Court of Appeal File No. COA-23-OM-0304

COURT OF APPEAL FOR ONTARIO

BETWEEN:

ROYAL BANK OF CANADA

Respondent

- and -

TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.

Moving Party

AND IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*., R.S.C 1985, c.B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O.1990, c.C.43, AS AMENDED

BOOK OF AUTHORITIES

December 4, 2023

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto, ON M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas – LSO No. 43275C
Tel: 416.367.6266
Email: rjaipargas@blg.com

Douglas O. Smith – LSO No. 36915R
Tel: 416.367.6015
Email: dsmith@blg.com

Lawyers for Royal Bank of Canada

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I N D E X

Tab	Document
1.	*Marchant Realty Partners Inc. v 2407553 Ontario Inc*. 2021 ONCA 375.
2.	*Nortel Networks Corp*., (Re), 2016 ONCA 332.
3.	*Essar Steel Algoma Inc*. (Re), 2017 ONCA 478.
4.	*Stomp Pork Farm Ltd*., (Re), 2008 SKCA 73.
5.	*Mundo Media Ltd*. (Re), 2022 ONCA 607.
6.	*Stelco Inc*., *Re*, 2005 CarswellOnt 1188, [2005] O.J. No. 1171 (Ont. C.A.).
7.	*Potential Renewables Inc. v Deltro Electric Ltd*. 2018 ONSC 343 and 2019 ONCA 779.
8.	*Ravelston Corp*., (Re), 2007 ONCA 135.
9.	*Business Development Bank of Canada v Pine Tree Resorts Inc*. 2013 ONCA 282.
10.	*Kaiser*, (Re), 2011 ONCA 713.

11.	*Echino v Munro*, 2014 ABCA 422.
12.	*Lechcier-Kimel* (Re), 2011 ONCA 590.
13.	*Can*Sport Incorporated v HarbourEdge Mortgage Investment Corporation*, 2022 NSCA 8.
14.	*Farm Credit Canada v Gidda*, 2015 BCCA 236.
15.	*KingSett Mortgage Corporation v 30 Roe Investments Corp*., 2022 ONCA 479.
16.	*DEL Equipment Inc. (Re)*, 2020 ONCA 555 (CanLII)
17.	*Business Development Bank of Canada v 2197333 Ontario Inc*. 2012 ONSC 965.

Tab 1

Most Negative Treatment: Recently added (treatment not yet designated)
Most Recent Recently added (treatment not yet designated): Ontario Securities Commission v. Bridging Finance Inc. | 2023 ONSC 2847, 2023 CarswellOnt 8417 | (Ont. S.C.J., Jun 5, 2023)

2021 ONCA 375
Ontario Court of Appeal

Marchant Realty Partners Inc. v. 2407553 Ontario Inc.

2021 CarswellOnt 7770, 2021 ONCA 375, 333 A.C.W.S. (3d) 474, 90 C.B.R. (6th) 39

Marchant Realty Partners Inc., as agent (Responding Party) and 2407553 Ontario Inc., 2384648 Ontario Inc., 2384646 Ontario Inc., 24000196 Ontario Inc. and 2396139 Ontario Inc. (Moving Parties)

Marchant Realty Partners Inc., as agent (Responding Party) and 4544 Zimmerman Avenue LP and 4544 Zimmerman Avenue GP Inc. (Moving Parties)

Marchant Realty Partners Inc., as agent (Responding Party) and 4267 River Road LP and 4267 River Road GP Inc. (Moving Parties)

M. Jamal J.A.

Heard: May 20, 2021
Judgment: May 31, 2021
Docket: CA M52417, M52418, M52419

Counsel: Steven L. Graff, Miranda Spence, Stephen Nadler, for Moving Parties
Sara-Ann Wilson, Kenneth Kraft, for Responding Party, Zeifman Partners Inc.

