Date: 20071102

Docket: A-419-06

Citation: 2007 FCA 345

CORAM: **LÉTOURNEAU J.A.**
PELLETIER J.A.
TRUDEL J.A.

BETWEEN:

HER MAJESTY THE QUEEN

Appellant

and

JACQUES MARCHESSAULT

Respondent

Hearing held at Montréal, Quebec on October 11, 2007.

Judgment rendered at Ottawa, Ontario on November 2, 2007.

REASONS FOR JUDGMENT: TRUDEL J.A.

CONCURRED IN BY: LÉTOURNEAU J.A.
PELLETIER J.A.

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REASONS FOR JUDGMENT

TRUDEL J.A.

[1] Does paragraph 128(2)(*d*) of the *Income Tax Act*, R.S.C. 1985 (5th Supp.) c. 1 (the Act), which provides that a current taxation year shall be deemed to end on the day immediately before an individual became a bankrupt, also apply to a proposal made pursuant to sections 50 *et seq.* of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (BIA)? That is the point at issue.

[2] For the reasons that follow, I propose to give this question a negative answer.

FACTS AND PROCEDURE

[3] On May 20, 2003 Mr. Marchessault made a proposal to his creditors which was accepted by them and then ratified by the Court in a judgment of July 10, 2003.

[4] This proposal provided that a dividend of 100 cents on the dollar would be paid to ordinary creditors, the final and fifth payment being due in June 2008. Those creditors included the Canada Customs and Revenue Agency (CCRA), which proved its claim in the amount of $25,287.36.

[5] Relying on paragraph 128(2)(*d*) of the Act, the respondent sent the CCRA two returns for the 2003 taxation year, one taking his pre-proposal income into account and the other his post-proposal income.

[6] The text of paragraph 128(2)(*d*) of the Act reads as follows:

Where individual bankrupt **128.**(2) Where an individual has become a bankrupt, the following rules are applicable:	**Faillite d'un particulier** **128.** (2) Lorsqu'un particulier est en faillite, les règles suivantes s'appliquent :
. . . . .	. . . . .
(*d*) except for the purposes of subsections 146(1), 146.01(4) and 146.02(4) and Part X.1,	*d*) sauf pour l'application des paragraphes 146(1), 146.01(4) et 146.02(4) et de la partie X.1:

(i) a taxation year of the individual is deemed to have begun at the beginning of the day on which the individual became a bankrupt, and	(i) l'année d'imposition du particulier est réputée avoir commencé au début du jour où il est mis en faillite,
(ii) the individual's last taxation year that began before that day is deemed to have ended immediately before that day. . .	(ii) sa dernière année d'imposition ayant commencé avant ce jour est réputée avoir pris fin immédiatement avant ce jour . . .

[7] The Minister of National Revenue (MNR) disallowed the taxation year cutoff proposed by the respondent since the latter was not bankrupt in 2003. Consequently, the MNR determined the respondent's assessment on the basis of a full taxation year. Following a notice of objection by the respondent, the MNR confirmed his decision.

[8] Using the informal procedure of subsections 18(1) to (28) of the *Tax Court of Canada Act*, R.S.C. 1985, c. T-2, the respondent appealed the decision of the MNR not to divide the 2003 taxation year based on his proposal in May 20, 2003 and paragraph 128(2)(*d*) of the Act, *supra*.

[9] The respondent was successful in the Tax Court of Canada (2006 TCC 445).

[10] Before discussing the judgment at issue, the parties' arguments should be considered.

PARTIES' ARGUMENTS

[11] The issue indicates the diametrically opposed positions of the parties. The appellant argued for a strict interpretation of subsection 128(2) of the Act, which deals with an individual's bankruptcy, insisting that at no time in calendar year 2003 was the respondent bankrupt. She argued

that this provision is clear and unambiguous and should simply be applied. In doing so, she went on, the respondent is excluded from the effects of paragraph 128(2)(*d*) of the Act and cannot divide the 2003 taxation year in accordance with the date of his proposal.

