COURT OF APPEAL FOR ONTARIO

CITATION: RPG Receivables Purchase Group Inc. v. American Pacific Corporation, 2025 ONCA 371
DATE: 20250515
DOCKET: COA-23-CV-1066

Lauwers, Zarnett and Pomerance JJ.A.

BETWEEN

RPG Receivables Purchase Group Inc.

Appellant

and

American Pacific Corporation

Respondent

R. Brendan Bissell and Joel Turgeon, for the appellant

Stephen Brown-Okruhlik and Madeline Klimek, for the respondent

Heard: September 18, 2024

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, dated September 6, 2023.

Zarnett J.A.:

A. Overview

[1] The equitable treatment of creditors is one of the goals of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"). In furtherance of that purpose the BIA permits a trustee in bankruptcy, in defined circumstances, to treat a pre-bankruptcy transaction that advantaged one creditor over others as void.

[2] One example is a payment made by an insolvent debtor to an arm's length creditor within three months of the debtor's bankruptcy. Such a payment is void against the trustee if the payment was made with the intention of giving the recipient a preference over other creditors. In pursuing recovery of such a payment from the recipient, the trustee is given the benefit of a rebuttable presumption that if the payment had the effect of giving the recipient creditor a preference, it was made with that intention even if made under pressure: BIA, ss. 95(1)(a) and (2).

[3] Specialty Chemical Industries Inc. ("Specialty") made payments totalling USD $400,000 to one of its major suppliers, the respondent American Pacific Corporation ("AmPac"), slightly more than a month before Speciality assigned itself into bankruptcy. Specialty was insolvent when it made the payments and the effect of the payments was to give AmPac a preference over other unpaid creditors.

[4] Specialty's trustee in bankruptcy was unsuccessful in its claim to recover the amount of the payments from AmPac.[1] The bankruptcy judge found that Specialty's intention, in making payments of past indebtedness to AmPac while leaving other creditors unpaid, was to be able to buy more product from AmPac to supply to its only customer, and thus to preserve that relationship and continue in business. In the bankruptcy judge's view, this rebutted the presumption that the

[1] The appellant, a creditor in the bankrupt estate, acquired the trustee's right of action under s. 38 of the BIA, and continues the appeal. The title of proceedings reflects this change.

payments were made with a view to giving AmPac a preference over other creditors.

[5] The appellant, as assignee of the trustee's right of action, challenges the bankruptcy judge's conclusion on two bases. First, it argues that the bankruptcy judge improperly considered evidence that Specialty was under pressure to make the payments when the BIA says that evidence of pressure is inadmissible to support a transaction. Second, it argues that the bankruptcy judge erred in treating Specialty's intention to preserve a customer relationship and stay in business as sufficient to rebut the presumption, when there was no objectively reasonable basis for Specialty's desire to stay in business.

[6] As I explain below, I do not accept the first argument, but I accept the second.

[7] An insolvent debtor's intention to pay past indebtedness to one creditor to enable the continuation of the debtor's business is inconsistent with an intention to give that creditor a preference only if the plan to continue in business has a reasonable basis. What constitutes a reasonable basis is informed by the purpose of the anti-preference provisions of the BIA, which is to prevent frustration of the bedrock principle of bankruptcy law that all ordinary creditors should rank equally. The debtor's plan must therefore be more than simply a desire to keep going, heedless to whether doing so will continue or deepen the already existing

insolvency. There must be a reasonable basis for the debtor to believe that continuing in business will enhance the value of the enterprise for the benefit of all creditors.

[8] The bankruptcy judge did not consider, let alone find, that Specialty had a plan with a reasonable basis in the legally required sense. There was no objective evidence that the relationship with its only customer, Autoliv ASP, Inc. ("Autoliv"), would be preserved and that its business would continue, on a basis different from what had already resulted in Specialty's insolvency. The payments totalling USD $400,000 far exceeded any benefit Specialty would receive from the supply to the customer of roughly USD $100,000 worth of additional product it hoped to obtain from AmPac. In these circumstances, there was no evidence on which a business continuation plan with a reasonable basis could be found.

