

COURT OF APPEAL FOR ONTARIO

CITATION: Richter LLP v. Big Truck TV Productions Inc., 2015 ONCA 567

DATE: 20150731

DOCKET: C59686

Feldman, van Rensburg and Huscroft JJ.A.

BETWEEN

Richter LLP

Creditor (Respondent)

and

Big Truck TV Productions Inc.

Debtor

and

Inch Hammond Professional Corporation

Garnishee (Appellant)

Brian D. Duxbury and Andrew D. Pelletier, for the appellant

Jonathan Charland, for the respondent

Heard: May 5, 2015

On appeal from the judgment of Justice Robert F. Goldstein of the Superior Court of Justice, dated November 5, 2014, with reasons reported at 2014 ONSC 6379.

**Feldman J.A.:**

**Introduction**

[1] The appellant Inch Hammond is a law firm that was owed money by its client, Big Truck TV Productions Inc. Big Truck had a tax refund coming from the Canada Revenue Agency (“CRA”). Big Truck executed an Irrevocable Direction to Inch Hammond in respect of the anticipated tax refund, directing it to disburse the refund amount to pay three creditors in full, including itself for legal fees, with the balance to be paid to Big Truck. The respondent Richter, the third of these designated creditors, obtained default judgment against Big Truck and served a Notice of Garnishment on Inch Hammond in respect of the anticipated tax refund. Its intent was to obtain payment of its judgment debt from that refund.

[2] Inch Hammond disbursed the refund from the CRA to the listed creditors in priority sequence in accordance with the Irrevocable Direction rather than seek a garnishment hearing. As the funds were insufficient to pay all three creditors, little was left over to pay Richter after the first two listed creditors were paid in full.

[3] The matter reached the court in a garnishment hearing initiated by Richter under rule 60.08(16) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The issue before the court was whether Inch Hammond was permitted to pay itself for its legal fees from the funds from the CRA in the face of the Notice of Garnishment.

## **Facts**

[4] As a digital media company, Big Truck was eligible for a tax credit under the Ontario Interactive Digital Media Tax Credit Program, governed by ss. 93-

93.2 of the *Taxation Act, 2007*, S.O. 2007, c. 11, Sch. A, and s. 43.11 of the *Corporations Tax Act*, R.S.O. 1990, c. C.40. CTAP Inc. prepared the tax credit application for Big Truck for 2010, but when Big Truck was unable to pay CTAP's fees, CTAP sued. Inch Hammond acted for Big Truck and negotiated a settlement of the litigation, but neither the settlement amount nor Inch Hammond's legal fees were paid.

[5] R&D Funding Management Inc. prepared Big Truck's 2011 tax refund application. In anticipation of Big Truck receiving a tax refund cheque in the amount of \$265,000, a new settlement agreement with Big Truck was negotiated with CTAP, whereby the tax refund cheque would be directed to be paid to Inch Hammond to pay the three creditors – CTAP, Inch Hammond and R&D – with the balance to be paid to Big Truck. The anticipated tax refund was believed to be sufficient to pay all three creditors with some left over for Big Truck.

[6] Inch Hammond prepared an Irrevocable Direction to reflect those terms. Big Truck executed the Irrevocable Direction after making an amendment that replaced the third creditor, "R&D Funding", with "Richter". In his affidavit, Mr. Hammond deposed that when he later saw Richter's statement of claim, he inferred that at some point R&D's contract with Big Truck had been assigned to Richter.

