IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***American Bullion Minerals Ltd. (Re),***
2008 BCSC 639

Date: 20080521
Docket: B061351
Registry: Vancouver

In Bankruptcy

In the Matter of the Bankruptcy

of American Bullion Minerals Ltd.

Before: The Honourable Mr. Justice Pitfield

Reasons for Judgment

Counsel for Marinus Jellema and Lawrence Newton:	R.J. King J. Cockbill
Counsel for the Trustee of American Bullion Minerals Ltd.:	S. Stephens
Counsel for bcMetals Corporation:	J. Singleton, Q.C. A. Sherriff
Date and Place of Hearing:	April 21 - April 24, 2008 Vancouver, B.C

Introduction

[1] On August 30, 2006, American Bullion Minerals Ltd. ("ABML") was adjudged a bankrupt under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*") in response to a petition brought by its controlling shareholder, bcMetals Corporation ("bcM").

[2] Messrs. Marinus Jellema and Lawrence Newton (the “Applicants”) who are minority shareholders of ABML, apply under s. 181(1) for an order annulling the bankruptcy:

> 181(1) If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

[3] The character of the complaints made by the Applicants are these:

> (a) bcM and its agents made a number of misrepresentations, particularly with regard to ABML's assets and liabilities, when bcM petitioned ABML into bankruptcy;
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> (b) the sole ABML director failed to oppose or alert ABML shareholders to bcM's bankruptcy petition which was improper and in breach of his duties as a director of ABML; and
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> (c) bcM petitioned ABML into bankruptcy for an improper purpose which was to facilitate bcM's acquisition of ABML's interest in mineral claims without compensation to ABML's minority shareholders, in order that bcM could fulfill its commitments under an agreement between bcM and a co-venturer or partner.

[4] Two questions require answers:

> 1. Did ABML commit an act of bankruptcy which was a pre-condition to the order?

2. Did bcM abuse the process of the court when it petitioned ABML into bankruptcy?

The Bankruptcy Petition and Order

[5] The bankruptcy petition filed by bcM on August 18, 2006 alleged that:

1. ABML was indebted to bcM for the sum of $468,171.17 on account of a debt for legal fees which had been assigned to bcM, and the sum of $181,126.99 on account of a loan bcM made to ABML;

2. within the six months preceding August 18, 2006, ABML committed acts of bankruptcy by ceasing to meet is liabilities generally as they became due, those liabilities being comprised of a debt of $270,414 owing to Mountain View Development Ltd.; a debt in the amount of $33,384 owing to the unidentified holder of a demand promissory note; a debt of $126,325 owing to Quest Capital Corp.; a debt of $145,417 owing to former directors of ABML; and a second debt of $122,853 owing to other former directors of ABML.

3. The value of the ABML assets which provided bcM with security under a general security agreement was approximately $100,000.

[6] bcM's chief financial officer swore an affidavit in support of the petition. He deposed that the facts stated in the petition were true. The only exhibits to the affidavit were a copy of the cease trade order issued by the British Columbia Securities Commission on May 29, 2001, and unaudited financial statements, without notes, prepared by management for the period ending August 15, 2006.

[7] The proceedings before the master in chambers were brief:

> THE REGISTRAR: Your Honour, number 1, in the matter of the bankruptcy of American Bullion Minerals Ltd. Five minutes given.
>
> MR. ROBERTS: Your Honour, Roberts, initial W., for the petitioning creditor, BC Metals Corporation. It's a bankruptcy petition, and the companies are related in the sense that the debtor company has a sole director who is also a director of petitioning creditor. I don't know if there is [sic] any shareholdings that cross over. I think it's limited to that. There are two debts owing by the debtor to the petitioner: one is in the amount of approximately $470,000; the other is in the amount of approximately $180,000. There are four other debts

listed in the petition and attested to by the affidavit. Attached to the affidavit are also the financial statements of the debtor company that set out these debts. The debtor company was a publicly traded company. There has been a cease trade order issued by the BC Securities Commission that's also attached to the affidavit. All of the technical requirements have been met, in my submission, Your Honour. They have been served properly. The superintendent has been served, et cetera.

THE COURT: Well, yes, they have been served. There is no evidence of that here.

MR. ROBERTS: I'm sorry. I have all those here. I believe they were filed. I can pass you up copies.

THE COURT: No, in the circumstances I will accept your representation. This is fairly straightforward.

MR. ROBERTS: They do bear stamps on them.

THE COURT: All right. So if everyone has been served --

MR. ROBERTS: Yes.

THE COURT: -- then no one opposes --

MR. ROBERTS: No.

THE COURT: -- the facts as set out clearly like the petitioner's book.

MR. ROBERTS: Thank you, Your Honour. Sorry, two minor points, and only because I've recently had two bankruptcy orders rejected. In our standard order we put two terms that don't appear in the petition. One is that the trustees require to post bond as the superintendent may require. That's a provision in the act. And the other is the petitioner is entitled to his costs of the application as part of the administration of the estate. Again, that's in the act. We put it in the order, so I would just like to add those to my order.

THE COURT: It wouldn't be a bad idea to put them in this petition perhaps, but all right; that's fine. Did you get those two additional terms, Madam Registrar?

THE REGISTRAR: I did. Thank you, Your Honour.

THE COURT: Thank you.

MR. ROBERTS: Thank you, Your Honour.

[8] The Applicants, who, like other shareholders excluding bcM, were not aware that the petition had been filed, allege a number of deficiencies and

misrepresentations in the petition, the affidavit, and the representations to the court at the hearing of the petition. They say that if the court had been aware of all the relevant facts and circumstances, it would not have concluded that ABML was bankrupt, or that it was in the interests of justice to grant the bankruptcy order. In that regard, s. 43(7) of the *BIA* provides:

> (7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for any other sufficient cause no order ought to be made, it shall dismiss the application.

[9] The deficiencies alleged are the following.

