AMERICAN BANKRUPTCY INSTITUTE

2021 Virtual Annual Spring Meeting

Insolvencies of Cannabis Producers and Their Cross-Border Implications

Hosted by the Emerging Industries & Technology and International Committees

Sponsored by Perkins Coie LLP

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CONCURRENT SESSION

2021


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Up in Smoke: Cross-border insolvency in the Cannabis space The Canadian Perspective
Patrick Shea (Gowling WLG), Gavin Finlayson (Miller Thomson) and Vanessa Allen (MNP Ltd.) - Prepared as a hand-out for the ABI Spring Meeting
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Industry Considerations

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Cannabis Insolvencies – the Canadian Perspective

Industry considerations

- Significant consolidation – ongoing
- Increased insolvency filings in 2020
- Ongoing black-market competition (significant concern of Health Canada)
- Continued vulnerability to liquidity shortfalls
- Increased scrutiny and pressure to comply with regulatory and compliance requirements

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Cannabis Insolvencies – the Canadian Perspective

Industry considerations (cont'd)

- Institutional lenders continue to be hesitant to enter the market due to:
  - Reputational concerns
  - Restrictions on the ability of lenders to take adequate security or to secure the license(s)
  - Current lending generally based on more traditional assets such as real property mortgages or on less conventional methods such as receivable factoring, "streaming" or the pledging of shares
  - Uncertainty around valuation

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Asset Class Considerations

Cannabis Insolvencies – the Canadian Perspective

Asset class considerations

- Licenses are issued federally by Health Canada under the *Cannabis Act* (a secondary license will need to be obtained from Canada Revenue Agency)
  - *Cannabis Act* does not include a mechanism for collateralization or assignment of licenses
  - Held corporately (or individually) but linked to specific individuals and locations
    - Allows specific people to do specific tasks at a specific location
  - Divided into cultivation, processing, sale for medical purposes analytical testing and research
  - Contraventions of the *Cannabis Act* can result in criminal liability
  - If a license is revoked, the corresponding product can be seized

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Cannabis Insolvencies – the Canadian Perspective

Asset class considerations (cont'd)

- The process to apply for a license is extensive and requires the creation of both corporate and individual accounts (for those in positions of control)
  - Applications take 12 to 18 months to process
  - Requires production facility

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Challenges and Strategies

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Cannabis Insolvencies – the Canadian Perspective

Challenges and strategies

- Industry specific expertise is critical to navigating regulatory requirements and maximizing realizations
  - Use of CRO
  - Approval of a new license or a change in corporate ownership is subject to stringent approvals including appropriate security clearances
- Outside of the license, assets to be realized on will include land and buildings, equipment and cannabis inventory
  - Small pool of purchasers as inventory can only be sold to existing licensees
- Increased use of stalking horse bids
- Use of Reverse Vesting Orders

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Cannabis Insolvencies – the Canadian Perspective

Challenges and strategies (cont'd)

- Early communication and close working relationships with Health Canada and key stakeholders required
- Day 1 considerations
  - Licenses are linked to individuals (long-term contracts with key employees, including significant language around non-disclosure/ non-competition required)
  - Operational/ product quality controls
  - Use of KERPs

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Cannabis Insolvencies – the Canadian Perspective

Challenges and strategies (cont'd)

- Debtor-led restructurings are preferred and may preserve the value of the existing license(s)
  - Receiverships may be done in specific circumstances
    - Order granted only in respect of parent/ hold co.
- Federally legislated in Canada so have access to insolvency legislation
- Where companies have operations in Canada and the U.S., Chapter 15 proceedings may be an option as they arguably do not create a "bankrupt estate"
- U.S. companies may seek relief in Canada under specific circumstances

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Considerations for Practitioners

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Cannabis Insolvencies – the Canadian Perspective

Considerations for practitioners

- Reputational and personal risks for practitioners must be carefully managed
- Court Orders make it clear that no party other than the debtor are taking possession of the cannabis inventory
- Specific conditions may apply to consent to act
  - Not participating in cross-border activities
  - Not acting as a foreign representative
  - Not acting with enhanced powers
- Fee considerations