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.i Availability
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Receiver moved before court to approve sale process for commercial properties — Properties had been owned by debtors — Receiver's motion was granted — Debtors moved for leave to appeal from motion judgment — Motion for leave dismissed — Granting of leave in bankruptcy matters was discretionary — Motion judge applied proper test taking into account receiver's actions and interests of parties among other factors — There was no error of law in application of test — Proposed appeal lacked prima facie merit under test and did not meet criteria for leave — Proposed appeal would delay progress of receivership proceedings — Loans in issue matured at least three years before hearing date — Further delay would harm lenders' security position.
Table of Authorities
Cases considered by *M. Jamal J.A.*:

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — referred to
McEwen (Re) (2020), 2020 ONCA 511, 2020 CarswellOnt 11610, 452 D.L.R. (4th) 248 (Ont. C.A.) — referred to
Ravelston Corp., Re (2007), 2007 CarswellOnt 1115, 29 C.B.R. (5th) 45, 2007 ONCA 135, 85 O.R. (3d) 175 (Ont. C.A.) — referred to
Regal Constellation Hotel Ltd., Re (2004), 2004 CarswellOnt 2653, 50 C.B.R. (4th) 258, 35 C.L.R. (3d) 31, *(sub nom. HSBC Bank of Canada v. Regal Constellation Hotel Ltd. (Receiver of))* 242 D.L.R. (4th) 689, 23 R.P.R. (4th) 64, *(sub nom. Regal Constellation Hotel Ltd. (Receivership), Re)* 188 O.A.C. 97, 71 O.R. (3d) 355 (Ont. C.A.) — referred to
Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
s. 193(e) — referred to

MOTION by debtors for leave to appeal from judgment approving receiver's motion for sale process.

***M. Jamal J.A.*:**

1 The moving parties are debtors ("Debtors") over whose assets, undertakings, and real property the responding party Zeifman Partners Inc., ("Receiver") is the court-appointed receiver and manager. The Debtors seek leave to appeal to this court under s. 193(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B–3 ("BIA"), from orders of Cavanagh J. ("motion judge") of the Superior Court of Justice (Commercial List) dated March 25, 2021, approving the Receiver's proposed sale process and list prices for five commercial properties in downtown Niagara Falls, Ontario ("Properties").

2 For the reasons that follow, the motions for leave to appeal are dismissed.

Background

3 Marchant Realty Partners Inc. ("Agent"), as agent for a group of lenders ("Lenders"), commenced three related receivership proceedings before the Commercial List concerning loans the Lenders made to the Debtors. The loans matured over three years ago, some loans more than four years ago. As of October 2020, the Debtors owed more than $16 million under the loans.

4 The three receivership applications were originally scheduled for September 2018 but were adjourned five times to give the Debtors more time to refinance the Properties. The refinancing never happened.

5 With no refinancing or repayment plan on the horizon, the Agent moved forward with the receivership applications. In August 2020, Gilmore J. of the Commercial List appointed the Receiver as receiver and manager over the Debtors' Properties, although the appointment was stayed for just over two months to give the Debtors one last chance to repay the loans. They could not do so, and the Receiver's appointment became effective in mid-October 2020.

6 The Properties are about 4 km from the tourist area of Niagara Falls. The Properties are mixed-use commercial properties (most needing repairs), a seasonal operating motel (closed because of the pandemic), and vacant land.

7 The Receiver is authorized to market the Properties, including advertising them for sale, soliciting offers to buy them, and negotiating such terms as the Receiver deems appropriate.

The Motion Judge's Decision

8 The Receiver recommended list prices for the sale of Properties based on: (1) independent appraisals from two local appraisers, Humphrey Appraisal Services Inc. and Jacob Ellens & Associates Inc.; (2) recommended list prices for the Properties from three real estate brokerages; and (3) discussions with Jones Lang LaSalle Real Estate Services, the proposed listing brokerage, which has expertise selling properties around Niagara Falls. Even with these list prices, the Lenders will lose money on their loans to the Debtors.