[12] The respondent, for his part, noted the choice by Parliament in the Act (section 248.(1)) to define a "bankrupt" by reference to the BIA (section 2). That said, and by virtue of subsection 66(1) of the BIA, which makes provisions of that Act applicable under certain conditions to proposals made under the general scheme, he argued he was entitled to the benefit of subsection 128(2) of the Act.

[13] To fully understand his argument, it is worth setting out these provisions at once:

***Income Tax Act* (1985, c. 1 (5th Supp.))**	***Loi de l'impôt sur le revenu* (1985, ch. 1 (5e suppl.))**
PART XVII **INTERPRETATION** **Definitions** 248. (1) In this Act,	**PARTIE XVII** **INTERPRÉTATION** **Définitions** 248. (1) Les définitions qui suivent s'appliquent à la présente loi.
. . . . .	. . . . .
"bankrupt" « failli » "bankrupt" has the meaning assigned by the *Bankruptcy and Insolvency Act*;	« failli » "bankrupt" « failli » S'entend au sens de la *Loi sur la faillite et l'insolvabilité*.
. . . . .	. . . . .
***Bankruptcy and Insolvency Act* (R.S., 1985, c. B-3)**	***Loi sur la faillite et l'insolvabilité* (L.R., 1985, ch. B-3)**
Definitions	**Définitions**

2. In this Act,	2. Les définitions qui suivent s'appliquent à la présente loi.
. . . . .	. . . . .
“bankrupt” « failli » “bankrupt” means a person who has made an assignment or against whom a bankruptcy order has been made or the legal status of that person;	« failli » "bankrupt" « failli » Personne qui a fait une cession ou contre laquelle a été rendue une ordonnance de faillite. Peut aussi s'entendre de la situation juridique d'une telle personne.
. . . . .	. . . . .
Act to apply 66. (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.	**Application de la présente loi** 66. (1) Toutes les dispositions de la présente loi, sauf la section II de la présente partie, dans la mesure où elles sont applicables, s'appliquent, compte tenu des adaptations de circonstance, aux propositions faites aux termes de la présente section.

[14] The respondent accordingly strongly opposed the appellant’s contention. As at trial, he cited in support of his argument *Gollner v. Canada (Customs and Revenue Agency)* (2003), 57 D.T.C. 5608 (Ont. S.C.); *Bernier (syndic) v. Québec (Sous-ministre du Revenu)*, [2000] R.D.F.Q. 7 (S.C.), 2000 J.Q. no 982 (S.C.) (QL), noted by the trial judge. He further cited *Hancor Inc. v. Systèmes de Drainage Modernes Inc.*, [1996] 1 F.C. 725 (C.A.), and *Québec (sous-ministre du Revenu) v. Perrette inc. (syndic)*, [1998] R.J.Q. 1015 (C.A.), in particular for their interpretation of section 66(1) of the BIA. I will return to this later.

[15] Finally, the parties argued as to the impact of administrative directive RCD 95-07 on the point at issue. That directive deals with provisional proofs of claim which the MNR may file in the

case of a proposal. The judge referred to this at paragraph 10 of his decision, and I also will return to this later.

[16] Accordingly, the solution to this question depends essentially on the interpretation of subsection 66(1) of the BIA and paragraph 128(2)(*d*) of the Act, and their interaction if any.

[17] I will not consider a final argument by the respondent, who argued as the debtor did in *Bernier* that the tax debt arises as the income is earned, an argument which the appellant conceded to Mr. Bernier (*Bernier, supra*, paragraph 33; *R. v. Simard-Beaudry inc.*, 71 D.T.C. 5511 (F.C.), followed *inter alia* in *Electrocan System Ltd. v. The Queen*, 89 D.T.C. 5079 (F.C.A.); *The Queen v. Westbrook Management Ltd.* (November 5, 1996), A-790-95 (F.C.A.), 89 D.T.C. 5079 (F.C.A.)).

