Assign of Rights to Collect

Debts on Loans or as Chose in Action

A Brief Guide to Understanding the Assignment of Creditor Rights to Collect Debts or Loans

The buying and selling of accounts receivables and debts on loans is common in the world of commerce whereas the 'trade' of collecting upon outstanding monies is itself big business. Matters involved in the trade of debts may include overdue credit accounts, private lending, bank loans, among many things. Essentially, anytime a person borrows or lends money, the creditor may at some point in time seek to sell the right to collect the debt to another party. When a debt is assigned from a creditor to another party who will step into the shoes of the creditor, the debt is 'assigned'. The new owner of the debt is known as the assignee and the assignee obtains whatever rights the original creditor, or previous assignee, held as against the debtor.

Right to Collect an Assign of Debts

In Ontario, the Court of Appeal case of ***Clark v. Werden***, 2011 ONCA 619 confirmed the right to assign debts per the ***Conveyancing and Law of Property Act***, R.S.O. 1990, c. C.34, whereas such statute prescribes the conditions and requirements for the transfer of rights involving monies, among other things, whereas it was said:

> [13] The ability to assign a debt or legal chose in action is codified in s. 53 of the *Conveyancing and Law of Property Act*, which provides that a debt is assignable subject to the equities between the original debtor and creditor and reads as follows:

> 53 (1) Any absolute assignment made on or after the 31st day of December, 1897, by writing under the hand of the assignor, not purporting to be by way of charge only, of any debt or other legal chose in action of which express notice in writing has been given to the debtor, trustee or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action is effectual in law, subject to all equities that would have been entitled to priority over the right of the assignee if this section had not been enacted, to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same without the concurrence of the assignor.

Partially Assigned

It is notable that the statute makes mention of, "absolute assignment" without clearly addressing the rights and method of treatment for a partial assignment of a debt or chose in action. In this circumstance, where more than one assignee may obtain or assume the rights of the creditor (or earlier assignee), a partial assignee is required to join all assignees when bringing legal action against the debtor. This view was stated by the Court of Appeal in ***DiGuilo v. Boland***, 1958 CanLII 92, where it was said:

> The main reason why an assignee of a part of a debt is required to join all parties interested in the debt in an action to recover the part assigned to him is in my opinion because the Court cannot adjudicate completely and finally without having such parties before it. The absence of such parties might result in the debtor being subjected to future actions in respect of the same debt, and moreover might result in conflicting decisions being arrived at concerning such debt.

Failed Notice

Of potentially grave concern to creditors, and potentially with great relief to debtors, for an assignee to retain the right to pursue the debtor, express written notice of the assignment is required. This requirement was stated in ***1124980 Ontario Inc. v. Liberty Mutual Insurance Company and Inco Ltd.***, 2003 CanLII 45266 as part of the four part test to establish the right to pursue an assigned debt:

> [44] Accordingly, for there to be a valid legal assignment under section 53(1) of the *CLPA*, four requirements must be met:
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> > a) there must be debt or chose in action;
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> > b) the assignment must be absolute;
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> > c) the assignment must be written; and
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> > d) written notice of the assignment must be given to the debtor.

Where there is a failure of notice, and therefore failure to comply with the ***Conveyancing and Law of Property Act***, it is said that the right to assign fails in law; however, relief in equity, via an 'equitable assignment' may be available to an assignee affected by failure of notice. Generally, in equity, when failure of notice occurs, the assignee is unable, in law, to bring an action in the name of the assignee and may do so only in the name of the creditor; however, even in the absence of proper notice as results in failure of assignment in law, and failure ot enjoin the creditor in an action pursued as an 'equitable assignment', the court may remain prepared to waive such a requirement whereas such occurred in the matter of ***Landmark Vehicle Leasing Corporation v. Mister Twister Inc.***, 2015 ONCA 545 wherein it was stated:

> [10] Section 53(1) requires "express notice in writing" to the debtor. Although there is some ambiguity in her reasons, it would appear that the trial judge found that Mr. Blazys had express notice of the assignment, but not notice in writing. Ross Wemp Leasing therefore did not assign the leases to Landmark in law: see *80 Mornelle Properties Inc. v. Malla Properties Ltd.*, 2010 ONCA 850 (CanLII), 327 D.L.R. (4th) 361, at para. 22. Ross Wemp Leasing did, however, assign the leases to Landmark in equity. An equitable assignment does not require any notice, let alone written notice: *Bercovitz Estate v. Avigdor*, [1961] O.J. No. 20 (C.A.), at paras. 16, 25.

[11] The appellants, relying on *DiGuilo v. Boland*, 1958 CanLII 92 (ON CA), [1958] O.R. 384 (C.A.), aff'd, [1961] S.C.C.A. vii, argue that as the appellants did not have written notice of the assignment, Landmark could not sue on its own. Instead, Landmark had to join Ross Wemp Leasing in the action. The appellants argue that the failure to join Ross Wemp Leasing requires that the judgment below be set aside.

[12] *DiGuilo* does in fact require that the assignor of a chose in action be joined in the assignee's claim against the debtor when the debtor has not received written notice of the assignment. The holding in *DiGuilo* tracks rule 5.03(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194:

> In a proceeding by the assignee of a debt or other chose in action, the assignor shall be joined as a party unless,
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> (a) the assignment is absolute and not by way of charge only; and
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> (b) notice in writing has been given to the person liable in respect of the debt or chose in action that it has been assigned to the assignee. [Emphasis added.]

[13] Yet the assignee's failure to join the assignor does not affect the validity of the assignment or necessarily vitiate a judgment obtained by the assignee against the debtor. Rule 5.03(6) reads:

> The court may by order relieve against the requirement of joinder under this rule.

[14] The joinder requirement is intended to guard the debtor against a possible second action by the assignor and to permit the debtor to pursue any remedies it may have against the assignor without initiating another action: *DiGuilo*, at p. 395. Where the assignee's failure to join the assignor does not prejudice the debtor, the court may grant the relief in rule 5.03(6): see *Gentra Canada Investments Inc. v. Lipson*, 2011 ONCA 331 (CanLII), 106 O.R. (3d) 261, at paras. 59-65, leave to appeal refused, [2011] S.C.C.A. No. 327.

[15] In this case, the trial judge found that Mr. Blazys, and effectively all of the appellants, gained actual notice of the lease assignments very shortly after the assignments were made and well before Landmark sued. Armed with actual, albeit not written, notice of the assignment, the appellants could fully protect themselves against any prejudice from Landmark's failure to join Ross Wemp Leasing. Had the appellants seen any advantage in joining Ross Wemp Leasing, either to defend against Landmark's claim or to advance a claim against Ross Wemp Leasing, the appellants could have moved for joinder under rule 5.03(4). The appellants' failure to bring a motion to add Ross Wemp Leasing speaks loudly to the absence of any prejudice caused by Landmark's failure to join the assignor.

[16] Ross Wemp Leasing perhaps should have been a party to the proceeding. Landmark's failure to join Ross Wemp Leasing, however, did not prejudice the appellants and should have had no impact on the trial judgment. If requested, this court will make a *nunc pro tunc* order relieving Landmark from the requirement of joining Ross Wemp Leasing in the action.