9 The Debtors opposed the proposed list prices and relied on competing appraisals of Colliers, a commercial real estate firm. Colliers' appraisals — which focussed on the development potential of the Properties — were almost 300% higher than the Receiver's list prices. The Debtors asked the motion judge to direct the Receiver to list the Properties at Colliers' proposed prices for 60 days to see what the market will bear.

10 By order dated March 25, 2021, the motion judge approved the Receiver's proposed sale process and list prices for the Properties. The motion judge found:

> The Receiver is an officer of the court with duties to all stakeholders. In my view, the Receiver has shown that it is acting in good faith and diligently to discharge its duties to deal with the [Properties] in a commercially reasonable manner. The Receiver has reviewed the Colliers appraisals and the information upon which Colliers relies for its appraisals of the [Properties]. The Receiver has explained why it does not agree with the Colliers appraisals, and why it has recommended that the sale process be approved. I have considered the process which the Receiver has followed and the information upon which it relies to support its recommendations. The [Debtors] have not shown that the Receiver followed a flawed procedure. I am not satisfied that this is an exceptional case where it is proper for me to reject the business judgment made by the Receiver.

The Test for Leave to Appeal Under s. 193(e) of the BIA

11 The moving parties seek leave to appeal from the motion judge's orders under s. 193(e) of the BIA. This provision provides that, unless an appeal lies as of right or as otherwise expressly provided, an appeal lies to the Court of Appeal "from any order or decision of a judge of the court . . . by leave of a judge of the Court of Appeal".

12 In deciding whether to grant leave under s. 193(e) of the BIA, this court considers the following principles:

- Granting leave is "discretionary and must be exercised in a flexible and contextual way": Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

- In exercising its discretion, the court should examine whether the proposed appeal: (1) raises an issue of general importance to bankruptcy/insolvency practice or the administration of justice, and is one this court should address; (2) is *prima facie* meritorious; and (3) would not unduly hinder the progress of the bankruptcy/insolvency proceedings: *Pine Tree Resorts*, at para. 29; McEwen (Re), 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

Should this Court Grant Leave to Appeal?

(1) Does the proposed appeal raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice?

13 The Debtors assert that the proposed appeal raises an issue of general important to bankruptcy/insolvency practice. They frame the issue on the proposed appeal as "the extent of the deference that the Court owes to a receiver's business judgment when approving a sale process." They claim the appeal "will provide guidance to receivers as they consider the level of scrutiny they may expect from the Court, and to other stakeholders as they consider whether to challenge the actions taken by any given receiver."

14 The Receiver frames the issue on appeal much more narrowly. It claims the appeal "is highly fact-specific and concerns, in essence, the appropriate list prices" of the Properties. It says no legal principles are in dispute and the appeal will have "no bearing or importance for the practice of insolvency and the administration of receivership proceedings."

15 I agree with the Receiver. Although on any appeal the court would consider and apply the principles of deference applicable to a receiver's business judgment, those principles are not in dispute. They were correctly stated by the motion judge, who cited this court's decision in *Regal Constellation Hotel Ltd. (Re)*, (2004), 71 O.R. (3d) 355 (C.A.), at para. 23:

> Underlying these considerations are the principles the courts apply when reviewing a sale by a court-appointed receiver. They exercise considerable caution when doing so, and will interfere only in special circumstances — particularly when the receiver has been dealing with an unusual or difficult asset. Although the courts will carefully scrutinize the procedure followed by a receiver, they rely upon the expertise of their appointed receivers, and are reluctant to second-guess the considered business decisions made by the receiver in arriving at its recommendations. The court will assume that the receiver is acting properly unless the contrary is clearly shown. See *Royal Bank of Canada v. Soundair Corp.* (1991), 4 O.R. (3d) 1, 83 D.L.R. (4th) 76 (C.A.).

16 On the Debtors' argument, the appeal would involve the application of these settled principles. However, applying settled principles of deference to the Receiver's business decisions here would not raise an issue of general importance to bankruptcy/insolvency practice or the administration of justice.

