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# Insolvency News

INSOLVENCY LAW SECTION / SECTION DU DROIT DE L'INSOLVABILITÉ

## Court Holds that Trustee Cannot Claim Litigation Privilege

Case Comment on *Re Beetown Honey Products Inc.* (2003), 67 O.R. (3d) 511

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In *Re Beetown Honey Products Inc.* (“*Re Beetown*”), the Superior Court of Justice held that a Trustee in Bankruptcy was not able to claim litigation privilege against parties appealing the disallowance of their claims. The Court concluded that a report prepared for a Trustee in Bankruptcy during an appeal from the Trustee’s disallowance of two creditors’ claims should be produced to those creditors. In giving the creditors access to the report, the Court held a Trustee could not assert litigation privilege given its role as an officer of the court and its duty to represent all creditors impartially.

### Background

In January 1997 Beetown Honey Products Inc. (“Beetown”) filed an Assignment in Bankruptcy, and a Trustee in Bankruptcy was appointed (the “Trustee”). Donald and Beverly Couture made a claim in the bankruptcy as secured creditors, and, when their claim was disallowed, they appealed. They supported their appeal with two affidavits, one of which was sworn by an expert and provided financial analysis of Beetown’s business.

The Trustee obtained a consent order from the Registrar requiring Donald Couture and the expert David Pawlett to attend for cross-examination on their

affidavits. Before this could take place, however, the Coutures’ solicitors learned that the Trustee had an audit report from Price Waterhouse that was relevant to the issues on appeal (the “Report”). They requested the production of the report and the Trustee denied the request claiming litigation privilege.

### Analysis and Decision

In holding the litigation privilege did not apply to the Report, Sachs J.’s decision focused not on whether privilege attached to the report, but on whether it was open for the Trustee to claim privilege in the first place. The Court first outlined the purpose of litigation privilege and then explained how this tool could not be utilized by the Trustee in this case.

Citing the Ontario Court of Appeal’s decision in *General Accident Assurance Co. v. Cbrusz*,<sup>1</sup> the Court reasoned that a claim for litigation privilege is meant to reinforce a process that is fundamentally adversarial in nature. The privilege is aimed at creating a “zone of privacy” that facilitates the preparation of the advocate’s case for the trial process. This need to provide protection to facilitate preparation for the adversarial process must then be weighed against the harm flowing from the non-disclosure.

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The Trustee's use of a tactic that is fundamentally adversarial, in Sachs J.'s analysis, runs counter to the general duties and responsibilities of a Trustee in Bankruptcy. The Court found that as a Trustee in Bankruptcy has an obligation to be neutral and even-handed in its dealings with all classes or creditors, claiming litigation privilege would call into question the Trustee's impartiality.

As a result, the Court granted the Coutures' motion for production, concluding that the role of the Trustee in bankruptcy proceedings, and the rationale behind litigation privilege, made its claim for litigation privilege inappropriate.

### Commentary

The decision in *Re Beetown* could have far reaching consequences for any court appointed officer, including Receivers and Interim Receivers, who have duties to creditors. In addition, similar reasoning could be applied to a claim to solicitor/client privilege in certain circumstances. If the reasoning in this decision is broadly applied then court appointed officers may want to operate under the assumption that they may have to provide full disclosure to disputed creditors and possibly others.

The difficulty with the analysis in *Re Beetown* is that the cases it cites deal with disputes between valid creditors of the bankrupt and the Trustee. As such, the courts are quick to address any perception of bias on the part of the Trustee. The fact that a Trustee has an obligation to be neutral in its dealings with all creditors may be relevant in cases where it is clear that the other party is a creditor, but it is less clear whether the Trustee has a duty of impartiality in relation to creditors whose claims have been disallowed. Trustees have a duty to examine every proof of claim, and if they believe that the claim is invalid, they have a duty to disallow it. Furthermore, the disallowance of a claim yields a benefit to the bankrupt estate since it increases the dividend for the other creditors.

As a result, it can be argued that the Trustee in a case like *Re Beetown* has a duty to those whose claims have been allowed to ensure that it presents its best case to the Court. The adversarial process, including claims for privilege, is intended to bring to the Court's attention the facts and arguments most favourable to each party. Barring claims for litigation privilege in situations like that in *Re*

*Beetown* may make it more difficult in the future for Trustees to act for the benefit of all creditors.

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<sup>1</sup> (1999), 45 O.R. (3d) 321 (C.A.)