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Cases of Interest

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Cannabis Insolvencies – the Canadian Perspective

Cases of interest

- Canada
  - Invictus Group
  - DionyMed Brands Inc.
  - Pure Global Cannabis Inc.
  - James E. Wagner Cultivation

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MARIJUANA AT THE CROSSROADS: THE INTERSECTION OF FEDERAL AND STATE LAW

By: Keri L. Riley*

Bankruptcy courts across the country have had to navigate the intersection between federal and state law with increased regularity as more states legalize the sale and production of marijuana. In March 2021, New York became the fifteenth state to legalize marijuana for recreational purposes,[1] and a majority of states have legalized marijuana for medical use. While the trend of legalization will continue on a state level, it remains illegal on a federal level, forcing bankruptcy courts to navigate the complicated intersection between State and Federal Law when businesses and individuals with some connection to marijuana file for bankruptcy.

Current Federal Law

The Controlled Substances Act [21 U.S.C. §§801 *et seq.*] ("CSA") was enacted by Congress in 1970 to consolidate the piecemeal drug laws and enhance federal enforcement powers.[2] In doing so, "Congress devised a closed regulatory system making it unlawful to manufacture, distribute, dispense, or possess any controlled substance except in a manner authorized by the CSA[,]" resulting in the creation of five schedules into which drugs are categorized based on use, effects, and addictive traits.[3] At the time of enacting the CSA, cannabis[4] was listed as a Schedule I drug, and remains a Schedule I drug to this day.[5]

In defining acts that are unlawful under the CSA, 21 U.S.C. § 841 provides:

> **(a)** Unlawful acts. Except as authorized by this title, it shall be unlawful for any person knowingly or intentionally--
>
> **(1)** to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance; or
>
> **(2)** to create, distribute, or dispense, or possess with intent to distribute or dispense, a counterfeit substance.

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[1] *New York Legalizes Recreational Marijuana, Tying Move to Racial Equity*, Luis Ferré-Sadurní, https://www.nytimes.com/2021/03/31/nyregion/cuomo-ny-legal-weed.html?searchResultPosition=7

[2] *Gonzales v. Rich*, 545 U.S. 1, 12 (2005).

[3] *Id.* at 13-14.

[4] The CSA refers specifically to "marihuana" which has become interchangeable with "marijuana" and "cannabis" in subsequent years.

[5] *See* 21 U.S.C. § 812(c); 21 U.S.C. § 802(15); *Nat'l Org. for Reform of Marijuana Laws (NORML) v. Drug Enforcement Administration, U.S. Dep't of Justice*, 559 F.2d 735, 738 (D.C. Cir. 1977).

In addition to acts that are defined as unlawful under section 841, the CSA further provides that it shall be unlawful to engage in maintaining a drug involved premises[6] or sell drug related paraphernalia[7], as defined by 21 U.S.C. § 863(d). Additionally, it is an unlawful act to knowingly possess, distribute, manufacture, import, or export "any three-neck round-bottom flask, tableting machine, encapsulating machine, or gelatin capsule, or any equipment, chemical, product, or material which may be used to manufacture a controlled substance or listed chemical, knowing, intending, or having reasonable cause to believe, that it will be used to manufacture a controlled substance or listed chemical in violation of this title[.]"[8] In defining these unlawful acts, the CSA expressly sets forth the activities related to controlled substances, including cannabis, that are illegal under federal law.

Direct Connections to Marijuana

A. Dismissal is Mandated

While marijuana may be legal under federal law, bankruptcy courts must still turn to the CSA to determine if a debtor's business operations conflict with federal law, thus making the debtor ineligible for the protections afforded by the Bankruptcy Code. In the context of a Chapter 11 and a Chapter 13, a debtor must propose a plan in "good faith and not be any means forbidden by law."[9] In the context of a Chapter 7, courts have held that a trustee cannot take control of or administer assets when doing so would require the trustee to commit a felony.[10]

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[6] 21 U.S.C. § 856 states:

> **(a)** Unlawful acts. Except as authorized by this title, it shall be unlawful to--
> **(1)** knowingly open, lease, rent, use, or maintain any place, whether permanently or temporarily, for the purpose of manufacturing, distributing, or using any controlled substance;
> **(2)** manage or control any place, whether permanently or temporarily, either as an owner, lessee, agent, employee, occupant, or mortgagee, and knowingly and intentionally rent, lease, profit from, or make available for use, with or without compensation, the place for the purpose of unlawfully manufacturing, storing, distributing, or using a controlled substance.