(a) The Relationship between bcM and ABML

[10] Nothing in the petition or the affidavit described the relationship between bcM and ABML. The representations of counsel in that regard were limited to the following:

> It's a bankruptcy petition, and the companies are related in the sense that [ABML] has a sole director who is also a director of petitioning creditor. I don't know if there are any shareholdings that crossover. I think it is limited to that.

[11] In fact the relationship between bcM and ABML was considerably more substantial than that which could be derived from the petition, the affidavit, the financial statements at August 15, 2006, and the submissions to the court.

[12] ABML was a public company whose shares traded on the TSX Venture Exchange until May 29, 2001, when the British Columbia Securities Commission

issued a cease trade order because of ABML's failure to file financial statements for the year ending December 31, 2000. ABML was de-listed in August 2001.

[13] Over a period of time, bcM acquired shares of ABML. It acquired some from a number of ABML shareholders in September 2003. It subsequently acquired additional shares in exchange for debt which it had acquired from one of ABML's creditors. At the date the bankruptcy petition was heard, bcM owned 6,403,700 of 12,191,498 issued and outstanding ABML shares, or approximately 52.53% of the total.

[14] At August 30, 2006, ABML had one director, Mr. Jay Sugir, who had held office since 2004. He was a bcM nominee.

[15] I find that the petition, the affidavit in support, and the submissions of counsel did not inform the court of the real relationship between bcM and ABML.

(b) The ABML Liabilities

[16] The Applicants allege that the liabilities were misrepresented in the petition and the affidavit. The complaints are the following:

(i) The Lang Michener LLP Account

[17] In the affidavit filed in support of the bankruptcy petition, bcM's chief financial officer deposed as follows:

> [ABML] is justly and truly indebted to the petitioner as at August 16, 2006, for the sum of $468,171.17 on account of a debt owing by the said [ABML] to Lang Michener LLP and assigned by Lang Michener LLP to the petitioner, and for the sum of $181,126.99 on account of a loan made by the petitioner to [ABML].

[18] Lang Michener LLP had rendered accounts totalling $468,171.17 for legal services alleged to have been rendered to ABML in 2003 and 2004. The accounts came before a master of the court on a review under the *Legal Profession Act*. The master referred the question of whether certain directors of ABML had the ability to bind ABML to pay for legal services during the currency of a receivership to the court. The matter came before Tysoe J., as he then was: see 2006 BCSC 504. The facts stated in the reasons are relevant for immediate purposes and in relation to other matters which I will address in due course. The learned judge described the facts as follows:

> [4] American Bullion was a publicly traded company but, by 2002, it had been de-listed and a cease trade order had been made in respect of its shares. It was involved primarily in the mining industry and its principal asset was an 80% ownership mineral claim in northern British Columbia known as Red Chris.
>
> [5] American Bullion had borrowed the sum of $400,000 (U.S.) from a company called Evanton Limited ("Evanton") in 1997. The monies had not been repaid and, in August 2002, American Bullion agreed to grant a general security agreement to Evanton in consideration of an extension of the time for repayment. The general security agreement was granted by American Bullion to Evanton in September 2002 (the "General Security Agreement").
>
> [6] On or about October 18, 2002, American Bullion entered into a joint venture agreement (the "Joint Venture Agreement") with Red Chris Development Company Ltd. ("Red Chris"), a company owned by a publicly traded company called bcMetals Corporation ("bcMetals"). Under the Joint Venture Agreement, American Bullion transferred its ownership interest in the mineral claim to Red Chris in exchange for a 30% reversionary carried ownership interest in the claim plus cash payments in a minimum amount of $2 million, together with a further $10 million out of commercial production in the event that a mine was built. The sum of $250,000 was paid to American Bullion in the fall of 2002 and the remainder of the $2 million minimum payment was payable over a six year period after Red Chris obtained all necessary regulatory and shareholder approvals for the acquisition and the proposed assignment of its interest in the Joint Venture Agreement to a publicly listed company, which I presume was intended to be bcMetals ($500,000 upon receiving the approvals, $625,000 on the first anniversary of the date of the last of the approvals and $125,000 on each of the second through sixth anniversaries of the date of the last of the approvals).

[7] Some of American Bullion's shareholders became dissatisfied with its management and took steps to hold a meeting of the shareholders for the purpose of electing different directors. A proxy battle ensued between two groups of shareholders, one group supporting the existing directors and the other group supporting new nominees, Mr. Barker, Mr. Gold and Mr. Kermeen, none of whom owned shares in American Bullion. Mr. Zinkhofer of the Law Firm assisted the group of dissatisfied shareholders in the proxy battle. The meeting took place on December 30, 2002, and Messrs. Barker, Gold and Kermeen were elected as the new directors of American Bullion (the "New Directors").

[8] I gather that Evanton was not pleased with the election of the New Directors. It was suggested in the testimony of the representative of the Receiver-Manager that Evanton was concerned that the New Directors wanted to challenge the validity of the Joint Venture Agreement, which Evanton saw as the means of repaying the indebtedness owed to it. Relying on a default under the General Security Agreement, Evanton appointed the Receiver-Manager by instrument accepted on December 31, 2002.

[9] When the New Directors persisted in making public statements to the effect that the Joint Venture Agreement was invalid, Evanton commenced an action against American Bullion on January 30, 2003. On that same day, it obtained an *ex parte* injunction enjoining American Bullion from dealing with the Joint Venture Agreement.

[10] The Receiver-Manager was of the view that it was in the best interests of American Bullion to preserve the Joint Venture Agreement and that the Joint Venture Agreement represented the only source of funds to pay the indebtedness owed under the General Security Agreement. At the request of Red Chris, the Receiver-Manager confirmed the Joint Venture Agreement and acknowledged that it would not be challenging the Joint Venture Agreement.