17 The Debtors also say the motion judge failed to apply the correct legal test for evaluating whether a receiver has acted properly in selling a property, as stated in *Royal Bank of Canada v. Soundair Corp.*, (1991), 4 O.R. (3d) 1 (C.A.). This issue relates to the deference issue because the Debtors claim the motion judge failed to cite or apply the *Soundair* test and instead was unduly deferential to the Receiver. I will consider this argument below in evaluating whether the proposed appeal is *prima facie* meritorious.

(2) Is the proposed appeal prima facie meritorious?

18 In evaluating whether the proposed appeal has *prima facie* merit, I begin by noting that this court gives substantial deference to the discretion of commercial court judges supervising insolvency and restructuring proceedings and does not intervene absent demonstrable error: Ravelston Corp. Ltd. (Re), 2007 ONCA 135, 85 O.R. (3d) 175, at para. 3.

19 As already noted, commercial court judges also give substantial deference to the decisions and recommendations of a receiver as an officer of the court. If the receiver's decisions are within the broad bounds of reasonableness and the receiver proceeded fairly, after considering the interests of all stakeholders, the court will not intervene: *Ravelston*, at para. 3; *Regal Constellation Hotel*, at para. 23. A court "will assume that the receiver is acting properly unless the contrary is clearly shown": *Regal Constellation Hotel*, at para. 23.

20 The Debtors assert, however, that this court would overcome the deference shielding the receiver's business judgments and the motion judge's review of those judgments because the motion judge made an extricable error of law. The Debtors say the motion judge erred in law by failing to state or apply the *Soundair* test for evaluating whether a receiver has acted properly in recommending list prices for the Properties.

21 The *Soundair* test in the context of a sale involves consideration of:

- Whether the receiver made sufficient effort to obtain the best price and did not act improvidently;
- The interests of the parties;
- The efficacy and integrity of the process by which offers were obtained; and
- Whether there has been unfairness in the working out of the process: *Soundair*, at p. 6; *Regal Constellation Hotel*, at para. 24.

22 The Debtors claim that the motion judge did not cite or apply the *Soundair* test but instead applied a new, two-part test: (1) the respondent on a motion to approve a sale process must show the receiver followed a flawed process in developing its sale process; and (2) only if that hurdle is cleared may the respondent challenge the sale process itself.

23 I do not accept the Debtors' submission. Although I agree the motion judge did not expressly set out the *Soundair* test, he cited *Soundair* elsewhere in his reasons. As an experienced commercial judge, he was familiar with the *Soundair* test and applied it in his reasons:

- *Whether the receiver made sufficient effort to obtain the best price and did not act improvidently* — The motion judge found that the Receiver made sufficient effort to obtain the best and most realistic list price and did not act improvidently. He noted that the Receiver "reviewed the Colliers appraisals and the information upon which Colliers relies for its appraisals of the [Properties]. The Receiver has explained why it does not agree with the Colliers appraisals, and why it has recommended that the sale process be approved." The motion judge also noted that the Receiver explained why listing the Properties for 60 days at Colliers' proposed list prices could "result in little to no interest in the sale process, with the result that properties languish on the market and ultimately require drastic price reductions to generate interest." This could lead to "lower recoveries than what would have been possible had the property [been] listed for sale at an appropriate price at the outset."

- *The interests of the parties* — The motion judge found that the Receiver considered the interests of all parties in proposing the suggested list prices. He noted that "[t]he Receiver is an officer of the court with duties to all stakeholders", which included the interests of the Debtors. He found that "the Receiver has shown that it is acting in good faith and diligently to discharge its duty to deal with the [Properties] in a commercially reasonable manner."

- *The efficacy and integrity of the process by which offers were obtained* — The motion judge considered the integrity of the process by which the list prices were recommended. He "considered the process which the Receiver has followed and the information upon which it relies to support its recommendations." He found that "[t]he [Debtors] have not shown that the Receiver followed a flawed procedure".

- *Whether there has been unfairness in the working out of the process* — The motion judge found no unfairness in the process that the Receiver followed. He found the Receiver properly considered and responded to Colliers' appraisals. The proposed list prices did not result from any unfairness.

