

# Court of King's Bench of Alberta

**Citation: Royal Bank of Canada v FASI 2 Ltd, 2023 ABKB 715**

**Date:** 20231214

**Docket:** 2101 01582; BK01 095379

**Registry:** Calgary

Between:

**Royal Bank of Canada**

Applicant

- and -

**FASI 2 Ltd., Alexander von Gramatzki,  
and Christopher Hanne**

Respondents

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**Reasons for Decision  
of the  
Honourable Justice Colin C.J. Feasby**

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## **Introduction**

[1] Royal Bank of Canada (“RBC”) applies pursuant to the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (“*BIA*”), s 43 for an order declaring the Respondents, Mr. von Gramatzki and Mr. Hanne bankrupt. *BIA* s 43(1) requires that a creditor demonstrate:

- (a) the debt or debts owing to the applicant creditor or creditors amount to one thousand dollars; and
- (b) the debtor has committed an act of bankruptcy within the six months preceding the filing of the application.

[2] The Respondents admit that they owe RBC more than \$1,000 but deny that they have committed acts of bankruptcy. Mr. von Gramatzki also submits that he has resided in Texas for over a year, so the Court has no jurisdiction to make a bankruptcy order. The Respondents further argue that since the loan to FASI 2 Ltd. (“FASI”) was made pursuant to the *Canada Small Business Financing Act*, SC 1998, c 36 (“*CSFBA*”), RBC may recover 85% of its loss from the Federal Government. Accordingly, the Respondents submit, there is no basis for making a bankruptcy order.

[3] RBC also applies pursuant to the *Fraudulent Preferences Act*, RSA 2000, c F-24 (“*FPA*”) to set aside a transfer of shares from Mr. von Gramatzki to his wife, Mackenzie Siba. RBC alleges that the share transfer was made within days of the commencement of this proceeding and at less than fair value. RBC also alleges that the share transfer constitutes an act of bankruptcy. Mr. von Gramatzki maintains that the transfer of shares was a legitimate transaction not made to defeat RBC’s rights as a creditor.

## **RBC’s Application for a Bankruptcy Order**

### ***Indebtedness to RBC***

[4] The Respondents were directors of FASI which operated a restaurant under the name “Fork and Salad” in Calgary prior to its dissolution.

[5] FASI and RBC entered into a credit card agreement in 2019, a loan agreement in 2019, and several loan amending agreements in 2019 and 2020 (together, the “Loan Agreements”).

[6] FASI and RBC entered into a General Security Agreement and a Security Agreement (Chattel Mortgage for Other than Inventory and Consumer Goods) in 2019. RBC registered the security interests at the Alberta Personal Property Registry.

[7] Both Mr. von Gramatzki and Mr. Hanne gave guarantees to RBC subject to a maximum amount of \$87,500 plus interest at RBC prime rate plus 5% (the “Guarantees”).

[8] RBC advanced funds to FASI pursuant to the Loan Agreements. FASI failed to pay amounts owing to RBC. On January 19, 2021, RBC demanded payment of the outstanding indebtedness owing pursuant to the Loan Agreements. RBC also delivered a Notice of Intention to Enforce Security pursuant to *BIA* s 244. On the same day, RBC demanded repayment of the outstanding indebtedness together with interest from the Respondents pursuant to the Guarantees.

[9] RBC commenced this action against FASI to recover the outstanding indebtedness owing by FASI and the Respondents. On September 12, 2022, Applications Judge Mattis issued a judgment in favour of RBC as follows:

- (a) \$343,692.21 against FASI;
- (b) \$98,650.02 against Mr. Gramatzki; and
- (c) \$98,650.02 against Mr. Hanne.

[10] No appeal of the judgment was filed.

[11] RBC is entitled to costs pursuant to s 12 of the Guarantees. Applications Judge Mattis issued a decision on costs on December 14, 2023 in the amount of \$40,000.00 (the “Costs Order”).

### ***Acts of Bankruptcy***

#### **(i) Fraudulent Preference**

[12] *FPA* sections 1 and 2 provide that a person on the brink of insolvency may not transfer assets of value to another person with the intent to obstruct creditors or prefer one creditor over others. *BIA* ss 42 (b), (c), and (g) designate these types of transfers as acts of bankruptcy.

[13] On February 7, 2021, Mr. Gramatzki entered into a Settlement Agreement with his wife, Ms. Siba – this was nine days after receiving a demand letter from RBC and five days after the Statement of Claim in this action was issued. He transferred 100 Class A shares in Global Advisory Services Inc. (“Global”), representing all the outstanding equity of Global at the time, to his wife in exchange for cancellation of \$20,000 in debt.

[14] RBC demonstrated that Mr. von Gramatzki’s shares were transferred to a related party shortly after RBC’s demand. The circumstances of the transfer accordingly exhibit characteristics of fraud. The presence of characteristics fraud shifts the burden of explanation to Mr. von Gramatzki: *Lay v Lay*, 2023 ABKB 354 at para 58; *Westcorp Inc v H & H Stucco & Siding Ltd*, 2016 ABQB 650 at para 39; and *Anderson v Westmount Projects Inc*, 2023 ABKB 619 at para 37.

