Judicature Act* following an application by a party that is not a creditor and in circumstances outside the normal course of bankruptcy.

The Court stated that while the rights and entitlements of ELFCo are important, they were displaced in these unique circumstances because the risk to the public is greater if there is a breach of solicitor-client privilege than if there is a displacement of the rights of ELFCo. In its reasoning, the Court held that the particulars of this case confirmed there was a risk that solicitor-client privilege could be breached if matters were not monitored by the LSA and the Custodian. In commenting that it was "better to be safe than sorry", the Court allowed for the appointment of a receiver and manager over Higgerty Law under section 13(2) of the *Judicature Act*.

Issues

The first issue involved whether the LSA had standing in this case. The Court ruled that the LSA had standing as it was a major stakeholder in the wind up of Higgerty Law and had a duty to make sure that solicitor-client privilege was preserved over the file information.

The second issue was whether the protection of solicitor client privilege displaced the rights of creditors. The Court ruled that solicitor-client privilege is a fundamental underpinning of the legal profession, near absolute and merits protection. In balancing the interest of the creditors and solicitor-client privilege, the Court ruled that the higher duty was the protection of the solicitor-client privilege.

The third issue was whether any alternative method could be used instead of appointing a receiver and manager over Higgerty Law. The Court acknowledged the risk posed to ELFCo and other creditors in its position but held that the rights under solicitor-client privilege take precedent over the rights of secured lenders. With respect to the alternative method proposed by ELFCo, the Court ruled that the risk of a breach of solicitor-client privilege was too important of a matter with which to gamble.

Takeaway

This case is an example of a court appointing a receiver by using the Judicature Act. It serves as a reminder to secured creditors that non-creditors can be granted standing by the courts to apply for an appointment of a receiver, and that the courts have a mandate to place certain public interests above the interest of secured creditors.

By

Kevin Barr, Farrukh Ahmad

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Centennial Place, East Tower
520 3rd Avenue S.W.
Calgary, AB, Canada
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F 403.266.1395

Ottawa

World Exchange Plaza
100 Queen Street
Ottawa, ON, Canada
K1P 1J9

T 613.237.5160
F 613.230.8842

Vancouver

1200 Waterfront Centre
200 Burrard Street
Vancouver, BC, Canada
V7X 1T2

T 604.687.5744
F 604.687.1415

Montréal

1000 De La Gauchetière Street West
Suite 900
Montréal, QC, Canada
H3B 5H4

T 514.954.2555
F 514.879.9015

Toronto

Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON, Canada
M5H 4E3

T 416.367.6000
F 416.367.6749

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