24 I thus conclude the motion judge applied the *Soundair* test. I see no extricable error of law or any basis to interfere with his decision.

25 The proposed appeal therefore lacks *prima facie* merit.

(3) Would the proposed appeal unduly hinder the progress of the receivership proceedings?

26 Lastly, the Debtors assert that the proposed appeal would not unduly hinder the progress of the receivership proceedings. They say the Debtors have no other assets, so all the Receiver has left to do is list and sell the Properties. The Debtors agree to expedite the appeal and claim that any minor delay in the sale process is not enough to deny leave to appeal.

27 I disagree. All the loans in issue matured at least three years ago, some four years ago. Over two years have passed since the original return date of the receivership applications. There have been further delays to allow the Debtors to refinance the Properties, which they could not do. Substantial property taxes are accruing on the Properties and the Receiver is responsible for their ongoing carrying costs, which rank ahead of the Lenders' mortgages and are thus eroding their potential recovery. Further delay in the Receiver's ability to sell the Properties will only further degrade the Lenders' security position and should not be permitted.

28 I thus conclude the proposed appeal would unduly hinder the progress of the receivership proceedings.

Disposition

29 The motions for leave to appeal are dismissed. As agreed by the parties, there shall be no order as to costs.

30 As jointly requested by the parties, pending further order the unredacted versions of the Debtors' factums shall remain under seal and will not be publicly available because they contain commercially sensitive and confidential information about the Receiver's and Debtors' proposed list prices for the Properties.

Motion for leave dismissed.

End of Document

Tab 2

Most Negative Treatment: Application/Notice of Appeal
Most Recent Application/Notice of Appeal: Nortel Networks Inc. v. Pension Protection Fund | 2016 CarswellOnt 14117, [2016] S.C.C.A. No. 301 | (S.C.C., Jul 29, 2016)

2016 ONCA 332
Ontario Court of Appeal

Nortel Networks Corp., Re

2016 CarswellOnt 6785, 2016 ONCA 332, 130 O.R. (3d) 481, 265 A.C.W.S. (3d) 834, 348 O.A.C. 131, 36 C.B.R. (6th) 1

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985 c. C-36, as amended

In the Matter of a Plan of Compromise or Arrangement of Nortel Networks Corporation, Nortel Networks Limited, Nortel Networks Global Corporation, Nortel Networks International Corporation and Nortel Networks Technology Corporation Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Alexandra Hoy A.C.J.O., R.A. Blair, S.E. Pepall JJ.A.

Judgment: May 3, 2016
Docket: CA M45307, M45309, M45310 M45311, M45312, M45313

Proceedings: refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 175, 2015 CarswellOnt 7072, 2015 ONSC 2987, Newbould J. (Ont. S.C.J. [Commercial List]); and refusing leave to appeal *Nortel Networks Corp., Re* (2015), 27 C.B.R. (6th) 51, 2015 ONSC 4170, 2015 CarswellOnt 10304, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Sheila Block, Scott A. Bomhof, Andrew Gray, Adam M. Slavens, Jeremy Opolsky, for Moving parties, U.S. Debtors(1)
Richard B. Swan, S. Richard Orzy, Gavin H. Finlayson, for Moving party, Ad Hoc Group of Bondholders
David R. Byers, Daniel S. Murdoch, for Moving party, Conflicts Administrator of Nortel Networks S.A.
Shayne Kukulowicz, Michael Wunder, Ryan Jacobs, Geoffrey Shaw, Jane Dietrich, for Moving party, Official Committee of Unsecured Creditors of Nortel Networks Inc. et al.
Andrew Kent, Brett Harrison, Laura Brazil, for Moving party, Bank of New York Mellon as Indenture Trustee
Steven L. Graff, Ian Aversa, Miranda Spence, for Moving party, Nortel Trade Claims Consortium
Michael E. Barrack, D.J. Miller, John L. Finnigan, Michael S. Shakra, Andrea McEwan, for Responding parties, Board of the Pension Protection Fund and Nortel Networks U.K. Pension Trust Ltd.
Benjamin Zarnett, Jessica Kimmel, Peter Ruby, Peter Kolla, for Responding party, Monitor, Ernst & Young Inc.
Kenneth Kraft, John Salmas, for Responding party, Wilmington Trust, National Association
Derrick Tay, Jennifer Stam, for Responding parties, Canadian Debtors(2)
Kenneth Rosenberg, Lily Harmer, Massimo Starnino, for Responding party, Superintendent of Financial Services as Administrator of the Pension Benefits Guarantee Fund
Mark Zigler, Ari Kaplan, for Responding parties, Former Employees of Nortel and LTD Beneficiaries
Arthur O. Jacques, Paul Steep, Byron Shaw, for Responding party, Canadian Creditors' Committee
Barry E. Wadsworth, for Responding party, CAW-Canada
Matthew P. Gottlieb, Matthew Milne-Smith, for Responding parties, Joint Administrators of the EMEA Debtors(3) other than Nortel Networks S.A.