[15] Global’s main asset was a home in Springbank outside Calgary that was purchased for \$1.7 million in 2014. Mr. von Gramatzki deposes that he borrowed approximately \$500,000 in his personal capacity from Ms. Siba for the house purchase and that the balance was financed with a bank mortgage. Mr. von Gramatzki further deposed that Ms. Siba “spent hundreds of thousands of dollars renovating the property.” The property was sold \$1.7 million in 2022 to Mohamed Ramathullah.

[16] Mr. von Gramatzki did not explain how it was determined that the consideration for the 100 Class A shares in Global would be the cancellation of \$20,000 in debt. He now says that the consideration is fair because Ms. Siba was due to earn 1,000 shares in Global on November 28, 2021, pursuant to a Share Incentive Program.

[17] Mr. von Gramatzki’s explanation for the share transfer falls short of what is required to establish that the transaction is legitimate. When faced with evidence that called into question the *bona fides* of the share transfer, Mr. von Gramatzki should have responded by providing evidence of the value of Global at the time of the share transfer together with an explanation of how the consideration for the share transfer was determined. Instead, he provided a narrative about the financing of the house purchase and Ms. Siba’s contributions to the Global business and property without supporting documents. The only document provided was a copy of the Share Incentive Plan which does not provide evidence of the house financing and only outlines what Ms. Siba’s contributions to the Global business were expected to be. Given that Mr. von Gramatzki is represented by counsel and is said to be “in the finance industry in Texas,” I can only conclude that his choice to avoid providing evidence concerning the value of Global at the relevant time was deliberate.

[18] I conclude that Mr. von Gramatzki has committed an act of bankruptcy and that the transfer of Global shares to Ms. Siba must be set aside pursuant to the *FPA*.

#### **(ii) Suspension of Payment of Debts/Unable to Meet Liabilities**

[19] *BIA* s 42(1)(j) provides that it is an act of bankruptcy if the debtor ceases to meet his liabilities generally as they become due. The evidence indicates that Mr. von Gramatzki and Mr. Hanne are insolvent, and the only available inference is that they cannot meet their liabilities as they become due.

[20] The only evidence of Mr. von Gramatzki and Mr. Hanne’s financial circumstances comes from their respective Financial Statements of Debtor. The Financial Statements of Debtor appear to be incomplete or completed with a lack of diligence. Nevertheless, Financial Statements of

Debtor are statutory declarations and, as such, in the absence of contrary evidence, I must take the information provided in the documents as a true picture of the financial circumstances of Messrs. von Gramatzki and Hanne.

[21] Mr. von Gramatzki's Financial Statements of Debtor dated February 1, 2023 states that he earns \$36,000 per year from consulting work. It further indicates that he owes \$39,928.75 on a VISA credit card and \$28,485.48 on an AMEX credit card. The Financial Statements of Debtor also says that he has "stopped paying" both credit cards. Mr. von Gramatzki disclosed in the Financial Statements of Debtor liabilities of approximately \$600,000 and assets of less than \$1,000. There is no question that Mr. von Gramatzki is unable to meet his liabilities as they come due.

[22] Mr. Hanne's Financial Statements of Debtor dated February 2, 2023 indicates that he is unemployed and does not indicate any source of income. His Financial Statements of Debtor discloses RRSP and TFSA savings of less than \$40,000 and no other material assets. Though Mr. Hanne only lists rent as an expense, it is reasonable to conclude that he has other regular expenses for basic necessities including food, clothing, and transportation. Though Mr. Hanne lists no liabilities, taking into consideration his debt to RBC and the Costs Order, it is obvious that Mr. Hanne is unable to meet his liabilities as they come due.

### ***Jurisdiction***

[23] Counsel for the Respondents suggested in oral argument that the Court does not have jurisdiction to make a bankruptcy order against Mr. von Gramatzki because he now resides in Texas. This argument was not developed, nor were any cases on point given to the Court. RBC, however, provided written argument addressing the issue.

[24] *BIA* s 43(1) provides that a creditor may make an application for a bankruptcy order against a debtor. A "debtor" is defined in *BIA* s 2 as "...an insolvent person and any person who, at the time an act of bankruptcy was committed by him, resided or carried on business in Canada...." If the requirements of *BIA* s 2 are met, a Canadian Court has jurisdiction: ***Re Chu***, 1995 CanLII 7365 (ON SC) at para 2. As the fact findings in the preceding section of these reasons make clear, the Respondents resided or carried on business in Canada at the times of the acts of bankruptcy. The Respondents are subject to the *BIA*.

[25] *BIA* s 43(5) provides that an application for a bankruptcy order must be filed in the court with jurisdiction in the judicial district of the locality of the debtor. *BIA* s 43(5) is concerned with where in Canada the bankruptcy application should be made, not whether the debtor is subject to the *BIA*: ***Re Chauvco Resources International Ltd***, 1999 ABQB 56 at para 12.