[7] 21 U.S.C. § 863 states:

> **(a)** In general. It is unlawful for any person--
> **(1)** to sell or offer for sale drug paraphernalia;
> **(2)** to use the mails or any other facility of interstate commerce to transport drug paraphernalia; or
> **(3)** to import or export drug paraphernalia.

[8] 21 U.S.C. § 843(a)(6) and (a)(7).
[9] 11 U.S.C. §§ 1129(a)(3), 1325(a)(3).
[10] *See In re Arenas*, 514 B.R. 887, 895 (Bankr. D. Colo. 2014).

In those cases where the debtor has a connection to marijuana, the courts have based their decisions on whether the debtor was acting in direct violation of the CSA.[11] In the seminal case of *Rent-Rite*, the bankruptcy court focused on the ongoing violation of the CSA by the Chapter 11 debtor in holding that its case was subject to dismissal.[12] The debtor owned a warehouse located in Denver, Colorado, which was leased in part to tenants who used the space for the ongoing cultivation of cannabis.[13] Approximately 25% of the debtor's revenue was derived from leasing space to the cannabis cultivators.[14] After the debtor filed its Chapter 11 bankruptcy case, the primary secured creditor filed a motion to dismiss the case, arguing that the debtor's ongoing criminal activities should deprive the debtor of the protections afforded by the Bankruptcy Code.[15] In ruling on the motion to dismiss, the court held that the debtor was in direct violation of 21 U.S.C. § 856 by knowingly renting the space for the purposes of allowing the tenants to cultivate cannabis.[16] Because the debtor was knowingly violating the CSA under the assumption that Colorado law would preempt federal law, the court held that the bankruptcy court, as a federal court, could not be asked to enforce the protections of the Bankruptcy Code in aid of a debtor whose actions "constitute a continuing federal crime."[17] As a result, because of the debtor's ongoing criminal conduct, the court held that cause existed for dismissal or conversion of the debtor's case pursuant to 11 U.S.C. § 1112(b), subject to a determination as to which would be in the best interests of creditors.[18]

In *Arenas*, the debtors' violation of the CSA again formed the basis for dismissal of a Chapter 7 bankruptcy case.[19] The debtors were engaged in the cultivation and sale of marijuana, and also owned real property that was leased to a marijuana dispensary.[20] The debtors only other

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[11] *E.g.*, *Arenas v. United States Trustee (In re Arenas)*, 535 B.R. 845, 851 (B.A.P. 10th Cir. 2015)(affirming the bankruptcy court's dismissal of the debtors' case because the debtors were violating the CSA by growing and selling cannabis, as well as leasing space to a cannabis dispensary); *In re Rent-Rite Super Kegs W. Ltd.*, 484 B.R. 799, 803-04 (Bankr. D. Colo. 2012); *Olson v. Van Meter (In re Olson)*, BAP No. NV-17-1168-LTiF, 2018 Bankr. LEXIS 480, at *17-18 (B.A.P 9th Cir. Feb. 5, 2018)(holding that the bankruptcy court had committed reversible error by failing to make findings that the elements of the alleged CSA violation, including establishing the intent elements of the violation); *In re Johnson*, 532 B.R. 53, 58-59 (Bankr. W.D. Mich. 2015)(holding that the debtors' cultivation and sale of cannabis was "patently incompatible with a bankruptcy proceeding").
[12] 484 B.R. at 803-04.
[13] *Id.* at 803.
[14] *Id.*
[15] *Id.* at 802.
[16] *Id.* at 803-04.
[17] *Id.* at 805.
[18] *Id.* at 810-11.
[19] *In re Arenas*, 514 B.R. 887, 895 (Bankr. D. Colo. 2014).
[20] *Id.* at 888.