Subject: Contracts; Estates and Trusts; Evidence; Insolvency; Intellectual Property; International; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XIV Administration of estate

XIV.4 Sale of assets
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.6 Appeals

Headnote

Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Appeals

Debtor group of companies (N group) operated as highly-integrated multinational enterprise — Cross-border insolvency proceedings went on for over seven years — Debtor group's assets, primarily intellectual property (IP), had been sold and proceeds had been placed in escrow (Lockbox Funds) — Ontario Commercial List judge (trial judge) and Judge of U.S. Bankruptcy Court presided over joint trial and both concluded that Lockbox Funds should be allocated among various N debtor estates on pro rata basis — Judges diverged on issue of IP rights under Master Research and Development Agreement (MRDA), which provided for payment of residual profits to certain entities — Trial judge held that MRDA did not govern allocation of Lockbox funds — Moving parties brought motions for leave to appeal trial judge's judgment — Motions dismissed — Test for leave to appeal was not met — There was no prima facie merit to arguments that pro rata allocation constituted substantive consolidation, that trial judge erred by failing to recognize distinct and separable property rights various N companies allegedly had in N group's IP, that allocation was arbitrary, or that trial judge erred in interpreting MRDA — Facts of case were unique and exceptional, so granting leave would not allow court to provide guidance on legal issues of significance to practice — Fact that allocation of Lockbox Funds was significant issue to parties was insufficient to warrant granting leave.

Bankruptcy and insolvency --- Administration of estate — Sale of assets — Miscellaneous

Distribution of proceeds of sale — Debtor group of companies (N group) was highly integrated multinational enterprise — During lengthy cross-border insolvency proceedings, debtor group's assets, primarily intellectual property (IP), had been sold and proceeds had been placed in escrow (Lockbox Funds) — Ontario Commercial List judge (trial judge) and Judge of U.S. Bankruptcy Court presided over joint trial and both concluded that Lockbox Funds should be allocated among various N debtor estates on pro rata basis — Judges diverged on issue of IP rights under Master Research and Development Agreement (MRDA), which provided for payment of residual profits to certain entities — Trial judge held that MRDA did not govern allocation of Lockbox Funds — Moving parties brought motions for leave to appeal — Motions dismissed — Test for leave to appeal was not met — Grounds of appeal had no prima facie merit — There was no prima facie merit to arguments that pro rata allocation constituted substantive consolidation, that trial judge erred by failing to recognize distinct property rights various N companies allegedly had in N group's IP, that allocation was arbitrary, or that trial judge erred in interpreting MRDA — There was no reason to interfere with trial judge's interpretation of MRDA — Trial judge was alive to fairness concerns and gave reasons for adopting approach he did.