[26] Section 2 of the *BIA* defines "locality of a debtor" as the principal place:

- (a) where the debtor has carried on business during the year immediately preceding the date of the initial bankruptcy event;
- (b) where the debtor has resided during the year immediately preceding the date of the initial bankruptcy event; or
- (c) in cases not coming within (a) or (b), where the greater portion of the property of the debtor is situated.

[27] Mr. Hanne, according to his Financial Statements of Debtor, resides in Calgary. No evidence to the contrary was adduced.

[28] Mr. von Gramatzki's Financial Statements of Debtor dated February 1, 2023 indicates that despite residing in Texas he carries on business as a consultant at a Calgary address. This fact alone is sufficient to establish that the locality of the debtor is Calgary.

[29] I am satisfied that Calgary is the proper locality of the debtor for Mr. von Gramatzki. As noted above, the purpose of *BIA* s 43(5) is to ensure that proceedings are brought in the appropriate Canadian jurisdiction; it is not relevant to determining whether the debtor is subject to the *BIA*. In the present circumstances, Mr. von Gramatzki is subject to the *BIA* because he resided and conducted business in Canada at the time of the first act of bankruptcy – the fraudulent preference on February 7, 2021 – and Calgary is the only plausible Canadian jurisdiction for proceedings against Mr. von Gramatzki because that is where he resided and carried on business prior to relocating to Texas.

### **Canada Small Business Financing Act**

[30] The Respondents argue that a bankruptcy order is not warranted because “RBC qualifies to collect 85% of the loan loss pursuant to Section 8 of the [*CSBFA*].” They further submit, “[r]educing by 85%, the claim of RBC against the guarantors takes on a completely different complexion.... There is no basis for RBC putting Mr. Gramatzki and Mr. Hanne into bankruptcy when RBC can clearly recover the majority of its loss for its loan to FASI from the Federal Government.”

[31] *CSBFA* s 8 provides as follows:

The liability of the Minister in respect of losses sustained by a lender as a result of a loan made by it is limited to the lesser of

- (a) 85% or any prescribed lesser percentage, of its eligible loss, calculated in accordance with the regulations, and
- (b) a prescribed maximum amount.

[32] The Respondents say that “the 15% for which RBC would not be indemnified by the Government is an amount that the Respondents could seriously consider and address.” The Respondents' argument appears to be that RBC is being unreasonable in pursuing the full amount of the debt in these proceedings.

[33] The *CSBFA* scheme cannot be understood without reference to the *Canada Small Business Financing Regulations*, SOR/ 99-141 which provide the mechanism by which lenders submit claims to the government. *CSBF Regulations* s 37 provides as follows:

(2) If a borrower is in default under section 36, the lender must demand repayment of the outstanding amount of the loan within the period specified in the demand before submitting a claim for loss sustained as a result of the loan under section 38.

(3) If the outstanding amount of the loan is not repaid within the period specified, the lender must take any of the following measures that will minimize the loss sustained by it in respect of the loan or that will maximize the amount recovered:

- (a) collect the principal and interest outstanding on the loan;
- (b) fully realize any security, guarantee, or suretyship;

- (c) realize on any insurance policy under which the lender is a beneficiary;
- (d) fully implement a compromise settlement with the borrower or with a guarantor or surety or any other person on behalf of the borrower, guarantor or surety; and
- (e) subject to subsection (4), take legal proceedings, including the enforcement of any resulting judgment, if the estimated cost of the proceedings is not greater than the estimated amount that may be recovered.

...

38(1) A lender must take all of the measures described in subsection 37(3) that are applicable before submitting a claim to the Minister for loss sustained as a result of the loan.

[34] The *CSBFA* scheme, when viewed in its entirety, provides for reimbursement for lenders who have first taken reasonable steps to maximize the amount collected from debtors: see *Caisse Populaire Desjardins Chutes Montmorency v Canada (Attorney General)*, 2011 FCA 166 at para 22. Reasonable steps can include taking legal proceedings. In my view, seeking a bankruptcy order against a debtor fits within the category of legal proceedings contemplated by *CSBF Regulations* s 37(3)(e).

[35] Under the *CSBF Regulations* whether a legal proceeding to collect from a debtor is reasonable depends on, among other things, the estimated cost of the proceedings relative to the potential recovery. The reasonableness of the legal proceeding, however, is not the concern of the debtor. The question of reasonableness determines whether the lender will be reimbursed by the government. As such, reasonableness is a question for the government if and when RBC seeks reimbursement, not the Court in the present proceeding.

### **Conclusion**

[36] RBC's application for an order declaring Mr. von Gramatzki and Mr. Hanne bankrupt is granted. RBC is entitled to Schedule C costs in the appropriate column.

Heard on the 24<sup>th</sup> day of October, 2023 with additional written submissions received on the 7<sup>th</sup> day of November, 2023.

**Dated** at Calgary, Alberta this 14<sup>th</sup> day of December, 2023.

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**Colin C.J. Feasby**  
**J.C.K.B.A.**

**Appearances:**

Jonathan J. Bouchier, Catrina J. Webster and Kaitlin Ward of MLT Aikins LLP  
for the Applicant

Dennis A. McDermott, K.C. of McDermott Law  
for the Respondents