source of income was social security and pension benefits in an amount significantly less than their monthly expenses.[21] After the debtors filed their Chapter 7 bankruptcy case, the United States Trustee filed a motion to dismiss, asserting that it would be impossible for the Chapter 7 trustee to administer the assets of the estate without violating federal law.[22] In an effort to avoid dismissal, the debtors instead moved to convert their case to Chapter 13.[23] The bankruptcy court held that because the trustee would be in violation of the CSA if he took possession of the assets of the estate, namely the leased real property and the cannabis plants, the trustee could not administer the estate assets, allowing the debtors to receive the benefit of a discharge without allowing creditors to receive the benefit of the trustee's administration of the estate.[24] The court further held that the debtors could not convert their case to a Chapter 13, as the debtors could not propose a confirmable plan because they lacked sufficient income to do so, even with the income from cannabis.[25] Accordingly, the bankruptcy court held that cause existed to dismiss the debtors' case.[26]

On appeal to the Tenth Circuit Bankruptcy Appellate Panel, the debtors argued that the trustee could have abandoned the marijuana assets out of the estate as a means of curing the violation of the CSA.[27] The Bankruptcy Appellate Panel rejected this argument, holding that the debtors had violated federal law and were continuing to do so.[28] The court held that the debtors had exposed the trustee to violations of federal criminal law to the extent he administered the assets, stating that "nothing could be more burdensome to the Trustee's administration than requiring him to take possession, sell, and distribute marijuana assets in violation of federal criminal law."[29] The court further held that if assets were abandoned, the debtors would be able to retain their business while providing creditors with little to no recovery while receiving the benefit of a discharge, resulting in a prejudicial delay that would itself be cause for dismissal.[30] The court therefore held that dismissal of the case was warranted given the ongoing violation of the CSA, and therefore affirmed the decision of the bankruptcy court.[31]

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[21] *Id.* at 894.
[22] *Id.* at 889, 891.
[23] *Id.* at 891.
[24] *Id.* at 891-92.
[25] *Id.* at 894.
[26] *Id.* at 895.
[27] *Arenas*, 535 B.R. at 848, 854.
[28] *Id.* at 853-54.
[29] *Id.* at 852.
[30] *Id.* at 853-54.
[31] *Id.* at 854.

B. Dismissal Can Be Avoided If A Cure Is Possible

While these seminal cases seem to suggest that a case must be dismissed once it has been tainted by the presence of marijuana, recent cases suggest that when the CSA violation is curable, the debtor may still be entitled to the protections afforded by the Bankruptcy Code. For instance, in *Johnson*, the Chapter 13 debtor given the choice between continuing with his bankruptcy case, or continuing to cultivate and sell marijuana.[32] At the time of his bankruptcy filing, he was deriving income from cultivating and selling cannabis to three patients and a regulated dispensary in compliance with applicable Michigan law in addition to receiving social security income.[33] After filing his Chapter 13 bankruptcy case, the United States Trustee filed a motion to dismiss, asserting that because the debtor was engaged in growing and selling marijuana, the debtor should not be afforded the protections of the Bankruptcy Code to "aid violations of the federal Controlled Substances Act."[34] In ruling on the motion to dismiss, the court held that the debtor's financial life was "inextricably bound up with his federal criminal activity through his chapter 13 plan[.]"[35] The court held that that just as a trustee was precluded from using estate assets to violate federal law, including federal criminal law, so too is a debtor in possession.[36] The court held that the debtor's actions in growing and selling cannabis were a violation of the CSA, and stated that:

> The Debtor's business is patently incompatible with a bankruptcy proceeding, but his financial circumstances are not. In other words, if the Debtor were not engaged in post-petition criminal activity, there would likely be no controversy about his eligibility for relief under chapter 13. The problem, of course, is that he derives nearly half of his income from activity that Congress forbids as criminal. The Debtor, it seems, must choose between conducting his medical marijuana business and pursuing relief under the Bankruptcy Code.[37]

Because the debtor's business activity in cultivating and selling cannabis was a violation of the CSA, the court held that the debtor was required to choose between continuing to cultivate and sell cannabis, or continue with his bankruptcy case.[38]

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[32] 532 B.R. at 57.
[33] *Id.* at 55.
[34] *Id.* at 54.
[35] *Id.* at 57.
[36] *Id.* at 57.
[37] *Id.*
[38] *Id.* at 59.