[7] The following is the entire Irrevocable Direction as executed:

**IRREVOCABLE DIRECTION**

TO: INCH HAMMOND PROFESSIONAL CORPORATION

Re: Big Truck TV Productions Inc. et al ats. CTAP Inc.  
Court File No: CV-11-439081 (the "Action")  
Payment of Settlement Funds

**IN CONSIDERATION** of CTAP INC. (the "Plaintiff") forbearing to obtain an issued and entered judgment in the Action or from taking any other enforcement steps against the Undersigned and for other good and valuable consideration:

**THE UNDERSIGNED HEREBY IRREVOCABLY DIRECTORS [SIC] ITS LAWYERS, INCH HAMMOND PROFESSIONAL CORPORATION**, upon receipt of funds from the Canada Revenue Agency in accordance with the Undersigned's irrevocable direction dated (date), to pay out said funds as follows:

1. Payment of all amounts owing to CTAP Inc. to "Jack Copelovici, in trust".
2. Payment to Inch Hammond Professional Corporation of all amounts owing, including fees and disbursements.
3. Payment to Richter of all amounts owing.
4. Balance of funds to be paid to Big Truck TV Productions Inc. or as otherwise directed by the Undersigned.

and doing this shall be its good and sufficient authority.

DATED this 13<sup>th</sup> day of April, 2013.

BIG TRUCK TV PRODUCTIONS INC.  
Per: Michael Carpentier  
Title: CEO

I HAVE AUTHORITY TO BIND THE CORPORATION

[8] Big Truck also sent an Irrevocable Direction to the CRA, which was referred to in the above Irrevocable Direction, directing the CRA to make the refund cheque payable to Inch Hammond in Trust.

[9] In July 2013, Richter obtained default judgment against Big Truck, and in October, issued a Notice of Garnishment to Inch Hammond in respect of the anticipated refund cheque from the CRA. It was only at that point that Inch Hammond reviewed the signed Irrevocable Direction it had received in April and found that Richter was named as the #3 payee.

[10] Inch Hammond responded in November to the Notice of Garnishment with a Garnishee's Statement, and corresponded with counsel for Richter. In the Garnishee's Statement, Inch Hammond asserted that it did not owe a debt to Big Truck, but rather it was a trustee and a creditor of Big Truck. It also asserted that because Inch Hammond had been directed to pay other creditors before paying Richter, Inch Hammond required clarification and possibly a court order to determine whether it was required to pay Richter pursuant to the Notice of Garnishment.

[11] The refund cheque was not issued by the CRA until December. While it was sent to Inch Hammond as directed, contrary to Big Truck's direction it was made out to Big Truck and not to Inch Hammond in Trust. Also, it was not for the anticipated amount of \$265,000 but instead only for \$150,074.70, an amount that was not sufficient to pay all three creditors in full.

[12] Big Truck endorsed the cheque to Inch Hammond in February 2014. At that point, Inch Hammond paid CTAP in full in the amount of \$52,716.08, it paid itself in full including interest in the amount of \$94,824.88, and because it had received a Notice of Garnishment, it paid the balance (\$2,533.74 less \$10) not directly to Richter but to the Sheriff.

[13] Richter then initiated a garnishment hearing motion, seeking payment from Inch Hammond of the amount it was owed as set out in the Notice of Garnishment. The motion judge found that the Notice of Garnishment put Inch Hammond on notice that “there was a dispute about the funds, and that a court would have to decide the rights and liabilities of each party.” He referred to the decision of this court in *International Union of Painters and Allied Trades, Local 200 v. S&S Glass and Aluminum (1993) Ltd.* (2004), 185 O.A.C. 38 (C.A.), at para. 23, for the proposition that garnishment proceedings “put the garnishee on notice that debts owing to the debtor are to be paid to the creditor.” He found that Inch Hammond should have followed the garnishment procedure or paid the money into court, but should not have used self-help and should not have paid itself.

[14] The motion judge decided the issue on that legal basis but also went on to address and reject other issues raised by Inch Hammond as defences, including legal and equitable set-off, the effect of registration under the *Personal Property Security Act*, R.S.O. 1990, c. P.10 (“PPSA”), and whether there was an absolute

assignment. He found that Inch Hammond had “not come to the court with clean hands.” He ordered Inch Hammond to pay \$89,608.19 to the Sheriff, being the amount owing as set out in the Notice of Garnishment, plus costs to Richter.

### **Issue on Appeal**

[15] Although all the issues addressed by the motion judge were argued on the appeal, it is only necessary to decide one issue to resolve the appeal: whether Inch Hammond was obliged to treat the refund cheque from the CRA to Big Truck as a garnishable debt it owed to Big Truck.