[18] For the purposes of this appeal it is not necessary to discuss the exact time at which an individual's tax obligation arises under the Act, whether concurrently with his or her taxable earnings or on January 1 following a particular taxation year. I will therefore move immediately to analysis of the trial judgment.

TAX COURT OF CANADA JUDGMENT

[19] The Tax Court of Canada ruled in favour of the respondent as follows:

> The appeal from the assessment of tax made under the *Income Tax Act* for the 2003 taxation year is allowed without costs and the assessment under appeal is referred back to the

> Minister for reconsideration and reassessment on the basis that the appellant's tax liability for the 2003 taxation year arising from income earned by, or accrued to, him on or before the proposal for protection from bankruptcy was filed on May 20, 2003, shall be governed by the terms of the proposal and be assessed separately from the income earned by, and accrued to, him after the proposal, which income shall be dealt with in a post-proposal assessment. (see judgment.)

[20] In accordance with this judgment, therefore, the MNR had to prepare two separate notices of assessment: one subject to the conditions of the proposal from the period from January 1 to May 19, 2003; the second for the period from May 20 to December 31, 2003.

[21] After disposing of a preliminary argument as to jurisdiction, which does not concern us, and setting out the sections considered relevant in the Act and the BIA, the judge undertook the analysis of the law in paragraphs 8 *et seq.* of her reasons.

[22] To do this, she set out the facts and decisions in *Gollner* and *Bernier*, cited by the respondent, and *Agard v. The Queen*, 94 D.T.C. 1232 (T.C.C.), and *Jones v. The Queen*, (2003), 66 O.R. (3d) 674 (C.A.).

[23] Adopting the analysis of the Court in *Gollner* and *Bernier*, she concluded that “the *Gollner* and *Bernier* cases seem to support the appellant’s position that, despite the fact subsection 128(2) of the ITA refers only to bankruptcy, it is also applicable to proposals” (paragraph 10).

[24] Having reached this decision, the judge quickly dismissed the MNR argument, which relying on *Agard* suggested a strict construction of the definition of “bankruptcy” in the BIA.

[25] According to the judge, a subsequent decision of the Ontario Court of Appeal, *Jones, supra*, rejected *Agard*, saying the following at paragraph 12:

> [12] I would pause to note parenthetically that in the case of a bankruptcy, a new taxation year is deemed to begin on the day the taxpayer becomes a bankrupt (see ss. 128(1)(*d*) and (2)(*d*) of the ITA). That option is not available, however, where the taxpayer is not a bankrupt: *Agard v. Canada* (1994), 94 D.T.C. 1232 (T.C.C.). As there is no specific legislative provision deeming that a new taxation year begins at the date of the proposal by an insolvent person, the question raised on this appeal falls to be determined on the basis of the general provisions of the BIA relating to proposals and the terms of the proposal.

[26] Without elaborating further, the judge indicated she was in agreement with *Gollner*, *Bernier* and *Jones*. She wrote:

> [15] I agree with these decisions and therefore conclude that, even if subsection 128(2) of the *ITA* does not refer specifically to a proposal, the effect of the provisions of the *BIA* taken together and the general scheme of both the *BIA* and the *ITA* lead to the conclusion that in cases of proposals two assessments are to be made: a pre-proposal assessment and a post-proposal assessment, with the first being subject to the terms of the proposal.

[27] Hence the judgment which she signed in favour of the respondent, who is defending it on appeal.

ANALYSIS OF TAX COURT OF CANADA DECISION

[28] The appellant argued that the trial judgment was vitiated by errors of law regarding:

- the interpretation of paragraph 128(2)(*d*) of the Act;
- the application of *Gollner, Jones* and *Bernier* to the case at bar;

- the impact of directive RCD 95-07 on the legislative interpretation of the Act;
- the interpretation of subsection 66(1) of the BIA and *Hancor*, *Perrette* and *Bernier*.