[9] The bankruptcy judge erred in finding the presumption was rebutted. I would therefore allow the appeal.

B. Factual Background

[10] Although Specialty's intention was a pivotal issue, no direct evidence from Specialty's principal, Alan Palmer, was led by either side. The parties left that matter for inference by the bankruptcy judge from other evidence, including that of Kris Griffiths, the Vice-President of AmPac.

[11] Prior to its bankruptcy, Specialty was a bulk chemical purchasing broker. It had one customer, Autoliv, an automotive safety product supplier. The bankruptcy judge noted that Specialty's sales to Autoliv generated "several hundred thousand dollars' worth of revenue per month".

[12] Specialty had three major chemical suppliers, one of which was AmPac. The three suppliers' products accounted for 98% of Specialty's sales, with AmPac's products representing 21%.

[13] Specialty and AmPac did not have a supply agreement for a fixed or indefinite term. Rather, Specialty placed purchase orders for chemical supplies, which AmPac allowed Specialty to acquire on 45-day credit terms.

[14] Starting in early 2018, Specialty became persistently delinquent in the payment of AmPac's invoices. AmPac warned Specialty several times that failure to bring its account current would jeopardize further supply of chemicals. Nonetheless, by early June 2018, three of AmPac's invoices, totalling USD $412,664 remained unpaid and overdue.

[15] Specialty's principal, Mr. Palmer, was desperate to secure two new deliveries representing about $100,000 of chemicals from AmPac to fill an order for Autoliv. Mr. Griffiths gave evidence that AmPac refused to make additional deliveries unless Specialty paid its outstanding, past due, invoices, which Specialty agreed to do.

[16] On June 6, 2018, Specialty made payments totaling USD $400,000 to AmPac. On June 8, 2018, AmPac filled Specialty's order for the delivery of approximately USD $100,000 worth of additional chemicals to Autoliv.

[17] After making the June 2018 payments to AmPac, Specialty had less than $35,000 left in its bank account. It had $11 million of unpaid liabilities due and owing to its creditors, including $5.6 million to its two other major chemical suppliers. Specialty's last payments before insolvency to its two other major chemical suppliers had been in March and April of 2018.

[18] As noted, there was no direct evidence from Mr. Palmer as to his intention in paying the delinquent invoices of AmPac while leaving other creditors unpaid. The trial judge inferred that his intention was to secure the additional product to "avoid a rupture with [Specialty's] only customer resulting from the non-delivery of essential shipments of chemicals", and to "preserve a relationship with Specialty's only customer in circumstances where, if the payments were not made, the relationship would abruptly end, putting Specialty out of business and ending the stream of revenues to Specialty from sales to Autoliv".

[19] The relationship between Specialty and Autoliv was not, however, preserved. Shortly after Specialty made the June payments to AmPac, Autoliv terminated its relationship with Specialty. It informed Specialty that it was doing so for several reasons, including that Specialty had advised it was unable to pay

suppliers and was insolvent, Specialty had failed to deliver product when required, and critical suppliers were refusing to supply Specialty, which required Autoliv to pay AmPac on account of Specialty's delinquent obligations in order to obtain new product.

[20] After terminating its relationship with Specialty, Autoliv entered into a relationship directly with AmPac.

[21] Specialty made a voluntary assignment into bankruptcy on July 25, 2018. A. Farber & Partners Inc. was appointed trustee.

C. The Decision Below

[22] The bankruptcy judge found that Specialty was insolvent at the time of the payments to AmPac in June 2018. He was also satisfied that the payments had the effect of giving AmPac a preference over other creditors. He then turned to the question of whether AmPac had rebutted the presumption that the payments had been made "with a view to giving the creditor a preference". He instructed himself that those words referred to the intention of the debtor alone, determined objectively.