### **Analysis**

#### **(1) Did Inch Hammond owe a garnishable debt to Big Truck?**

[16] The fundamental premise of the garnishment process is that a creditor who obtains an order for a debtor to pay money may enforce that order by garnishing debts payable by other persons to the debtor. That premise is articulated in rule 60.08(1) which provides:

A creditor under an order for the payment or recovery of money may enforce it by garnishment of debts payable to the debtor by other persons.

[17] In this case, the process was available to Richter as a creditor with a default judgment against the debtor, Big Truck, to use against Inch Hammond, if Inch Hammond was an “other person” with a “debt payable” to Big Truck.

[18] Before the motion judge, Inch Hammond argued that it was not a debtor of Big Truck, but rather, it was a creditor. While acknowledging that fact, the motion judge focused on the status of the cheque from the CRA payable to Big Truck. He found that Inch Hammond was holding that cheque on behalf of Big Truck, and that it owed Big Truck a fiduciary duty to carry out its “direction” regarding the cheque.

[19] I agree with the motion judge that “Inch Hammond obviously did not owe money to Big Truck”. However, with respect to the motion judge, I do not agree that Richter could nevertheless “garnish monies to be paid pursuant to a direction to Inch Hammond for Big Truck’s benefit.” Rule 60.08(11) provides that “[t]he garnishee is liable to pay to the sheriff any *debt of the garnishee to the debtor*, up to the amount shown in the Notice of Garnishment” (emphasis added). If the garnishee owes no debt to the debtor, then this rule is inapplicable.

[20] Since the CRA tax refund cheque was not a debt owed by Inch Hammond to Big Truck, the Notice of Garnishment had no effect in respect of that cheque.

[21] The tax refund represented monies owed by the CRA to Big Truck, which Big Truck directed to be paid first to its legal counsel in trust and then to three of its creditors for the amounts owed to them (except to the extent of any available excess) in accordance with the Irrevocable Directions to the CRA and to Inch Hammond.



[22] Had there been any balance available to pay to Big Truck, it may be that the amount of the balance that was directed to be paid to Big Truck would have represented a garnishable debt in the same way that upon termination of a legal retainer, the balance of trust funds owing to a client may be subject to garnishment: *Toronto-Dominion Bank v. Cooper, Sandler, West & Skurka* (1998), 37 O.R. (3d) 729 (Div. Ct.)(leave to appeal dismissed May 21, 1998). However, in the absence of any balance, Inch Hammond owed no debt to Big Truck.

[23] After Big Truck executed the Irrevocable Direction, the only duty Inch Hammond owed to Big Truck was to carry out its terms. Once the amount of the cheque was known, it was clear that no balance of funds would remain and therefore no debt to Big Truck would arise.

## **Conclusion**

[24] Richter's position on the appeal is solely that by serving a Notice of Garnishment it obtained priority to the extent of the amount claimed in the Notice. The motion judge accepted that Inch Hammond acted wrongfully by carrying out the terms of the Irrevocable Direction once it received the Notice of Garnishment and was therefore aware of a claim by Richter in priority to its own claim for payment by its client. However, because Inch Hammond owed no debt to Big Truck and there was no debt to garnish, Inch Hammond made no error by failing to treat the cheque from the CRA as garnishable. The rights of the parties in the garnishment hearing depended on whether there was a garnishable debt owed

by Inch Hammond to Big Truck. In the absence of such a debt, Richter had no claim under rule 60.08 to the funds that had been disbursed by Inch Hammond.

[25] I would allow the appeal and set aside the order made by the motion judge. I would specifically note that I am satisfied that Inch Hammond did not act in an improper manner or with unclean hands in all the circumstances.

[26] I would allow the appeal with costs fixed in the agreed amount of \$10,000 inclusive of disbursements and HST.

Released: "KF" July 31, 2015

"K. Feldman J.A."

"I agree. K. van Rensburg J.A."

"I agree. Grant Huscroft J.A."