[29] I intend to analyse the law applicable in the case at bar in the following order. I will first deal with paragraph 128(2)(*d*) of the Act and *Agard*, *Gollner* and *Jones*. *Gollner* will enable me to comment on directive RCD 95-07. I will then consider *Hancor*, *Perrette* and *Bernier* and subsection 66(1) of the BIA. Finally, I will conclude with a statement of the relevant principles of statutory construction.

[30] Section 128 is found in Part I of the Act, titled *Income Tax*, under the section titled *Special Rules Applicable in Certain Circumstances*, including cases of the bankruptcy of a corporation (128(1) of the Act) and of an individual. Subsection 128(2) is titled "Where individual bankrupt".

[31] As mentioned earlier in paragraph 128(2)(*d*) of the Act, Parliament provided that an individual's taxation year is deemed to have begun on the day the individual became bankrupt, his or her last taxation year beginning before that day being deemed to have ended immediately before the day.

AGARD, GOLLNER* AND *JONES

[32] In subsection 128(2) of the Act Parliament is not in any way concerned with a taxpayer who filed a proposal under the BIA.

[33] This is what is indicated by *Agard*, a judgment of January 26, 1994. In that case, the taxpayer was claiming the right to file pre- and post-proposal tax returns, based on the provisions of paragraph 128(2)(*d*) of the Act, which had been disallowed by the MNR. He argued that the filing of his proposal with the trustee had made him a "bankrupt" within the meaning of the BIA.

[34] Judge Sorbier of the Tax Court of Canada rejected Mr. Agard's argument, noting that the earlier decisions clearly established that an individual making a proposal is not a bankrupt and also does not have the status of a bankrupt, as the proposal does not have the effect of depriving him of his property (*Employers' Liability Assurance Corporation Limited v. Ideal Petroleum (1959) Ltd.*, [1978] 1 S.C.R. 230).

[35] In *Gollner*, a judgment of August 21, 2003, the case concerns the impact of Mr. Gollner's proposal on his tax obligation for the year of the proposal. In that case, Mr. Gollner earned all his net income from the exercise of his profession in the pre-proposal period and objected that the CCRA had not taken this into account in determining his pre- and post-proposal tax obligations.

[36] Judge Sedgwick ruled in favour of the debtor and held that the tax debt from income earned before the proposal was subject to the terms of the proposal. He did not discuss the deemed year-end or paragraph 128(2)(*d*) of the Act. The judge referred instead to the CCRA's administrative policy that allows a deemed year-end when a proposal has been filed.

[37] *Gollner* dealt at length with directive RCD 95-07, referred to by the respondent in paragraphs 40 *et seq*. of his memorandum. This directive, issued on October 27, 1995, deals with the filing of a provisional proof of claim in respect of a proposal. The trial judge said this about it:

> [10] . . . Furthermore, according to the CCRA's own administrative policy with respect to proving a provisional claim in a proposal filed by a tax debtor under the *BIA* as set out in their above-mentioned Directive RCD 95-07, in cases of proposals pre-proposals tax liability must be treated differently than post-proposal tax liability. Indeed, that policy indicates that the tax liability under the pre-proposal assessment is subject to the proposal.
>
> [Emphasis added.]

[38] In the judgment, which she wrote originally in English, the last sentence reads as follows: "Indeed, that policy indicates that the tax liability under the pre-proposal assessment is subject to the proposal". (Emphasis added.)

[39] This is a misinterpretation of the directive. Nowhere is there any mention of the tax obligation being associated with a pre-proposal assessment. Rather, it states that:

. . . the pre-proposal portion of that tax liability is provable in the proposal as a provisional claim.	. . . la partie de cette obligation fiscale attribuable à la partie de l'année qui précède le dépôt de la proposition peut faire l'objet d'une réclamation provisionnelle dont la preuve peut être déposée relativement à une proposition.
[Emphasis added.]	[Je souligne.]