[23] The bankruptcy judge rejected the trustee's position that Mr. Griffiths' testimony was inadmissible evidence of creditor "pressure" which s. 95(2) of the BIA forbids being used to rebut the presumption of intent to give a preference. In his view, Mr. Griffiths' description of the circumstances – that AmPac's overdue

invoices had to be paid for Specialty to obtain more product for Autoliv, which Specialty was desperate to acquire – was evidence of the commercial relationship between Specialty and AmPac and the commercial imperative facing Specialty when it made the payments in question.

[24] Taking into account this evidence, the bankruptcy judge concluded that Specialty did not make the payments at issue with the intent to prefer AmPac. Rather, the evidence tendered by Mr. Griffiths showed that Specialty made the payments "out of commercial necessity and to preserve Specialty's relationship with…Autoliv" given AmPac's refusal to make further chemical shipments unless Specialty paid its overdue invoices. The bankruptcy judge stated:

> Although the payment did not preserve Specialty's relationship with Autoliv, I am satisfied that from Mr. Palmer's perspective, viewed objectively on June 6, 2018, the relationship between Specialty and Autoliv may not have been irretrievably broken and could, perhaps, be sustained for at least some period of time while Mr. Palmer pursued options to keep Specialty's business operating during which, as the Trustee acknowledged, Specialty was receiving hundreds of thousands of dollars a month in revenues from Autoliv.
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> I am satisfied that AmPac has shown that the June 6 payments, viewed objectively from Mr. Palmer's perspective on that day, were reasonably justified because they would preserve a relationship with Specialty's only customer in circumstances where, if the payments were not made, the relationship would abruptly end, putting Specialty out of business and ending the stream of revenues to Specialty from sales to Autoliv.

D. Analysis

(1) The Anti-Preference Provisions of the BIA

[25] Section 95 of the BIA provides, in relevant part:

> **95 (1)** A transfer of property made, a provision of services made, a charge on property made, a payment made, an obligation incurred or a judicial proceeding taken or suffered by an insolvent person
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> > **(a)** in favour of a creditor who is dealing at arm's length with the insolvent person, or a person in trust for that creditor, with a view to giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy; and
> >
> > **(b)** in favour of a creditor who is not dealing at arm's length with the insolvent person, or a person in trust for that creditor, that has the effect of giving that creditor a preference over another creditor is void as against — or, in Quebec, may not be set up against — the trustee if it is made, incurred, taken or suffered, as the case may be, during the period beginning on the day that is 12 months before the date of the initial bankruptcy event and ending on the date of the bankruptcy.
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> **(2)** If the transfer, charge, payment, obligation or judicial proceeding referred to in paragraph (1)(a) has the effect of giving the creditor a preference, it is, in the absence of evidence to the contrary, presumed to have been made, incurred, taken or suffered with a view to giving the creditor the preference — even if it was made, incurred, taken or suffered, as the case may be, under pressure — and evidence of pressure is not admissible to support the transaction.

(2) Issues on Appeal and the Standard of Review

[26] The resolution of this appeal turns on whether the bankruptcy judge properly found that the presumption in s. 95(2) of the BIA, that the payments were made

with a view to giving AmPac a preference over other creditors, was rebutted. There is no issue that, on the facts, the presumption arose because the payments were made within three months of bankruptcy, Specialty was insolvent when the payments were made, and the payments had the effect of giving AmPac a preference. Nor is there any issue that, if the presumption was not rebutted, the payments were void as a preference, since the unrebutted presumption would fulfill the final criterion of a payment that is void against the trustee in bankruptcy – Specialty's intention to give AmPac a preference.

[27] The appellant submits that the bankruptcy judge made two legal errors in his decision. First, it argues that he considered evidence of pressure that was inadmissible to rebut the presumption. Second, even if the bankruptcy judge did not make the first error, the appellant submits that he erred in treating the evidence as legally capable of rebutting the presumption because there was no reasonable basis for Specialty's business continuation plan.