[11] On February 10, 2003, despite the opposition of American Bullion on the instructions of the New Directors, Mr. Justice Groberman granted an Order appointing the Receiver-Manager. He decided that it was not necessary to deal with a cross-application made by the New Directors to dissolve the injunction in view of the appointment of the Receiver-Manager. In his Reasons for Judgment, Mr. Justice Groberman mentioned that if the directors and shareholders of American Bullion wanted to get rid of the Joint Venture Agreement, they could apply for leave of the court to commence an action.

[12] The New Directors brought two applications on behalf of American Bullion in the Court of Appeal with respect to the Order granted by Mr. Justice Groberman. On April 14, 2003, Madam Justice Ryan granted a stay of the Order, until the application for leave to appeal the Order, to the extent that it permitted a sale of American Bullion's assets and an application for approval of any such sale. On May 28, 2003, Madam Justice Levine granted leave to appeal the Order and continued the stay pending the appeal. However, the appeal was not pursued by the New Directors and I gather that it lapsed

when American Bullion failed to file an appeal record by the due date of July 28, 2003.

[13] In the meantime, the New Directors continued making public statements to the effect that the Joint Venture Agreement was invalid and that court proceedings would be commenced to have it set aside. This caused difficulties for bcMetals, which was trying to raise funds from the public for the purpose of conducting exploratory work on the Red Chris claim.

[14] In June 2003, the New Directors made application under s. 126 of the *Company Act*, R.S.B.C. 1996, c. 62, for leave to commence an action to have the Joint Venture Agreement set aside or declared invalid. Mr. Justice Pitfield dismissed the application. An application for leave to appeal was filed in respect of this decision, but it was never pursued by the New Directors.

[15] While the receivership was ongoing, the New Directors instructed the Law Firm to take certain steps to preserve the corporate standing of American Bullion. Those steps included the calling and holding of an annual general meeting of American Bullion on June 30, 2003. At that meeting, the New Directors were re-elected.

[16] During the first half of 2003, two bankruptcy petitions were filed against American Bullion. The first petition was filed in February 2003 by Hunterbrooke Capital Corp., which claimed to be owed management fees. The second petition was filed in May 2003 by Evanton. Mr. Reardon testified that the New Directors instructed him to defend the petitions on behalf of American Bullion and that, after Mr. Reardon argued that the petitions had been brought for improper purposes, the presiding judges adjourned each of the hearings generally. Neither of the two hearings was re-scheduled.

[17] It had been anticipated that the regulatory and shareholder approvals referred to in the Joint Venture Agreement would be obtained approximately six months after its execution in October 2002. As a result of delays caused by the New Directors making efforts to have the Joint Venture Agreement set aside, Red Chris requested the Receiver-Manager to postpone the due dates for each of the installments of the remaining $1,750,000 minimum payment due to American Bullion under the Joint Venture Agreement. The Receiver-Manager applied to court for directions in connection with this request and was supportive of postponing the payment dates of the remaining installments by a period of six months each. The New Directors opposed any postponement of the payments. On July 28, 2003, Mr. Justice Williamson agreed to a postponement of the payment date of the first $500,000 installment for a period of six months, but he did not agree to postponing the final six payments.

[18] In August 2003, bcMetals bought out the position of Evanton and took an assignment of the General Security Agreement. bcMetals was subsequently substituted as the Plaintiff in the action commenced by Evanton.

[19] Two courses of action were being pursued during the late summer and early fall of 2003. The first related to an attempt by bcMetals to resolve the receivership and the second related to efforts by the New Directors to obtain refinancing in order to pay out or redeem the General Security Agreement.

[20] After bcMetals took an assignment of the Evanton security, it approached the Receiver-Manager with a form of settlement proposal. It was suggested by bcMetals that it would take ownership of American Bullion's interest in the Joint Venture Agreement and would issue shares in its capital to the shareholders of American Bullion. In this way, bcMetals would effectively own all of the Red Chris claim (at some stage it bought the other 20% of the claim from Tech/Cominco) and the shareholders of American Bullion would be able to participate in the future development of the claim. It was proposed that bcMetals could take ownership of American Bullion's interest in the Joint Venture Agreement by way of a voluntary foreclosure under s. 61 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359. The Receiver-Manager would allow the voluntary foreclosure to occur by refraining to give a notice of objection under s. 61(2). This proposal became known as the voluntary foreclosure proposal. bcMetals gave a notice of voluntary foreclosure under s. 61(1) but neglected to first get leave of the court as required by the Order of Mr. Justice Groberman appointing the Receiver-Manager.

[21] The focus of the New Directors at this time was, in the words of Mr. Reardon, to find a white knight. They found a party called Quest Capital Corp. which was prepared to provide financing in an amount sufficient to pay out or redeem the General Security Agreement. This would enable the receivership to be brought to an end and for American Bullion to retain its interest in the Joint Venture Agreement. In brief terms, the financing involved a loan in the amount of $1,525,000 for a term of approximately 9 months, with Quest Capital Corp. being granted security over all of the assets of American Bullion and being issued shares in American Bullion giving it approximately 25% of the equity. This became known as the Quest financing proposal.

[22] The New Directors instructed the Law Firm to make an application to court on behalf of American Bullion for, among other things, an order authorizing two of the New Directors to sign all necessary documents in connection with the Quest financing proposal and an order discharging the Receiver-Manager upon payment of the amount required to redeem the General Security Agreement. As a result of this development, bcMetals made a financing proposal with the same basic terms as the Quest financing proposal, but it was slightly more favourable to American Bullion. This became known as the bcMetals financing proposal.

[23] The application came before me on October 7, 2003. I was advised that the Receiver-Manager considered the bcMetals financing proposal to be better for American Bullion than the Quest financing proposal. I refused to approve the application brought by the New Directors on the basis that good reason was not shown why the court should decline to follow the views of the Receiver-Manager. I now understand from the testimony of Mr. Evans in this

proceeding that he preferred the voluntary foreclosure proposal over both of the financing proposals because a refinancing only postponed the problem for a short period of time and did not address the real issue, which was the lack of funds to repay the secured indebtedness. Leave to appeal my order was granted by the Court of Appeal on December 15, 2003, but no further steps were taken in the appeal.