[40] The provisional estimate in such cases is intended primarily to accommodate the debtor and encourage the success of a proposal which is otherwise acceptable. Accordingly, it is an

administrative policy left in the discretion of the Crown according to (a) its assessment of the possibility [TRANSLATION] “that the proposal will be dismissed if the Department does not file a provisional claim; (b) the probability of a bankruptcy and (c) the amount that may be lost or recovered in such a case” (*ibid.*).

[41] It is clear from this directive that the taxpayer’s tax obligation is determined at the end of the fiscal year during which the proposal was filed, making a comparison between the total amount assessed for this period and the amount of the provisional claim. Once again, there is no question here of a pre-proposal assessment, but rather of taking the tax obligation attributable to the part of the year covered by the proposal into account (in English, “the pre-proposal part of the fiscal period”).

[42] Additionally, I feel that this directive does not have any impact on the issue here and that the trial judge placed too much importance on it.

[43] As the Court noted in *Gollner*:

> 26 . . . the ITA is silent on the subject matter of the Directive. The Directive has no statutory foundation.

[44] Finally, it should be noted that since *Gollner* the CCRA had discontinued the Directive in favour of the Rules of Professional Conduct 03-1 of the Canadian Association of Insolvency and

Restructuring Professionals (CAIRP), titled *Investigating the Financial Situation of the Proposal Debtor as it Relates to Income Tax Debt* [03-01] and its explanatory notes [03-1 EX].

[45] The judge mentions this in a footnote, nothing more. These Rules of Professional Conduct indicate that since 1995 the CCRA has, in certain circumstances and in its discretion, authorized the division of the tax year during which a proposal was filed as the Act provides in a case of a bankruptcy. This is simply an administrative policy. The writer Sherman states that the CCRA intended to terminate this practice after 2002, but agreed to defer the introduction of this change and in its place to apply Rule 03-1 of the CAIRP, cited above (David Sutherland, "Commentaire sur le paragraphe 128(2) de la *Loi de l'impôt sur le revenu*", Taxnet.pro, 2007).

[46] Accordingly, the CCRA may choose to file a provisional proof of claim for the deemed tax debt prior to the proposal, in the absence of any provision to this effect in the Act.

[47] Finally, the explanatory notes (03-1 EX) indicate that in December 2002 the CAIRP submitted a brief to the Department of Finance asking that the Act be amended to allow the application of a deemed year-end in a proposal (Rules of Professional Conduct 03-1 EX), but in vain. Hence Rule 03-1, [TRANSLATION] "to clarify the requirements on inclusion in a proposal of a tax debt prior to the proposal for the current year".

[48] I feel we cannot decide the case at bar without this background, as a principal argument in *Gollner* was that the CCRA had approved the debtor's proposal pursuant to directive RCD 95-07.

[49] Administrative policies and interpretation are not conclusive: at most they have a certain value. In cases of doubt as to the meaning of the legislation, they may be a significant factor since they are intended to be a statement of the interpretation and policies of a particular department (*Harel v. Deputy Minister of Revenue of Québec*, [1978] 1 S.C.R. 851, at p. 859; *R. v. Nowegijick*, [1983] 1 S.C.R. 29).

[50] For the foregoing reasons, and because I consider that paragraph 128(2)(*d*) is not subject to any ambiguity, I have no hesitation in disregarding directive RCD 95-07. I agree that that directive has no statutory basis.

[51] I turn now to *Jones*, which according to the judge rejected *Agard*. This was when she cited paragraph 12 of the Ontario Court of Appeal judgement, reproduced above at paragraph [25], but set out again for the sake of convenience:

> [12] I would pause to note parenthetically that in the case of a bankruptcy, a new taxation year is deemed to begin on the day the taxpayer becomes a bankrupt (see ss. 128(1)(*d*) and (2)(*d*) of the ITA). That option is not available, however, where the taxpayer is not a bankrupt: *Agard v. Canada* (1994), 94 D.T.C. 1232 (T.C.C.). As there is no specific legislative provision deeming that a new taxation year begins at the date of the proposal by an insolvent person, the question raised on this appeal falls to be determined on the basis of the general provisions of the BIA relating to proposals and the terms of the proposal.

