

# KEEPING CURRENT

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## Leave required to sue representative of trustee in bankruptcy

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Trustees in bankruptcy are granted protection from civil claims for acts and omissions under the [Bankruptcy and Insolvency Act](#) ("[BIA](#)"), as the statute requires that a plaintiff obtain leave of the court to pursue some types of claims. In *Flight (Re)*, [2022 ONCA 526 \(CanLII\)](#), the Ontario Court of Appeal determined that a motion judge erred in allowing a civil action for damages to be pursued against an individual representative of a trustee in bankruptcy without first obtaining leave to do so.

The respondent (Flight) made four assignments into bankruptcy in 2004, 2006, 2011, and 2016. The appellant trustee (Adamson Inc.) was the trustee in respect of each of these bankruptcies. The individual appellant (JA) was the representative of Adamson Inc. with carriage of Flight's bankruptcies.

In 2018, during his fourth bankruptcy, Flight discovered that between 2003 and 2018, his former spouse (LeBlanc), who was also his bookkeeper and

power of attorney, had misappropriated approximately \$206,000 from his business. Flight was able to recover about \$30,300 from LeBlanc, which he did not turn over to the trustee.

In April 2018, Flight complained to the Office of the Superintendent of Bankruptcy about the trustee's failure to detect what LeBlanc had done. Disputes then arose between Flight and the trustee concerning the terms upon which he could be discharged from bankruptcy and how the payments from LeBlanc should be treated.

In October 2020, Flight filed a Consumer Proposal under section [66.11](#) of the [BIA](#). In February 2021, the proposal was accepted by Flight's sole significant creditor, and his bankruptcy was deemed annulled.

Prior to his discharge from bankruptcy, Flight had commenced an action against JA seeking declaratory and monetary relief. The central allegation was that JA,

as the “Licensed Insolvency Trustee” for each of the bankruptcies, failed to detect and prevent LeBlanc’s fraudulent conduct and then failed to sue her. The action did not name, or refer to, Adamson Inc., but it treated JA as though he were the trustee.

Adamson Inc. and JA objected to the action commenced by Flight against JA on the basis that at the time of its commencement, (i) Flight had not been discharged from bankruptcy, and (ii) no permission was obtained under section 215 of the *BIA* to bring the action against them. Section 215 of the *BIA* states:

Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

A motion judge, sitting in the bankruptcy court, determined that Flight did not need permission under section 215 of the *BIA* to commence the action. In the motion judge’s view, actions against trustees in their personal capacity did not require permission nor do actions that allege omissions: [2021 ONSC 4278](#).

The motion decision did not address whether, if permission were required, leave should be granted, nor did the decision address whether Flight’s status as an undischarged bankrupt at the time the action was started prevented him from bringing it.

The Ontario Court of Appeal granted leave to appeal the motion judge’s decision on the basis that it raised an issue of general importance to the practice in bankruptcy/insolvency matters, namely the circumstances in which a trustee in bankruptcy can be sued without leave.

In its [decision](#), the Court of Appeal noted that section 215 serves a gatekeeping function for claims against a trustee by allowing a bankruptcy court to screen out or prevent actions that are frivolous or vexatious or that do not disclose a cause of action, or for which there is no factual support, so that the trustee need not respond to them: *GMAC Commercial Credit Corporation – Canada v. T.C.T. Logistics Inc.*, [2006 SCC 35](#), at paras. [55-61](#), [66](#).

In the Court of Appeal’s view, a claim falls within section 215 where the person sued was involved in the acts complained of as a trustee in a bankruptcy, is alleged to have been performing duties incidental to the administration of the estate, and is alleged to have owed the plaintiff duties as a trustee: citing *Grimanis v. Harris & Partners Inc.*, [2009 CanLII 10673](#), at paras. [31-34](#).

The question of whether section 215 applies requires an assessment of the relationship between “the substance of the action” (the alleged wrongdoing) and the role of the defendant as trustee.

Here, JA’s alleged involvement in the trustee’s administration of Flight’s bankruptcies formed the basis of the negligence claim. It was the basis upon which JA was alleged to have owed Flight a fiduciary duty and set the standard of care which JA was alleged to have breached. All misfeasance alleged against JA was misfeasance in his role as trustee.

The Court of Appeal therefore determined that the motion judge erred in finding that the action against JA was outside of the scope of section [215](#).

The Court of Appeal also found that the motion judge erred in concluding that a claim is outside

of section [215](#) where the gist of the action is the omission to do something expressly and specifically required by the [BIA](#).

In that regard, section [215](#) specifically refers to “any report made under” or “any action taken” pursuant to the [BIA](#), which encompasses actionable omissions that could be committed by a trustee. Most civil claims allege that a defendant failed—or omitted—to do what was required. In other words, “[d]oing the wrong thing and omitting to do the right thing can be two ways of describing the same complaint” (para. [56](#)).

The central omissions asserted against JA were that he failed to detect or prevent LeBlanc’s misappropriations or take the right steps as a consequence of learning about them. These omissions were asserted as breaches of common law duties arising from the role of trustee, making aspects of the performance of the trustee role wrongful and actionable.

The Court of Appeal determined that section [215](#) therefore applied to the action concerning JA’s alleged omissions, and the motion judge erred in concluding otherwise.

In the result, the motion judge’s decision was set aside and the dispute will return to the bankruptcy court to determine whether leave should be granted to sue JA. No court has yet made any finding as to whether JA or the trustee actually committed any wrongful acts or omissions. JA and Adamson Inc. were awarded costs of the appeal in the amount of \$13,000.

### **Contact us**

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact [James Cook](#), at 416.865.6628 or [jcook@grllp.com](mailto:jcook@grllp.com).

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