Similarly, in *In re Andrick*, the debtor was given the choice between continued expenditures for medical marijuana or proceeding towards confirmation of a Chapter 13 Plan.[39] The debtor proposed a Plan that provided for monthly payments of $681 to the Chapter 13 Trustee while including monthly expenses of $900 for medical marijuana to treat a chronic and painful condition.[40] The United States Trustee objected to confirmation of the Chapter 13 Plan, asserting that the Plan could not be confirmed because proposed monthly expenditures for marijuana were illegal under Federal Law, and thus the debtor was not contributing all disposable monthly income due to the impermissible expenditures.[41] The Bankruptcy Court sustained the objection and denied confirmation of the Chapter 13 Plan, holding that the "deduction of a medical marijuana expense cannot be allowed as either an ongoing out-of-pocket medical expense of a deduction for special circumstances."[42] As a result, the debtor was given a choice to file an amended plan that contributed all monthly income to the Plan, barring which the case would be dismissed. [43]

In *Arm Ventures, LLC*, the debtor was again given the choice between continuing to derive income from the sale of cannabis, or proceed with a reorganization under Chapter 11.[44] The Debtor owned a 48.8% interest in a commercial building leased to three separate companies.[45] After filing its bankruptcy case, the debtor proposed a plan which proposed to lease a portion of the building to a medical marijuana dispensary.[46] The primary secured creditor filed a motion to dismiss, asserting that the debtor had filed its case in bad faith pursuant to 11 U.S.C. § 1112(b).[47] In ruling on the motion to dismiss, the court held that it was highly unlikely that the proposed tenant would be able to operate in accordance with federal law, as growing and selling cannabis was illegal under Federal Law and only one research facility had obtained a federal permit to grow and sell marijuana.[48] As a result, any income the debtor derived from leasing the facility to a medical marijuana dispensary would also be illegal under federal law.[49] The court ultimately declined to dismiss the case, recognizing that the best interests of creditors would be best served by allowing

[39] *In re Andrick*, 604 B.R. 577, 582 (Bankr. D. Colo. 2019).
[40] *Id*. at 581-82.
[41] *Id.*
[42] *Id.* at 582.
[43] *Id.*
[44] 564 B.R. 77, 86 (Bankr. D. Fla. 2017).
[45] *Id.* at 79.
[46] *Id.* at 81.
[47] *Id* at 80.
[48] *Id.* at 85.
[49] *Id.* at 84-85.

the debtor to remain in bankruptcy, but holding that the debtor must propose a plan that did not rely on income from marijuana, barring which the debtor's case would be subject to conversion to a case under Chapter 7.[50]

In each of these cases, the debtors were in clear violation of the CSA, whether by growing and selling marijuana, or by leasing a space to a grower or seller of marijuana. With a clear cut violation of federal law, the only question that remained for the courts to decide was whether the respective debtors could be successfully rehabilitated by stripping away the conduct that was violating federal law. If the bankruptcy case could not proceed without violating federal law, the only remaining option is dismissal.

Downstream Marijuana Businesses

As states continue to legalize marijuana, the problem that marijuana poses to the bankruptcy court will spill over into other industries and professions. The interplay between state and federal laws is also starting to reach those businesses that can be considered "downstream" marijuana related businesses, such as material and equipment suppliers or management companies that have no direct interaction with marijuana growers or distributors, but derive a profit from the marijuana industry. In these cases, the violation of the CSA may not be as clear cut, but bankruptcy courts are still required to determine whether these debtors can receive the benefits of the Bankruptcy Code.