[28] In both respects the appellant is raising questions of law. The scope of the BIA prohibition on the use of evidence of pressure is a question of statutory interpretation, which is reviewed on a correctness standard: *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653, at para. 37. Similarly, whether there is a requirement that a business continuation plan have a reasonable basis to be legally capable of rebutting the statutory presumption raises a question of law because it addresses the components of a

legal standard to be applied to the facts: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 27, 31.

[29] The appellant does not challenge the bankruptcy judge's findings of fact, which are, of course, entitled to deference on appeal.

(3) The Bankruptcy Judge Did Not Improperly Rely on Evidence of Pressure

[30] Section 95(2) of the BIA creates a rebuttable presumption. It provides that a payment which had the effect of conferring a preference is "in the absence of evidence to the contrary, presumed to have been made … with a view to giving the creditor the preference". The section restricts what evidence may be relied on to rebut the presumption. The presumption applies "even if [the payment] was made … under pressure – and evidence of pressure is not admissible to support the transaction".

[31] I do not view the restriction in s. 95(2) as rendering inadmissible any evidence that the debtor was put under pressure. What the section prevents is a particular use of that evidence.

[32] A statutory provision is interpreted "in a textual, contextual and purposive way": *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 11. The text of s. 95(2) prevents evidence of pressure being used as support – in the sense of justification – for the transaction. When a justification for

the transaction is proffered other than pressure, evidence that the debtor was under pressure may be considered so that the court has a proper understanding of the entire circumstances; the text does not suggest otherwise.

[33] The context of the provision supports this view. The statutory presumption as to an insolvent debtor's intent is rebuttable by evidence to the contrary. Parliament would know that an insolvent debtor would often be under pressure yet would want the full circumstances to be considered in determining whether there was an intention behind a transaction other than the presumed intent to give the recipient a preference.

[34] This interpretation is also consistent with the purpose of the provision. The statutory language abolished a doctrine that a debtor was not considered to have acted voluntarily, and therefore did not intend to give a preference, when it paid one creditor due to pressure: *Orion Industries Ltd. (Trustee of) v. Neil's General Contracting Ltd.*, 2013 ABCA 330, at paras. 31-32. In other words, the purpose of the section was to prevent evidence of pressure being used as the justification for the transaction; the purpose does not extend to preventing consideration of the entire circumstances confronting the debtor in evaluating a different justification.

[35] The bankruptcy judge relied on Mr. Griffiths' evidence to find that Specialty made the payments "out of commercial necessity and to preserve Specialty's relationship with its only customer". This was not a finding that the payments were

supportable because Specialty was under pressure and did not make a voluntary choice. Rather, the bankruptcy judge used this evidence to situate the demands of AmPac – that its prior invoices had to be paid as a condition of supplying additional product – within the overall circumstances that bore on the intent of Specialty. He found, in all the circumstances, that the payments were made because Specialty's intent was to continue in business.

[36] I also agree with AmPac that the bankruptcy judge's approach to whether he could admit Mr Griffiths' evidence was consistent with the case law.

[37] In *Orion*, the debtor had to make a payment to a party holding its equipment to free up the equipment so that it could be sold. The claim that the payment was a preference was dismissed. In upholding the dismissal, the Alberta Court of Appeal rejected the contention that the lower court had taken into account inadmissible evidence of pressure. Rather, the evidence of the creditor's demands was evidence of the financial imperative the debtor faced. It was therefore properly considered in evaluating whether the debtor's plan, to make the payment so as to realize on the equipment for proceeds that would exceed the payment and go "a long way toward saving the insolvent company from bankruptcy", meant a preference was not intended: at para. 35.

[38] The appellant argues that the bankruptcy judge's approach was not consistent with *Orion* on the question of pressure because in that case the debtor

had a reasonable plan to generate proceeds that would benefit the creditors or the enterprise as a whole, while in this case there was no such reasonable plan.

