

New Judgment Clarifies When Bankruptcy Debt May Be Declared Non-Releasable

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BLG represented the applicant, Adobe Systems Incorporated, in this filing.

The Québec Superior Court recently rendered a judgment ([*Francis v. Adobe* 2018 QCCS 2547](#)) confirming that a bankrupt's debt may be declared non-releasable by a discharge order pursuant to section 178 of the *Bankruptcy and Insolvency Act* (the "Act"), even when said discharge order has not yet been rendered or when the bankrupt's discharge has been suspended or granted conditionally pursuant to section 173 of the Act. BLG represented the applicant, Adobe Systems Incorporated ("Adobe" or the "Creditor"), in this filing.

The Facts

Adobe, one of Pierre Francis' unsecured creditors (the "Bankrupt"), had previously contested the Bankrupt's motion to be released from his bankruptcy. As a result, judgment was rendered by the registrar in bankruptcy staying the Bankrupt's discharge for a period of five years as well as making it conditional to a payment of \$85,000 to the trustee for the benefit of the Bankrupt's creditors. Therefore, at the time of the presentation of the application to have a debt declared non-releasable by an order of discharge pursuant to section 178 (1) e) of the Act (the "Non-release Application"), the Bankrupt had not yet been discharged from his bankruptcy.

The Court found that no rules have been set out in the law to determine when the Non-release Application should be made. Therefore, the Court concluded that such application may be presented at any time before or following the Bankrupt's discharge and consequently, Justice Pinsonnault ruled that the Non-release Application was neither precipitous nor premature.

Adobe's claim against the Bankrupt arose from several final and in force judgments rendered by California and Québec courts against the Bankrupt, which established his fraudulent liability towards Adobe in the amount of \$6,783,810.00 (the "Fraud Judgments"). It was also confirmed in the Fraud Judgments that the Bankrupt's debt towards Adobe was the result of elaborate schemes either put in place or known by the Bankrupt in order to defraud Adobe by profiting from the sale of counterfeited Adobe products.

The Decision

In his judgment, which included an analysis of sections 173 (1) k) and 178 (1) e) of the Act that deal with the Bankrupt's fraudulent actions, Justice Pinsonnault underlined several differences between the remedies available to Adobe under said sections. For the Court, it is clear that section 173 (1) k) of the Act is only to be applied with regards to the Bankrupt's discharge from his bankruptcy, whereas section 178 (1) e) of the Act is an exception to the general concept of the release of a bankrupt's debts when discharged from bankruptcy and which only applies to cases where the preponderant evidence supports the fact that such specific debt arises from obtaining property or services through false representation or fraudulent conduct.

In order for section 178 (1) e) of the Act to apply, the Creditor has to demonstrate that there is a causal link between the bankrupt's fraudulent actions and the creation of the debt. The mere presence of fraudulent behaviour is therefore not enough for the debt to be declared non-releasable. In this particular case, the Court recognized that the Fraud Judgments constitute *prima facie* evidence that the Bankrupt's debt towards Adobe arose from obtaining property through false representation or fraudulent conduct and therefore ruled that said debt is declared non-releasable by an order of discharge pursuant to section 178 (1) e) of the Act.

By

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