The first example of a "downstream" marijuana related company is *In re Medpoint Management,* LLC. In *Medpoint Management*, the debtor was engaged in business as the holder of intellectual property, including a trade name for cannabis products, which it licensed to a medical marijuana dispensary.[51] The debtor had previously acted as the manager for the dispensary, creating an avenue for the dispensary to drain off cash to allow the dispensary to operate on a not-for-profit basis as required by Arizona state law.[52] Following the termination of the management contract, the debtor's only source of revenue was from licensing its intellectual property to the dispensary.[53] After a creditor filed an involuntary bankruptcy petition against Medpoint, the debtor moved to dismiss the case, asserting that all of its assets and revenues were

[50] *Id.* at 86.
[51] *In re Medpoint Mgmt.*, 528 B.R. 178, 181 (Bankr. D. Ariz 2015), vacated on other grounds by *Medpoint Mgmt. v. Jensen (In re Medpoint Mgmt.)*, 2016 Bankr. LEXIS 2197 (B.A.P. 9th Cir. June 3, 2016).
[52] *Id.* at 180, 186.
[53] *Id.* at 181.

directly tied to cannabis, and that a Chapter 7 trustee could not administer the assets without violating the CSA.[54] The bankruptcy court agreed with the debtor, stating that it "observ[ed], without deciding, that it is quite possible that Medpoint's IP and the IP licensing revenues could be seized or forfeited, and that Medpoint could be or could have been guilty of facilitation of a crime under the CSA."[55] Accordingly, the court dismissed the involuntary petition.[56]

More recently, the Colorado Bankruptcy Court considered the issue of a "downstream" marijuana related business in *In re Way to Grow, Inc.*[57] Way to Grow ("WTG") was a Colorado based gardening supply store that specialized in high end gardening supplies and indoor gardening products, including supplies for growing plants in a hydroponic environment. Prior to the bankruptcy filing, the owner of the company, Corey Inniss ("Inniss"), sold WTG to its parent company, Pure Agrobusiness, Inc. ("Pure") for a cash price of $2.5 million, a secured promissory note in the original principal balance of $22,500,000, and 12,500,000 shares of stock in Pure. In Spring 2018, WTG, Pure, and another subsidiary of Pure, Green Door Agro, Inc. ("GDA") defaulted on the secured promissory note, resulting in Inniss filing a receivership action against the companies in state court. To avoid the appointment of the receiver and reorganize, WTG, Pure, and GDA filed their voluntary petitions for relief pursuant to Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Colorado.

Shortly after the cases were filed, Inniss filed a Motion to Dismiss or Abstain, asserting that the debtors were ineligible for relief under the Bankruptcy Code because the debtors' connections with the marijuana industry constituted aiding and abetting pursuant to 18 U.S.C. § 2. Both the Debtors and Inniss agreed that the Debtors did not sell any marijuana, did not manufacture marijuana, and did not own real property that was leased to a marijuana grower or manufacturer. Instead, the focus was placed on the customers purchasing the products sold by WTG and GDA, the use to which those products were put, and the Debtors' knowledge, or lack thereof, of what their customers were doing with the products. The Debtors responded, arguing that because GDA and WTG were selling indisputably legal gardening supplies, and had no direct connections to marijuana, such as selling or distributing marijuana, and were not selling drug paraphernalia, WTG

[54] *Id.* at 183.
[55] *Id.* at 185.
[56] *Id.* at 188.
[57] 597 B.R. 111 (Bankr. D. Colo. 2018).

and GDA were not in violation of any federal law, and could therefore utilize the protections afforded by the Bankruptcy Code.

Following a four day trial, the Bankruptcy Court entered an Order granting the Motion to Dismiss or Abstain on the basis that the Debtors were violating 21 U.S.C. § 843(a)(7), a statute raised for the first time in Order, holding that the Debtors knew that they were distributing gardening supplies, knowing or having reasonable cause to believe that the products were being used to grow marijuana. In ruling on the Motion, the Court expressly held that the Debtors were not aiding and abetting a violation of the CSA, nor were the Debtors engaged in a conspiracy to violate the CSA. The Court stated

> The Debtors' business is not limited in scope to marijuana sales. The evidence certainly shows many of the Debtors' customers are in the marijuana industry. As discussed below, this fact is no secret to the Debtors. However, by its nature and as shown by the evidence, the Debtors' business serves a broad customer base consisting of both commercial and individual horticulturalists, growing a variety of legal crops. Debtors' intent is to sell its product to any clientele engaged in hydroponic horticulture, and Debtors' products are generally applicable to those activities regardless the specific crop grown. Without sharing its marijuana-connected customers' specific intent to cultivate and distribute marijuana, Debtors are not aiding and abetting violations of the CSA.