[39] This submission intermixes the appellant's two grounds of appeal – it is pertinent to the appellant's second ground of appeal, not the first. As long as evidence is not used to proffer pressure as the justification for a preferential transaction, the restriction in s. 95(2) is respected. The question then becomes whether the totality of the evidence actually rebuts the presumption that the payments were made with a view to giving AmPac a preference over other creditors. It is on this issue, which is the appellant's second ground of appeal, that the existence or non-existence of a reasonable business continuation plan is germane.

[40] I would therefore reject the appellant's first ground of appeal.

(4) The Bankruptcy Judge Erred in Finding that Specialty's Intention Rebutted the Presumption

[41] The appellant submits that although the bankruptcy judge found Specialty's intention, determined objectively, was to try to stay in business, that finding was insufficient to rebut the presumption, because there was no reasonable business continuation plan. To paraphrase the appellant's argument, it is one thing for a debtor to reasonably conclude that by giving one creditor a preferential payment the abrupt termination of the business may be avoided. But to rebut the presumption – to justify giving the preference – more must be shown. Continuing

in business must be a reasonable thing to do from the standpoint of creditors as a whole. The appellant argues that the bankruptcy judge did not consider Specialty's business continuation plan from the standpoint of whether it was reasonable in the required sense.

[42] I accept this argument. In my view, where the insolvent debtor's actual intent in making a preferential payment to one creditor is to continue in business, that will displace the presumption that the payment was made with a view to giving the recipient creditor a preference over others only where there is a business continuation plan that a reasonable debtor could believe will achieve benefits for the creditors generally. This conclusion flows from the case law and a purposive approach to the anti-preference provisions of the BIA.

(i) Case Law

[43] *Orion* is an example of a case where the presumed intent to confer a preference was displaced by a plan that was reasonable in the sense described above. Although the debtor made a payment to a creditor holding its equipment to free up the equipment so that it could be sold, the debtor entertained the reasonable belief that the equipment could be sold for more than the payment necessary to obtain it. The payment, although in effect a preference, was not intended as such because it simply recognized the financial imperative the debtor faced to implement a plan to obtain the equipment and realize proceeds that would

exceed the payment, which would go “a long way toward saving the insolvent company from bankruptcy”: at para. 35.

[44] The Court of Appeal of New Brunswick took a similar approach in *St. Anne-Nackawic Pulp Co. (Trustee of) v. Logistec Stevedoring (Atlantic) Inc.*, 2005 NBCA 55, 255 D.L.R. (4th) 137. In that case, the debtor had paid, among other things, overdue invoices for past services to obtain the release of goods the creditor was holding. The goods could be used to fulfill contracts that would generate revenues many times greater than the amount of the payment ($5 of benefit for every $1 paid to the creditor). The Court of Appeal of New Brunswick found that the lower court erred in considering that the payment was made with the intent of giving the creditor a preference. The debtor’s dominant intent was to generate income exceeding the payment to be applied against debts, and in doing so the debtor was acting in a commercially reasonable manner: at paras. 1, 17-18.

[45] In both of these cases, making the payment to obtain expected benefits was found to be reasonable because, among other things, it was a course of action a trustee would be expected to pursue if it had the opportunity: *Orion*, at para. 22, *St. Anne-Nackawic*, at para. 17. This reinforces the view that the reasonableness of a debtor’s plan is to be assessed from the point of view of its substantive effect on creditors as a whole. A trustee is expected to adopt courses of action that are reasonable from the standpoint of maximizing recoveries for creditors: L.W. Houlden, G.B. Morawetz, and Janis Sarra, *Bankruptcy and Insolvency Law*

of Canada, loose-leaf (2025-Rel. 2), 4th ed (Toronto: Thomson Reuters, 2009) at §2:36; *Rassell (Re)*, 1999 ABCA 232, 177 D.L.R. (4th) 396, at paras. 12-13.