[24] The next step taken in the proceedings was an application by bcMetals, which was heard by Mr. Justice Masuhara on November 6, 2003. bcMetals sought leave, *nunc pro tunc*, to issue its voluntary foreclosure notice in order to implement the voluntary foreclosure proposal or, alternatively, for approval of the bcMetals financing proposal. Mr. Justice Masuhara reserved his decision and issued Reasons for Judgment on December 30, 2003. In his Reasons, Mr. Justice Masuhara approved the bcMetals financing proposal and authorized the Receiver-Manager to implement it.

[25] The New Directors instructed the Law Firm to seek leave on behalf of American Bullion to appeal the order of Mr. Justice Masuhara. Prior to the hearing of the application for leave, the New Directors negotiated a new financing package with Amarc Resources Ltd. and instructed the Law Firm to go back before Mr. Justice Masuhara. A hearing occurred before him on February 6, 2004 and he refused to consider the Amarc financing proposal because it was too late. The leave application was heard later in February and, on March 2, 2004, Madam Justice Huddart refused leave to appeal the order of Mr. Justice Masuhara.

[26] On April 16, 2004, bcMetals and Red Chris obtained leave to commence an action against American Bullion. The Statement of Claim asserted causes of action in interference in economic interests and defamation. I gather that the causes of action were based on the steps taken and things said by the New Directors in connection with the Joint Venture Agreement. Substantial damages were claimed.

[27] The Receiver-Manager then entered into negotiations with bcMetals and Red Chris, and a settlement agreement was reached. On June 29, 2004, Mr. Justice Pitfield approved the settlement. He also adjourned an application which the Law Firm had made for a charging order after bcMetals gave an undertaking to return a specified amount of funds to the Receiver-Manager if the Law Firm established that it held a lien in priority to the General Security Agreement. I gather that bcMetals (and Red Chris) also made allegations against the New Directors and that a settlement of those allegations involved the resignation of the New Directors as directors of American Bullion.

[28] It is my understanding that the overall result of the bcMetals financing proposal and the settlements is that bcMetals now owns 51% of American Bullion, which continues to hold its interest in the Joint Venture Agreement. The New Directors no longer have any involvement with American Bullion and are not in a position to cause it to pay any of the Law Firm's accounts.

> [29] The present management of American Bullion (which was put in place by bcMetals) disputes the entitlement of the Law Firm to charge any of its accounts to American Bullion. Counsel for American Bullion in this proceeding (who was the counsel for bcMetals in the receivership proceeding) says that bcMetals would never have gone forward with the bcMetals financing proposal and the settlements if it had known that American Bullion could be liable to the Law Firm for approximately $400,000 in legal fees and disbursements.

[19] Having considered the applicable principles, Tysoe J. answered the questions posed by the master:

> [68] I answer the questions posed by [the master] as follows:
>
> (a) the New Directors had the ability during the receivership to agree on behalf of American Bullion to pay for the Law Firm's legal services to the extent that those services related to (i) defending the Evanton action; (ii) defending the bankruptcy proceedings, and (iii) preserving the corporate existence of American Bullion;
>
> (b) the New Directors did not have the ability during the receivership to agree on behalf of American Bullion to pay for the Law Firm's legal services to the extent that those services related to (i) the Joint Venture Agreement, (ii) the Quest financing proposal, and (iii) the voluntary foreclosure proposal and the bcMetals financing proposal;
>
> (c) the Law Firm is not prevented from claiming the fees for the services referred to in clause (a) above as a result of the conduct of the New Directors or the Law Firm during the receivership.

[20] The amount ABML actually owed as a result of the ruling on the reference has not been quantified. What is clear, however, is that ABML did not owe the law firm the total of $468,171.17. On June 30, 2006, the law firm assigned its claim against ABML to bcM upon payment of $125,000.

[21] The Applicants say that bcM cannot claim more than the amount it paid for the law firm's account, or, in the alternative, no more than the portion of the full

account that represented legal fees properly payable by ABML, that being an amount that was substantially less than the face amount of the debt.

[22] The court was not advised of the ruling regarding the nature and extent of the ABML liability to Lang Michener LLP, or of the fact that bcM had acquired the claim at a cost of $125,000. The court was not apprised of the following note regarding the liability that appeared in the bcM consolidated financial statements dated August 4, 2006 prepared for the period ending June 30, 2006:

> Only one claim has been actively pursued. This claim was for legal fees, expenses, and taxes incurred during and after 2002 totalling $289,539 plus interest, and was acquired by the Company from the claimant during the quarter for $125,000. An amount of approximately $117,000, representing this amount less goods and services tax, is in included with legal expenses. The Company's management and legal counsel believe that remaining claims are without merit.

[23] In my opinion, the circumstances surrounding the Lang Michener LLP account were not fully and fairly placed before the court.

(ii) The bcM Loan: $181,126.99

[24] The bankruptcy petition and the affidavit in support state that bcM claimed $181,126.99 comprised of principal and interest in respect of a loan made by bcM to ABML in the period April 26, 2005 through July 25, 2006. The evidence on the annulment application establishes that the principal amount included the sum of $100,000 advanced April 26, 2005, and disbursements of $66,126.94 paid by bcM on behalf of ABML at various time up to and including July 25, 2006. Interest in the amount of $15,000.05 brings the total claimed to $181,126.99.

[25] On the evidence, I am satisfied that bcM's claim that ABML was indebted to it in the total amount of $181,126.99 at August 18, 2006, was accurate.

(iii) Mountain View Development Ltd. and Demand Promissory Note: $270,414 and $33,384

[26] The circumstances surrounding these claims, alleged to be debts owing by ABML, are similar. The evidence on the annulment application supports the conclusion, and I find, that no action has been taken by anyone at any time since December 31, 2000 with a view to enforcing either claim.

