

February 21, 2011

The Fun is Over: Section 437(2) of the Bank Act is in Jeopardy

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Almost the only member of the press to notice, Julius Melnitzer recently [reported](#) an Ontario Court of Appeal [decision](#) that held the Royal Bank of Canada had no right to freeze accounts belonging to one of its customers by simply starting a lawsuit. The case turned on the application of a little known (but much loved by litigators) section of the [Bank Act: section 437\(2\)](#). This section provides that a bank cannot pay money out to a customer from the customer's account when those funds are "claimed by some other person" and the bank has been named as a party in a lawsuit over the money.

Before the Ontario Court of Appeal decision, this section of the Bank Act would provide a quick and effective way of quickly freezing the proceeds of a fraud. How would this work? You discover an employee fraud. The proceeds were paid into or passed through a bank account at a chartered bank (this does not work with credit unions). You sue the employee and the bank. Against the bank you allege that the funds in the account are yours. That bank, relying on section 437(2) of the *Bank Act*, would then freeze the funds until a court sorted the matter out. Presto! A quick and easy injunction without the need to actually apply for one.

However, this "free injunction" now seems in doubt, though I think the decision is wrong. In *RBC v. Rastogi*, the Ontario Court of Appeal upheld a lower court decision that ruled a plaintiff cannot use section 437(2) to freeze a defendant's access to funds held in an account in its name. The court said the plaintiff failed to establish any "legal entitlement" to the funds and that a "claim for a tracing order" into the subject bank account is not enough.

The decision does not provide a detailed analysis and, hopefully, will be confined to its facts. It seems the court was motivated by two factors: first, the plaintiff had done nothing to advance the case for 22 months and, consequently, tied up the funds for that long; second, they failed to get an injunction in that 22 month period (which on the facts it would likely have obtained).

The down low? You can likely still use section 437(2) of the *Bank Act* to quickly and inexpensively freeze funds in a bank account but you should then go on to seek an injunction to keep the funds there.

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