[52] With respect, she saw in this passage a distinction that I do not find there. In *Jones*, the Court of Appeal was not dealing specifically with paragraph 128(2)(*d*) of the Act. It dealt with that

provision in passing and in fact relied on *Agard* in confirming that a debtor who has made a proposal cannot avail himself of the possibility of dividing the taxation year as authorized by paragraph 128(2)(*d*) of the Act.

[53] The question in *Jones* was quite different. The issue there was whether the payments made to the MNR by the debtor after his proposal could be credited to his prior tax obligation, as the MNR did.

[54] The Court of Appeal answered the question with reference to sections 69 and 69.1 of the BIA, which deal respectively with a stay of proceedings in cases of a notice of intent (section 69 BIA) and in the case of the filing of a proposal (section 69.1 BIA). It concluded that the MNR could not proceed as it had done without affecting the pro rata distribution of dividends derived from realization of the proposal.

[55] I therefore consider that these cases, *Gollner* and *Jones*, cannot support the proposition put forward by the respondent that [TRANSLATION] “the simplistic way of thinking [in *Agard*] has never been approved by appellate courts” (paragraph 24 of his memorandum).

HANCOR, PERRETTE* AND *BERNIER

[56] I turn now to *Hancor*, *Perrette* and *Bernier*, to which the respondent referred for support of his argument that paragraph 128(2)(*d*) of the Act applies to proposals as a result of subsection 66(1) of the BIA.

[57] In my opinion, in order to accept his argument it would be necessary to add to the provision and give it a meaning which it does not have.

[58] It is worth again reproducing subsection 66(1) of the BIA:

Act to apply 66. (1) All the provisions of this Act, except Division II of this Part, in so far as they are applicable, apply, with such modifications as the circumstances require, to proposals made under this Division.	**Application de la présente loi** 66. (1) Toutes les dispositions de la présente loi, sauf la section II de la présente partie, dans la mesure où elles sont applicables, s'appliquent, compte tenu des adaptations de circonstance, aux propositions faites aux termes de la présente section.

[59] I understand from this subsection that it is the provisions of the BIA which may be applied, *mutatis mutandis*, to proposals made under that Act. It is an interpretive exercise which is conducted within the framework of the BIA. This is how I read the passage cited by the respondent, taken from *Hancor*:

> [72] The words used by Parliament are significant: “All the provisions”, “in so far as they are applicable” and “with such modifications as the circumstances require”. Parliament was

> aware of the theoretical and practical differences between the scheme of bankruptcy and that of proposals. Whether due to indolence or economy, it did not consider it necessary for the provisions it had passed in respect of bankruptcy to be repeated in or adapted to the case of proposals. At the same time, however, it was very careful to say – at least that is how I understand the words it used – that all the provisions of the Act apply to proposals in so far as they can be applied. In other words, it wanted the courts to find a way, above and beyond their obvious differences, to harmonize the rules applicable to bankruptcy with those applicable to proposals in so far as is possible. It did not say that this must be done at any price: there are cases in which it will not be possible. However, it did say that an attempt must be made to do so on a case-by-case basis and that those involved in this harmonization effort must not hesitate to use their imaginations. Parliament has invited the courts to participate in a process of intelligent harmonization and adaptation, not one of blindly literal application.

[60] It will be recalled that in that case this Court was answering, *inter alia*, the question of whether the protection given good faith purchasers in bankruptcies by section 73 BIA should also be given to them in cases of proposals.

[61] The same is true in *Perrette*, when the Quebec Court of Appeal was considering whether subsection 101.1(1) BIA authorized a trustee, in connection with a proposal, to exercise the remedy for recovering preferential payments allowed in bankruptcy matters (*ibid.*, paragraph 29).

[62] In those two cases, the interpretation of subsection 66(1) BIA was, so to speak, made in isolation since the question sought to apply to the proposal another provision of the BIA applicable in cases of bankruptcy.