[27] Both amounts were recorded as liabilities on ABML's financial statements at December 31, 2000. In a report to the court dated June 17, 2004, the receiver-manager appointed in relation to the financing transaction between ABML and Evanton Limited, to which Tysoe J. made reference in his reasons, *supra,* stated that "according to the Directors [of ABML], these balances are erroneous, and no liability exists". A note to the receiver's financial analysis of a settlement proposal under consideration in the course of the receivership provided:

> The Receiver-Manager understands that the demand loan and Mountain View liability are disputed, and may not be legitimate liabilities of the Company.

[28] The holder of the note is not known with any certainty. No demand for payment has been made.

[29] In the course of submissions on the annulment application, counsel for bcM stated that Mountain View was a former subsidiary of ABML and the amount of $270,414 represented an accrual for United States income tax that might be payable

by Mountain View. It is not apparent from the record why ABML would be obliged to discharge the foreign tax debt of a wholly-owned subsidiary and, absent consolidation, there was no reason for the liability to appear on the ABML financial statements.

[30] None of the very relevant foregoing information was provided to the court at the hearing of the bankruptcy petition.

(iv) Quest Capital: $126,325

[31] The alleged liability to Quest Capital was not included in the financial statements exhibited to the affidavit in support of the bankruptcy petition. The receiver's report to the court dated June 17, 2004 provided:

> The Quest claim arises from a contract the Company's former directors purported to enter into with Quest, to refinance the Company. The Directors clearly had no capacity to enter into and bind the Company as the Company's affairs were under the administration of the Court. Both the Directors and Quest were aware that any agreement contemplated would require the consent of the Court, which was not obtained. Accordingly, the Company has no liability in connection with this alleged transaction.

[32] The court was not told of the report or the relevant circumstances at the hearing of the bankruptcy petition.

(v) Liabilities to Directors: $145,417 and $122,853

[33] As noted by Tysoe J. in his reasons, *supra*, one set of directors was replaced by another at a point in time. When bcM acquired control of ABML, both slates were replaced by a single director who was a bcM nominee.

[34] Each of the former boards of directors claimed that they were entitled to be reimbursed for expenses they had incurred, allegedly for the benefit of ABML. The amounts claimed had been recorded on the ABML financial statements since 2003. In its June 17, 2004 report, the receiver noted that ABML had received legal advice to the effect that some of the amounts claimed were not owing, and while other amounts were likely owing, those amounts could not be determined. The fact that the directors had undertaken activities for which they could not bind the company was confirmed by Tysoe J., *supra*. The reasonable inference is that their claim to reimbursement of certain of their own expenses would not succeed.

[35] The court was not informed of the circumstances surrounding the claims of the former directors.

[36] Generally, bcM responds to the Applicants' complaints regarding the existence and amount of the liabilities attributed to ABML by saying that each of them was recorded on the ABML financial statements and remained potentially owing at the hearing of the petition, even if the amount of each could not be quantified. Alternatively, bcM says that it would have been improper for ABML to refrain from disclosing the liabilities even if they were contingent in nature. bcM also says that proof of the fact that the liability to a group of former directors was properly recorded appears from the fact that those directors filed a proof of claim in the bankruptcy, the trustee disallowed the claim, and the disallowance is under appeal.

(c) The Value of ABML's Assets

[37] As I have previously stated, bcM estimated the value of ABML's assets to be approximately $100,000. Because the financial statements presented in connection with the bankruptcy petition recorded cash of $10,984 and goods and services tax recoverable of $28,263, the implied estimate of the value of ABML's other asset, an interest in resource properties, approximated $60,000.

[38] The Applicants claim that evidence pertaining to the actions of ABML and bcM in relation to the resource property owned by ABML indicates that the value of the assets was materially under-stated. They emphasize the following history.

[39] In 1994, ABML acquired an 80% interest in a group of mineral claims known as the Red Chris Claims (the "Claims") which contained copper and gold deposits. The Claims are located in Northwestern British Columbia. Teck Corporation, a predecessor to the present Teck Cominco, owned the other 20% interest.

[40] A successful exploration program was carried out on the Claims in 1994 and 1995 resulting in increased estimates of reserves and the location of two new zones of mineralization.

[41] bcM became interested in the Claims in 2002. It was unable to directly acquire an interest in them because of regulatory constraints. As a result, two bcM directors incorporated Red Chris Development Company Ltd. ("RCDC") to acquire an interest in the Claims.

[42] In October 2002, RCDC and ABML entered into a joint venture agreement under which RCDC acquired a 70% working interest in the claims and ABML retained a 30% reversionary carried ownership interest. Because ABML owned an 80% interest in the Claims, and Teck 20%, ABML's interest in the Claims was reduced to 24% represented by the reversionary carried ownership interest. That is the interest in the Claims which it presently owns.

[43] In August 2003, bcM acquired all outstanding shares of RCDC which became and remains bcM's wholly-owned subsidiary.

[44] In September 2003, RCDC acquired Teck's 20% interest in the Claims. It follows that since 2003, RCDC has owned 76% of the Claims, and ABML, 24%.

[45] bcM has engaged in a number of transactions in relation to the Claims which affect ABML.

[46] In September 2003, bcM completed a $5,250,000 financing. It described the intended use of the proceeds in a news release:

> Proceeds will be used to fund a Detailed Feasibility Study and Environmental Assessment Report for the Company's Red Chris porphyry copper/gold project and for general working capital.

[47] In early 2004, bcM entered into a debt settlement agreement with the receiver-manager that had been appointed by Evanton Ltd. bcM agreed to increase its share ownership in ABML by exchanging ABML debt which bcM had acquired from Evanton Ltd. for shares, and to refinance a portion of ABML's secured debt.

The settlement also resulted in changes to the ABML-RCDC joint venture agreement that were adverse to ABML. The extent of the adversity cannot easily be quantified.