In holding that the Debtors had violated Section 843(a)(7) of the CSA, the Court held that there was ample evidence that the Debtors had reasonable cause to believe its products were being used to grow marijuana. The Court relied on evidence at trial that demonstrated that Inniss had tailored the product mix at WTG for marijuana growers, and that the product mix had not changed significantly since Pure acquired the company. The Court also relied on evidence that customers used aliases for accounts, prior promotions with cannabis growers, and the managers' knowledge of what their customers were growing. The Court held that while the "Debtors do not share their customers' specific intent to violate the CSA, Debtors certainly know they are selling products to customers who will, and do, use those products to manufacture a controlled substance in violation of the CSA. Debtors tailor their business to cater to those needs, tout their expertise in doing so, and market themselves consistent with their knowledge. There is no evidence this business model has materially changed post-petition." As a result, the Court held that the Debtors' conduct

violated section 843(a)(7), and dismissal was therefore mandated. The ruling was subsequently affirmed by the United States District Court for the District of Colorado.

Alternatives to Bankruptcy

With more states legalizing marijuana, more companies will enter the market, bringing a more competitive marketplace and the financial issues that come with new entrants into the market. Without the relief available under the Bankruptcy Code, insolvent companies with ties to the marijuana industries are instead looking to remedies available under applicable State Law to restructure or liquidate insolvent entities. Creditors are frequently turning to court-appointed receivers or assignments of the benefit of creditors to effectuate the relief that would otherwise be afforded in a Chapter 7 Bankruptcy. For those entities that instead seek reorganization instead of liquidation, the only practical remedy is an out of court workout with buy-in from creditors to afford some relief to the financially distressed company.

As the marijuana industry continues to grow, bankruptcy courts will be required to engage in a fact intensive analysis early in a bankruptcy case to determine whether the debtor has any connections to the marijuana industry and the degree of those connections, whether in a case for an individual or for a company. In cases where the debtor's operations involve supplying equipment, providing management services, or deriving some form of income from a dispensary or a grow house, such as a janitor providing cleaning services, the bankruptcy court will likely be required to determine if the debtor can seek relief under the Bankruptcy Code. Questions will continue to arise as to the as to the nature and extent of permissible connections, requiring attorneys to engage in their own fact intensive inquiry before a case is filed to ensure that a case will not be subject to dismissal based on connections to the marijuana industry. Until clear cut lines are determined at a district court or circuit court level, it will remain up to the discretion of the bankruptcy court to determine where the line is drawn, and what degree of connection to the marijuana industry is permissible.

Faculty

Vanessa Allen, CIRP, LIT is a senior vice president with MNP Ltd.'s Corporate Recovery group in Calgary, Alta. She leads both formal and informal insolvency and turnaround engagements for troubled companies in a wide range of industries, including oil and gas, retail/wholesale, manufacturing, mining, real estate, hospitality and gaming, as well as nonprofit organizations. Having worked in restructuring since 2002, Ms. Allen acts in a variety of corporate insolvency engagements, including bankruptcies, proposals, private and court-appointed receiverships, proceedings under the Companies' Creditors Arrangement Act and chapter 15 proceedings. She also handles business review and monitoring engagements for companies experiencing poor financial or operational results. Ms. Allen is a frequent speaker and has made presentations to such professional organizations as the Canadian Bar Association, Turnaround Management Association, Canadian Association of Insolvency and Restructuring Professionals and Risk Management Association. She received he Bachelor of Commerce (BComm) with Great Distinction from the University of Saskatchewan in 2001.