[63] *Bernier* broadened the scope of subsection 66(1) of the BIA and extended its application beyond the provisions contained in the BIA. Forget J.A., writing for the Quebec Court of Appeal, noted that in subsection 248(1) of the Act Parliament chose to define the word “bankrupt” with reference to the definition contained in the BIA. I note that the word “faillite” [bankruptcy] used in the French version of subsection 128(2) of the Act is not defined.

[64] This external reference to the BIA, the wording of subsection 66(1) BIA and the broader interpretation previously of a similar provision in *Perrette* (101.1(1) BIA) led the Court of Appeal to conclude that section 779 of the *Taxation Act*, R.S.Q. c. I-3, the wording of which is similar to that of paragraph 128(2)(*d*) at issue, applied to cases of a proposal and so made it possible to divide the debtor’s assessment into two parts for the year of his or her proposal.

[65] This is a significant departure from the reasoning in *Hancor* and *Perrette*, namely an addition to the wording which is a matter for Parliament, not the courts.

[66] The word “bankrupt” is defined by external reference to the BIA. It is a way for Parliament to clarify the meaning of the word without having to draft a provision specific to the Act. It uses this procedure for several other definitions contained in the Act (for example, 13(21) , “vessel”; 19.01, “Advertisement directed at the Canadian market”; 248(1), “property of bankrupt”; 76(5), “operator”; 95(1) and 142.7(1)(*a*), “foreign bank”; 181(1) and 190(1), “long-term debt”).

[67] On this basis, the first thing that can be said is that Parliament has exactly identified the provision to which it refers. It is the word “bankrupt” found in the BIA definitions. In the case at bar, Parliament did not refer to the law applicable to a bankrupt under the BIA, as it did in general in subsection 66(1) BIA, or to a more limited extent in subsection 101.1(1) BIA, only to the definition of the word “bankrupt” (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed., pp. 75 *et seq*.).

[68] I feel that this distinction is of the first importance. I agree with Forget J.A. when he says that the purposes of the BIA [TRANSLATION] “are first and foremost the financial rehabilitation of the debtor and fair treatment for all creditors” (*Bernier, supra*, paragraph 26). I also agree that [TRANSLATION] “to achieve these ends, Parliament favours a proposal”, especially following the revision of the BIA in 1992 (*ibid.*, paragraph 47).

[69] In this way, subsection 66(1) of the BIA invites the courts to standardize so far as possible the rules applicable to bankruptcy and those applicable to a proposal, except for a consumer proposal (Division II) (*Hancor, supra*, paragraph 72). This purpose is consistent with section 12 of the *Interpretation Act*, R.S.C. 1985, c. I-21:

Enactments Remedial **Enactments deemed remedial** 12. Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects.	**Solution de droit** **Principe et interprétation** 12. Tout texte est censé apporter une solution de droit et s'interprète de la manière la plus équitable et la plus large qui soit compatible avec la réalisation de son objet.

[70] Where I disagree with Forget J.A. is that based on the definition of “bankrupt”, which refers to the BIA, he adds to the wording of section 128 of the Act, which according to his reasoning should now be headed [TRANSLATION] “Bankruptcy and Proposals”. That is not the case.

[71] Subsection 128(2) of the Act is only one of the many sections in the Act which refer to the words “bankrupt” or “bankruptcy”, whether in the case of an individual or a corporation. In *Bernier*, the parties and the Court did not examine the consequences of a broader definition of the word “bankrupt” on other provisions in the Act. Thus, we may think *inter alia* of certain tax carry-overs generally allowed on prior years, but disallowed for a bankrupt following the date of bankruptcy or the date of release of the bankrupt, as the case may be (128(2)(*f*)(iii) and (*g*) of the Act; *Délisle v. The Queen*, 2005 D.T.C. 32 (T.C.C.); *Abtan v. The Queen*, 2005 D.T.C. 1567 (T.C.C.)). These provisions would apply unfairly to the maker of the proposal, which is not the case at the present time.