[48] In February and March 2004, bcM announced that it had closed the debt-for-share exchange and that it had refinanced secured debt to the extent of $1,525,000. The news release stated:

> bcMetals plans to assist ABML in resolving outstanding claims from its various creditors and in re-listing its shares on the TSX Venture Exchange upon the resignation of ABML's current Board of Directors and the appointment of a new Board.

[49] bcM completed another financing in March 2004 in the amount of $5,012,500. It announced that a portion of the proceeds would be used to explore the Claims, and a portion would be used to explore another project.

[50] Throughout the period 2003 to 2006, bcM publicly portrayed the Claims to be of rapidly developing potential and likely to go into production if electric power could be obtained at the site.

[51] On April 25, 2006, bcM announced that it had commenced discussions with Global International Jiangxi Copper Mining Company Limited ("Jiangxi"), a Hong Kong company, with a view to forming a joint venture or partnership in relation to the Claims. bcM indicated that if the partnership materialized, Jiangxi would likely fund the equity component required to develop the Claims.

[52] On or about May 15, 2006, bcM posted a power point presentation to its website in which it estimated that the net present value of the Claims ranged from $46,358,000 to $691,045,000.

[53] On August 4, 2006, bcM released a management discussion and analysis of corporate matters at June 30, 2006. The company advised that the discussions with Jiangxi were continuing.

[54] While the evidence on this application regarding the precise timing and progress of negotiations with Jiangxi is diffuse, I am able to infer, and do infer, that a material term in relation to the partnership with Jiangxi was the requirement that bcM petition ABML into bankruptcy, purchase the ABML interest in the Claims from the trustee, and then assign that interest to the partnership with Jiangxi at no cost, all as part of bcM's capital contribution to the partnership. In that regard, the agreement that was to have been signed by bcM and Jiangxi defined the "ABML Plan" at s. 1.1.1(4):

> (4) "ABML Plan" means the plan of the bcM Group as described by bcM to CGIJCM to:
>
> (a) petition ABML into bankruptcy pursuant to the *Bankruptcy and Insolvency Act* (Canada);
>
> (b) purchase the ABML Interest from the trustee in bankruptcy of ABML appointed as a result of such petition; and
>
> (c) assign the ABML Interest to the Limited Partnership at no cost to the Limited Partnership, as a part of its capital contribution to the Limited Partnership;

[55] The court was not informed of any part of the ABML Plan or the proposed partnership with Jiangxi in the course of the bankruptcy proceeding. Although the partnership agreement was to be effective October 6, 2006 and had not been signed at August 30, 2006 when the bankruptcy petition was heard, the plan attributed to bcM was undoubtedly formulated before the bankruptcy petition was filed or heard.

[56] In response to the Applicants' complaint regarding the estimate of the value of the ABML assets, bcM says that all the evidence points to an extremely wide range of value for the entirety of the Claims ranging from a negative number to a very positive sum, ABML had only a minority interest in the Claims, and any estimate of value is highly speculative and very much dependent upon a wide range of assumptions and contingencies, as evidenced by the significant differences in value estimated by an expert for the Applicants and an expert for bcM.

[57] bcM says that in final analysis, the valuation of ABML's 24% reversionary carried ownership interest for purposes of the bankruptcy petition was reasonable and certainly not a "sham". In any event, bcM says that because of ABML's inability to meet its obligations generally as they became due in the absence of any immediate prospect of cash flow, it was appropriate to offer the court an estimate of value, leaving it to the trustee to convert that asset to cash for the benefit of creditors and shareholders.

[58] In the course of argument, counsel for the Applicants pointed to the fact that ABML had carried its interest in the Claims on its books at a cost in excess of $12,000,000, but bcM had caused that carrying cost to be written down to $100 by the time the petition was filed.

[59] I do not think it appropriate to attach much weight to either the carrying cost or the write-down. The evidence indicates that the original carrying cost was the cumulative total of ABML outlays in relation to the Claims. The value of the interest

could have been more or less than that amount. The write-down was made as a consequence of accountants inquiring about the reality of the book cost.

[60] The evidence is that the write-down to a nominal amount resulted primarily from bcM's interpretation of the ABML-RCDC joint venture agreement and the rights that accrued to ABML under it after it was modified by the debt settlement agreement in 2004. Whether or not there is value in that agreement and its amount may be matters to be addressed on another occasion.

[61] What is apparent, however, is that bcM entered into the debt settlement agreement in 2004 and lent approximately $170,000 to ABML in the period from April 2005 to July 2006. bcM agreed to purchase the Lang Michener LLP account for $125,000 in June 2006. It did so at a time when it was fully aware of ABML's financial circumstances. The financial circumstances did not worsen in the six month period preceding the filing of the petition in bankruptcy. In fact, they were enhanced by the ruling obtained from Tysoe J. to the effect that ABML was not liable for the full amount claimed by Lang Michener LLP as legal fees.

[62] It is difficult to understand why bcM would engage in transactions of the kind described if it regarded the value of ABML’s interest in the Claims through the joint venture to be only a nominal amount.

Analysis

[63] The Applicants say that, having regard for the evidence I have summarized, the bankruptcy should be annulled because:

1. ABML committed no act of bankruptcy and in particular, at August 30, 2006 had not ceased to meet its liabilities generally as they became due within the meaning of s. 43(1)(j) of the *BIA*;

2. The court would have declined to exercise its discretion to make the bankruptcy order had it been informed of the relationship between the petitioner and ABML, the character of the liabilities attributed to ABML, and the factors affecting the value of ABML's assets; and

3. bcM brought the petition in bankruptcy for an improper purpose.

[64] The first and second points are intertwined. The substance of the complaint is that there was but one creditor of ABML, that being bcM, and absent special circumstances that did not exist, that is not sufficient to ground a bankruptcy order under s. 43(1)(j) of the *BIA*.