Gavin H. Finlayson is a partner with Miller Thomson LLP in Toronto and focuses his practice on insolvency and restructuring. He provides strategic advice to court officers, creditors and debtors across a broad range of business sectors, including bondholders, accounting firms and insurers, as well as cryptocurrency, broadband, therapeutic psychedelic and biotech companies. Mr. Finlayson also regularly advises cannabis companies on regulatory and litigation matters and has represented both LPs and provincial retail license-holders in a variety of cannabis-related litigation, from debt enforcement and contractual disputes to judicial reviews of regulatory decisions. He has been counsel before all levels of Canadian courts, as well as a number of administrative and regulatory tribunals, and has played a key role in many complex and notable Canadian restructurings, class actions and other complex litigation. He has particular expertise in cross-border matters between Canada and the U.S. Mr. Finlayson is a Fellow of the International Association of Restructuring, Insolvency and Bankruptcy Professionals (INSOL), a course instructor for INSOL and a member of the editorial committee for the monthly INSOL International News Update Committee. He also has been counsel in numerous reported decisions and regularly writes and presents on novel and notable legal developments. Mr. Finlayson received his B.A. with honours in 1993 from Queen's University and his LL.B. in 1999 from the University of British Columbia.

Keri L. Riley is a partner with Kutner Brinen Dickey Riley, P.C. in Denver, where she focuses primarily in the areas of bankruptcy and insolvency law. She has represented debtors and creditors in all aspects of bankruptcy cases, including complex chapter 11 reorganizations and liquidations, chapter 7 cases, adversary proceedings, and appeals to the Tenth Circuit Bankruptcy Appellate Panel and Tenth Circuit Court of Appeals. Prior to joining the firm, Ms. Riley clerked for the Colorado Attorney General's Office, where she worked with the Consumer Protection Services Department, advocating for the rights of consumers who were subjected to illegal business practices. Her commitment to her clients has continued to earn her recognition in the legal community following graduation, and she has been selected as a "Rising Star" by *Super Lawyers* every year since 2018. In addition, she has been active in helping the survivors of human trafficking rebuild their financial lives through her continued *pro bono* work with the Alliance to Lead Impact in Global Human Trafficking. Ms. Riley received her J.D. with honors from the University of Denver, Sturm College of Law and was a member of the

DU National Trial Team and ABA Appellate Advocacy Team, where she won multiple awards for her advocacy skills.

E. Patrick Shea is a partner with Gowling WLG International Ltd. in Toronto, where he practices commercial law with a focus on commercial insolvency. He is a certified specialist in bankruptcy and insolvency law and has acted for a variety of clients in large corporate restructurings and insolvency matters across many industries. He is also one of less than a dozen lawyers to be certified by the Law Society of Upper Canada as a specialist in bankruptcy and insolvency law, and in 2015 was awarded the Law Society Medal, the highest award that the Law Society of Upper Canada can confer on a member. Mr. Shea has acted for a variety of clients in large corporate restructuring and insolvency matters in the entertainment, retail, automotive, airline, food and beverage, pharmaceutical and other industrial sectors. He has also acted as an outside advisor/consultant to the Canadian and Jamaican governments on the reform of their insolvency legislation. A former chair of the Canadian Bar Association's Insolvency Section, Mr. Shea currently sits as a member of the Canadian Bar Association's Legislation and Law Reform Committee and the National Sections' Council. He is also vice-chair of the Ontario Bar Association's Insolvency Section. Mr. Shea has served as a reserve officer and pilot/instructor with the Canadian Forces, and has been awarded the Queen Elizabeth II Diamond Jubilee Medal and the Canadian Minister of Veterans Affairs Commendation. In 2013, he was inducted as a member of the Most Venerable Order of the Hospital of Saint John of Jerusalem by the Governor General on behalf of Her Majesty Queen Elizabeth II. Mr. Shea sits on the board of a number of nonprofit companies and is a governor and vice-chair of the Air Cadet League of Canada, Ontario Provincial Committee, the Canadian Government's partner in the Royal Canadian Air Cadet program. He received his B.A. with distinction from Carleton University and his LL.N. *cum laude* from the University of Ottawa.