[72] In the case at bar, Parliament did not provide that reference should be made to other provisions of the BIA in order to interpret paragraph 128(2)(*d*) and subsection 248(1) of the Act. Moreover, we cannot forget that section 128 of the BIA is a special rule applicable in certain cases, as indicated by the title of the section of which it forms a part.

[73] Once again, the purposes of the BIA are praiseworthy, but it is not the courts’ function to add to the wording of other statutes in order to carry them out, especially when Parliament has spoken clearly and unambiguously, as it has here.

[74] The Court must be "cautious in utilizing tools of statutory interpretation in order to stray from clear and unambiguous statutory language" (*65302 British Columbia Ltd. v. Canada*, [1999] 3 S.C.R. 804). In the preceding case, Iacobucci J. cited P.W. Hogg and J.E. Magee, who mentioned that:

> "[i]t would introduce intolerable uncertainty into the Income Tax Act if clear language in a detailed provision of the Act were to be qualified by unexpressed exceptions derived from a court's view of the object and purpose of the provision": *Principles of Canadian Income Tax Law* (2nd ed. 1997), at pp. 475-76.

and added:

> This is not an endorsement of a literalist approach to statutory interpretation, but a recognition that in applying the principles of interpretation to the Act, attention must be paid to the fact that the Act is one of the most detailed, complex and comprehensive statutes in our legislative inventory and courts should be reluctant to embrace unexpressed notions of policy or principle in the guise of statutory interpretation. [also cited in *Canada Trustco Mortgage Company v. Canada*, [2005] 2 S.C.R. 601, at 611.]

[75] Bankrupty and a proposal are different vehicles which are available to an insolvent person. The choice of one or the other depends on several factors and also carries with it different consequences.

[76] One of the following two conditions must exist for an insolvent person to be a bankrupt within the meaning of the BIA;

(a) the debtor has made an assignment of his or her property;
(b) a bankruptcy order has been made against him or her.

[77] One of the fundamental differences between bankruptcy and a proposal is that (subject to certain exemptions) the property of a bankrupt is transferred to the trustee in bankruptcy for distribution to the creditors. This assignment is usually capable of enabling the debtor to be released from most of his or her debts.

[78] A proposal, on the other hand, avoids placing the debtor in a state of bankruptcy and does not carry with it the negative effects of a bankruptcy. It is a judicially approved agreement between a debtor and his or her creditors which is binding on the creditors once accepted by the necessary majority. This is the respondent's situation.

[79] Parliament is aware of the differences in principles and policy existing between bankruptcy and proposals. It chose not to amend the Act in response *inter alia* to the request of the CAIRP. Moreover, it dealt with proposals in other provisions of the Act (for example, 15.1(3)(*d*) and 15.2(3)(*d*) under "qualifying debt obligation"; 212(3)(*a*)(i) under "replacement obligations").

[80] I conclude that Parliament incorporated in the Act only the definition of "bankrupt" found in section 2 of the BIA, not the scheme of law applicable to a person who makes an assignment or against whom a receiving order has been made.

[81] Consequently, I would allow the appeal and, in accordance with section 18.25 of the *Tax Court of Canada Act*, I would award the respondent reasonable costs incurred by him as a result of this appeal.

"Johanne Trudel"

J.A.

I concur.

Gilles Létourneau J.A.

I concur.

J.D. Denis Pelletier J.A.

Certified true translation

Brian McCordick, Translator

FEDERAL COURT OF APPEAL

SOLICITORS OF RECORD

DOCKET:	A-419-06
STYLE OF CAUSE:	*HER MAJESTY THE QUEEN and JACQUES MARCHESSAULT*
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	October 11, 2007
REASONS FOR JUDGMENT BY:	TRUDEL J.A.
CONCURRED IN BY:	LÉTOURNEAU J.A.
CONCURRING REASONS:	PELLETIER J.A.
DATE OF REASONS:	November 2, 2007

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