[65] In *Re Puetter*, [1998] B.C.J. No. 2406, 6 C.B.R. (4th) 279 (S.C.), a judgment creditor made demand upon the debtor to satisfy the judgment, and then took the position that the failure to do so constituted an act of bankruptcy because the judgment debtor ceased to meet his liabilities generally as they became due.

[66] At para. 19, the court stated:

> [19] There is an obligation on the petitioner to show that the alleged bankrupt is unable to pay creditors "in most cases". *Re Hugh M. Grant Ltd.*, (1982), 41, C.B.R. (N.S.) 28. The court will not infer such inability unless there is evidence that liabilities to persons other than the petitioner have ceased to be met. *Re Action Video Centre Ltd.* (1970), 33 C.B.R. (N.S.) 14.

[67] With respect to the question of whether the failure to pay one debt amounted to an act of bankruptcy, the court said this at para. 22:

> [22] The authorities are clear that failure to pay one debt may, in special circumstances, be sufficient to support the granting of a receiving order, see for example: *Re Holmes and Sinclair* (1975), 20 C.B.R. (N.S.) 111 at 113.

[68] In *Re Holmes* (1976), 9 O.R. (2d) 240, 60D.L.R. (3d) 82 the Ontario High Court of Justice sitting in Bankruptcy considered whether or not evidence of a debtor's failure to pay a single creditor amounted to an act of bankruptcy in that the judgment debtor was not able to meet liabilities generally as they became due. After considering bankruptcy authorities originating in Ontario, the court stated its conclusion at para. 5:

> [5] I have carefully considered these decisions and it is clear that the courts, in Ontario at least, have granted a receiving order on the basis of a default to one creditor in special circumstances. These circumstances are:
>
> (a) the creditor is the only creditor of the debtor, and the debtor has failed to meet repeated demands of the creditor; in these circumstances he should not be denied the benefits of the *Bankruptcy Act* by reason only of his unique character; or
>
> (b) the creditor is a significant creditor and there are special circumstances such as fraud on the part of the debtor which make it imperative that the processes of the *Bankruptcy Act* be set in motion immediately for the protection of the whole class of creditors; or
>
> (c) the debtor admits he is unable to pay his creditors generally, although they and the obligations are not identified.

[69] At para. 7, the court stated:

> [7] … In the non-exceptional case, as in the case at bar, that situation cannot be ordinarily proved by having regard to the experience of one creditor only, even though he may be a major creditor. Resort to the statutory machinery of the Bankruptcy Act, rather than to the remedies to enforce a debt or claim in the ordinary Courts, is intended by Parliament to be for the benefit of the creditors of a debtor as a class, and the act of bankruptcy described in s. 24(1)(j) is in my judgment, an act that singles out the conduct of the debtor in relation to the class, rather than to the individual (as is the case under s. 24(1)(e)). It is for this reason that the court must be satisfied that there is sufficient evidence from which an inference of fact can fairly be drawn that creditors generally are not being paid. This requires as a minimum some evidence that liabilities other than those incurred towards the petitioning creditor, have ceased to be met. The Court ought not to be asked to draw inferences with respect to the class on the basis of one creditor's experience where evidence of the debtor's conduct towards other members

> of the class could, with reasonable diligence, be discovered and produced. The Court's intuition is no substitute for the diligence of the petitioning creditor.

[70] I adopt and apply the reasoning in *Re Holmes and Re Puetter*.

[71] bcM was fully aware of and involved in the financial affairs of ABML. As is apparent from the evidence I have summarized, bcM knew that it was ABML's only creditor because the other “liabilities” were not obligations that could be enforced against ABML. In the circumstances, I cannot agree with bcM’s submission that the debts should be included among those payable because they appeared on the ABML financial statements. The liabilities, other than those due to bcM, were contingent in nature or non-existent. The financial statements presented to the court were prepared by management and contained no notes. They did not accurately portray ABML’s financial situation.

[72] Because bcM was the only creditor of ABML and no claims were being made in a bankruptcy on behalf of a group or class of creditors, it was incumbent upon bcM to provide evidence of special circumstances of the kind described in *Re Holmes*. No such circumstances were described in the material presented to the court at the hearing of the bankruptcy petition. On all of the evidence I find that no special circumstances existed.

[73] The evidence points to other reasons why the bankruptcy order ought not to have been granted.

[74] There is no evidence that bcM had made any demand for payment of any amounts owed to it under either the legitimate claim for legal fees which it had acquired from Lang Michener LLP, or for the payment of either interest or principal on account of the loan made to ABML in the period from April 26, 2005, through July 2006.

[75] The liabilities described as owing to persons other than bcM related to transactions that preceded the filing of the bankruptcy petition by more than six months. There is no evidence that a demand for the payment of any of them was made in the six month period.

[76] Section 43(1)(b) of the *BIA* requires the debtor to have committed an act of bankruptcy within the six months preceding the filing of the application for the bankruptcy order. That means that the debtor must have ceased to meet its liabilities generally as they became due within that six month time frame. The test cannot be satisfied when the debts arose outside the six month period and no demand for payment has been made within the six month period: see *Brown v. England Estate* (1923), 32 B.C.R. 143, [1923] 2 D.L.R. 738, [1923] 1 W.W.R. 1340 (C.A.).

[77] Actions by a creditor or admissions by a debtor made within the six months preceding the petition in respect of liabilities that arose beyond the six month period may justify the conclusion that the debtor committed an act of bankruptcy: *Re Raitblat*, [1925] 2 D.L.R. 1219, aff'd [1925] 3 D.L.R. 446 (Ont. C.A.). In the present

case, there is no evidence that any of the alleged creditors made demands for payment in the six month period, and there were no admissions of liability by ABML.