[46] The same conclusion can be drawn from other cases where the debtor's hope to carry on business as a result of the preferential payment was assessed as objectively reasonable having regard to factors including whether there was a sensible business plan (*Holt Motors Ltd.,(Re)* (1966), 57 D.L.R (2d) 180 (Man. Q.B.), at p. 187); whether to a reasonable person the debtor's situation was hopeless (*Spectrum Interiors (Guelph) Ltd., Re* (1979), 29 C.B.R. (N.S.) 218 (Ont. H.C.), at paras. 5, 7), or whether the debtor's plan was reasonable in terms of satisfying creditor claims (*Excavation Boyer & Frères inc., Re*, [1997] R.J.Q. 866 (Que. C.A.), at pp. 870-71).

[47] More recently, in *Keith G. Collins Ltd., as Trustee of the Estate of Dubois-Vandale, a Bankrupt v. MBNA Canada Bank*, 2006 MBQB 258, 209 Man R (2d) 268, at paras. 16-18, the court summed up the matter this way, distinguishing between the debtor's actual intent and the requirement that the intent be objectively reasonable as a matter of substance:

> To rebut the presumption, MBNA must show on a balance of probabilities that Ms Dubois-Vandale's dominant intention was not to prefer a creditor. The court must look at all of the circumstances and determine if there was in fact an intention on her part to give MBNA a preference. Where, as here, a bankrupt asserts that it was her intention to reorganize her affairs and avoid bankruptcy, her intention must also be objectively

> reasonable. See *Re Holt Motors Ltd*. (1966), 1966 CanLII 437 (MB KB), 9 C.B.R. (N.S.) 92 (Man. Q.B.).
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> MBNA has failed to show, on a balance of probabilities, that Ms Dubois-Vandale's dominant intention was not to prefer it. Ms Dubois-Vandale selected the accounts which she wanted to pay in full on January 28, 2004. She paid these accounts knowing that other debts would receive only a minimal payment or no payment whatsoever.
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> While I am satisfied Ms Dubois-Vandale's plan was to try to secure financing to consolidate the remainder of her debts and avoid bankruptcy, her plan was not objectively reasonable. She was hopelessly insolvent. Her debts greatly exceeded her liabilities and she did not have sufficient income to service a loan of the magnitude she required to consolidate her debts. [Emphasis added.]

See also *Andrews (Trustee of) v. Canada (Minister of National Revenue)*, 2011 MBQB 50, at para. 48, where the court put the question as follows: "whether the Debtor was so far underwater at the time of the payment that her intention, however honestly held, to repay her other creditors in the fullness of time was simply not a viable option".

(ii) Purposive Approach to the BIA

[48] Requiring that an insolvent debtor's intention to continue in business have a reasonable basis before it can displace the presumed intent to give a preference flows from the purpose of the anti-preference provisions of the BIA themselves.

[49] One of the two main purposes of the BIA is the "equitable distribution of the bankrupt's assets among his or her creditors[2]: *Aquino v. Bondfield Construction Co.*, 2024 SCC 31, at para. 36. Section 141 of the BIA enshrines the basic rule that all unsecured creditors rank equally and share rateably in the bankrupt's assets.

[50] In furtherance of the purpose of putting, keeping, and treating creditors on an equal footing, s. 95 of the BIA provides a remedy for conduct by an insolvent debtor "which has the effect of preferring a particular creditor over other creditors" thus defeating "the equality of bankruptcy laws": *Hudson v. Benallack*, [1976] 2 S.C.R. 16, 59 D.L.R. (3d) 1, at pp. 175-176; *BDO Dunwoody Ltd. v. Canada (Minister of National Revenue)*, 2011 MBCA 93, 270 Man. R. (2d) 246, at para. 18.