[78] Another shortcoming in relation to the presentation of the petition arises out of the estimate of the value of ABML's assets. Strictly speaking, there is no requirement that a creditor prove that the value of a debtor's assets is insufficient to discharge the claims or all creditors. At the same time, the debtor's ability to pay and therefore the value of its assets, is relevant by virtue of s. 43(7) of the *BIA*:

> (7) If the court is not satisfied with the proof of the facts alleged in the application or of the service of the application, or is satisfied by the debtor that the debtor is able to pay their debts, or that for any other sufficient cause no order ought to be made, it shall dismiss the application.

[79] Whether by reference to s. 43(7) or by reference to the requirement of s. 43(1)(j) that a debtor not be able to meet its obligations to creditors generally as they become due, the court must be concerned with value.

[80] Frequently, the inability to pay a number of creditors over a period of six months preceding a petition in bankruptcy is itself evidence that the value of the assets is not sufficient to meet the claims of all creditors. That was not the situation faced by ABML.

[81] In the case of ABML, evidence of the value of its reversionary carried ownership interest in the Claims was of considerable consequence in view of the fact that bcM considered the Claims to have very substantial value, and it contemplated a partnership with Jiangxi. Information pertaining to value was a

relevant and material factor for the court's consideration, whether or not value could be quantified with any degree of certainty.

[82] With respect, it is not an answer, as urged by bcM, to say that the ABML interest was worth little because the terms of the original joint venture agreement between ABML and RCDC had been modified in 2004. The validity of that assertion is disputed and depends upon the proper interpretation of the original joint venture agreement as amended, the total value of the Claims, estimates of the time when ABML could reasonably expect to derive a return from any developed mine, and estimates of the value of the revenues it would derive. While there may be a range of possibilities, the existence of this range was a relevant and material concern which was not addressed in the bankruptcy application.

[83] By omitting to inform the court of the relationship between bcM and ABML, the original joint venture, and the partnership proposal involving bcM and Jiangxi, the court was denied the opportunity to consider whether it was satisfied on the evidence that the debtor was able to pay its debts, in which case no act of bankruptcy would have been proved, or whether there may have been other sufficient cause to refuse the bankruptcy order.

[84] I am persuaded that if the court had been fully informed of all relevant and material facts and circumstances the bankruptcy order would not have been made. On the facts, bcM could not prove that ABML had committed an act of bankruptcy.

[85] The final point raised by the Applicants is that the bankruptcy petition was brought for an improper purpose which would provide the court with sufficient cause

to refuse the bankruptcy order. The alleged improper purpose is the use of the bankruptcy procedure for the purpose of divesting ABML of its 24% reversionary carried ownership interest in the Claims in order that bcM and Jiangxi could proceed with the development of the Claims to the exclusion of ABML and to the detriment of its minority shareholders.

[86] As stated in *Re Wale* (1996), 45 C.B.R. (3d) 15, 67 A.C.W.S. (3d) 1064 (O.C.J.) at para. 26:

> 26. Under s. 181 [of the *BIA*] the court has a wide discretion when considering an annulment application. An exhaustive review of the circumstances surrounding the assignment should be made by the court. There is no single test or principle to be applied. The test is flexible and fact specific.

[87] To similar effect is the reasoning of the court in *Mahood v. High Country Holdings Inc.* (1996), 43 C.B.R. (3d) 267, 67 A.C.W.S. (3d) 224 at paras. 79, 80:

> 79. The threshold inquiry must be as to what legitimate purpose or motivation exists for the assignments into bankruptcy. It is clear that Mr. Mahood is determined to wrest control of the companies away from the receiver. The question is, why? None of the proponents of the assignments have supplied evidence from which I can discern any motivation or purpose that could be said to be necessary. The best evidence before the Court establishes that there is, even accepting the disputed charges, sufficiency of assets to pay all the creditors out of the potential proceeds from the sale of the properties.
>
> 80. With the dearth of evidence establishing a legitimate reason for the assignments, it becomes necessary to examine whether or not the assignments can be said, to use the words of Donald J. in *Manolescu,* to be motivated by “a purpose not legitimate to the use of the process.” Simply put, was there an abuse of process?

[88] While the extracts from *Mahood* refer to assignments, I see no reason to adopt a different principle in the case of a petition alleging an act of bankruptcy as the basis for a bankruptcy order.

[89] It was not necessarily inappropriate for bcM to petition ABML into bankruptcy in order to achieve the result referred to as the "ABML Plan" referenced in the partnership agreement with Jiangxi. However, having regard to all of the facts and circumstances surrounding the affairs and financial position of ABML, and the extent to which relevant information was not provided to the court, I must infer that the purpose for which bcM and Jiangxi resorted to the bankruptcy proceeding was to avoid the need to accommodate or respect the interests of ABML's minority shareholders.

[90] Bankruptcy, if it could be effected, would avoid the need to fairly value ABML's interest in the Claims in order to account to minority shareholders. Any alternative to bankruptcy as the means to transfer that interest into the bcM-Jiangxi partnership would have required a valuation of the interest and the payment of compensation to the minority shareholders.

[91] If ABML and bcM had entered into an amalgamation, if bcM had endeavoured to sell the ABML interest in the claims to bcM or to the partnership, if bcM had tried to realize on its security under the general security agreement it held, or if bcM had involved ABML in any number of other kinds of corporate reorganization, the minority shareholders' right to dissent would have been triggered.

[92] The exercise of dissent rights necessitates the *en bloc* valuation of the shares of ABML and the payment to those who dissent from certain transactions of their proportionate share of that *en bloc* value. In the absence of an ability to agree, that value is determined by a proceeding in the court.

[93] In my opinion, it is not a sufficient answer to say that the minority shareholders will be afforded an equivalent outcome by permitting a trustee to proceed with a sale of the asset. The trustee would be at a disadvantage in maximizing value for the asset, and he would be attempting to do so in circumstances where ABML had not committed any act of bankruptcy.

[94] In all of the circumstances, I am satisfied that the bankruptcy order would not have been granted had the relevant information been provided to the court at the hearing of the petition. In the result, the bankruptcy is annulled.

"The Honourable Mr. Justice Pitfield"