[51] Thus, together with s. 96 of the BIA, which addresses pre-bankruptcy transfers at undervalue, s. 95 is "a means of carrying into effect the principle of the [BIA] contained in s. 141 that all ordinary creditors should rank equally": Houlden, Morawetz, and Sarra, at §5:487. As Jamal J. noted in *Aquino*, at para. 37, in relation to s. 96, "[t]ransfers at undervalue frustrate the purposes of the BIA. They prejudice creditors by diminishing the value of the debtor's estate and reducing funds available for distribution." The same is true of preferences.

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[2] The other is the bankrupt's financial rehabilitation: *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 SCR 327, at para. 32.

[52] Making a preferential payment to enable the continuation of the debtor's business, where there is a reasonable basis to believe that doing so will benefit the business and creditors generally, rebuts the presumption that the debtor's payments were made with a view to giving one creditor a preference over other creditors because it is inconsistent with an intent to prejudice creditors. The preferential payment, in such a situation, enables activity that will benefit creditors, and the latter is properly considered to be the debtor's dominant intent (in the language of *St. Anne-Nackawic*).

[53] However, making a preferential payment to facilitate carrying on business without a reasonable basis to believe that doing so will benefit creditors generally does not rebut the presumption, because there is no reasonable basis to believe that the harm caused by the preference will be ameliorated by the continuation of the business. The harm to creditors might instead be accentuated by the enabled activity. Assessed objectively, there is no "dominant intent" that can displace the presumed intent consistent with the purpose of avoiding prejudice to creditors.

(iii) Application to This Case

[54] The appellant submits that *Orion* and *St. Anne-Nackawic* have no similarity to the case at bar. Here, the payments of USD $400,000 would facilitate the supply of USD $100,000 of product to be resold. Specialty's historical margin on sales

was around 2% to 10%. No rational person would pay USD $400,000 for the chance to recoup $2,000 to $10,000.

[55] The bankruptcy judge did not rest his finding on the likely benefits from this one transaction compared to the amount of the payments. He looked more broadly at Specialty's desire to salvage its relationship with Autoliv and remain in business. He considered that Specialty was reasonably justified in making the payments, because from Mr. Palmer's perspective, viewed objectively, the relationship with Autoliv might not have been irretrievably broken and could perhaps have been sustained for some period of time while Mr. Palmer pursued options to keep the business operating and the Autoliv stream of revenues continuing.

[56] It is one thing to conclude that making the payments could be reasonably expected to allow the business to continue. It is another to conclude that there is a reasonable basis to believe that the business continuation would yield a net benefit to creditors. I agree with the appellant that the bankruptcy judge did not consider whether there was a reasonable basis for a belief on the part of Specialty that making the preferential payments and staying in business would generate net revenues and thus benefit, rather than harm, creditors generally, as was the case with the specific transactions in *Orion* and *St. Anne-Nackawic*.

[57] The evidentiary record cuts sharply against the availability of any such finding. Although the bankruptcy judge referred to the relationship with Autoliv

having generated hundreds of thousand of dollars in monthly revenues in the past, and the hope that this might continue, he did not address whether revenues would exceed the cost to Specialty of making the preferential payments, being in business and making sales. Historically that was not the case. Specialty was insolvent, and owed millions of dollars to unpaid suppliers. Nor did the bankruptcy judge address how, going forward, Specialty would obtain further product to make sales to generate further revenues from Autoliv.

[58] The bankruptcy judge did not find an actual intent that was legally capable of rebutting the presumption that a preference was intended. Nor was such a finding available on the record. He therefore erred in failing to find the payments were void as preferences.

E. Disposition

[59] I would allow the appeal, set aside the order of the bankruptcy judge, and in its place order that the June 2018 payments are void and must be repaid by AmPac to the appellant.

[60] The appellant is entitled to costs of the appeal fixed in the sum of $50,000 inclusive of disbursements and applicable taxes. If the parties are unable to agree upon the disposition of the costs below, they may make written submissions within 10 days of the date of release of these reasons.

Released: May 15, 2025 “P.D.L.”

“B. Zarnett J.A.”
“I agree. P. Lauwers J.A.”
“I agree. R. Pomerance J.A.”