Table of Authorities

Cases considered:

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, *(*sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — followed

Housen v. Nikolaisen (2002), 2002 SCC 33, 2002 CarswellSask 178, 2002 CarswellSask 179, 286 N.R. 1, 10 C.C.L.T. (3d) 157, 211 D.L.R. (4th) 577, [2002] 7 W.W.R. 1, 219 Sask. R. 1, 272 W.A.C. 1, 30 M.P.L.R. (3d) 1, [2002] 2 S.C.R. 235, 2002 CSC 33 (S.C.C.) — referred to

Lehndorff General Partner Ltd., Re (1993), 17 C.B.R. (3d) 24, 9 B.L.R. (2d) 275, 1993 CarswellOnt 183 (Ont. Gen. Div. [Commercial List]) — referred to

Nortel Networks Corp., Re (2013), 2013 ONCA 427, 2013 CarswellOnt 8231, 5 C.B.R. (6th) 254 (Ont. C.A.) — referred to

Nortel Networks Inc., Re (2015), 532 B.R. 494 (U.S. Bankr. D. Del.) — referred to

Nortel Networks Inc., Re (2011), 669 F.3d 128 (U.S. C.A. 3rd Cir.) — considered

Northland Properties Ltd., Re (1988), 69 C.B.R. (N.S.) 266, 29 B.C.L.R. (2d) 257, 73 C.B.R. (N.S.) 146, 1988 CarswellBC 531 (B.C. S.C.) — considered

PSINET Ltd., Re (2002), 2002 CarswellOnt 1261, 33 C.B.R. (4th) 284 (Ont. S.C.J. [Commercial List]) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 1188, 2 B.L.R. (4th) 238, 9 C.B.R. (5th) 135, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 75 O.R. (3d) 5 (Ont. C.A.) — referred to

Ted Leroy Trucking Ltd., Re (2010), 2010 SCC 60, 2010 CarswellBC 3419, 2010 CarswellBC 3420, 12 B.C.L.R. (5th) 1, (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 D.T.C. 5006 (Eng.), (sub nom. *Century Services Inc. v. A.G. of Canada)* 2011 G.T.C. 2006 (Eng.), [2011] 2 W.W.R. 383, 72 C.B.R. (5th) 170, 409 N.R. 201, (sub nom. *Ted LeRoy Trucking Ltd., Re)* 326 D.L.R. (4th) 577, (sub nom. *Century Services Inc. v. Canada (A.G.))* [2010] 3 S.C.R. 379, [2010] G.S.T.C. 186, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 296 B.C.A.C. 1, (sub nom. *Leroy (Ted) Trucking Ltd., Re)* 503 W.A.C. 1 (S.C.C.) — referred to

Timminco Ltd., Re (2012), 2012 CarswellOnt 9633, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy Code, 11 U.S.C.

ss. 1101-1174 — referred to

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 13 — considered

Insolvency Act, 1986, c. 45

Generally — referred to

Proceeding: Motion/Application for Leave to Appeal.

MOTIONS for leave to appeal from decisions reported at *Nortel Networks Corp., Re* (2015), 2015 ONSC 2987, 2015 CarswellOnt 7072, 27 C.B.R. (6th) 175 (Ont. S.C.J. [Commercial List]) and *Nortel Networks Corp., Re* (2015), 2015 ONSC 4170, 2015 CarswellOnt 10304, 27 C.B.R. (6th) 51 (Ont. S.C.J. [Commercial List]), regarding allocation of proceeds of sale of debtor's assets.

***Per curiam*:**

A. Introduction

1 January 14, 2009 was not a good day. At that time, Nortel Networks Corp. ("NNC") and the other Nortel Canadian Debtors filed for insolvency protection under the *Companies Creditors' Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"). That same day, Nortel Networks Inc. ("NNI") and other U.S. Debtors filed voluntary petitions for relief under Chapter 11 of the U.S. *Bankruptcy Code*, 11 U.S.C. §§1101 - 1174, and other Nortel entities incorporated in Europe, the Middle East and Africa ("EMEA") were placed under administration in England by the High Court of England and Wales under the U.K. *Insolvency Act 1986*, c. 45. Shortly afterwards, courts in Canada and the United States approved a cross-border, court-to-court protocol that established procedures for the co-ordination of cross-border proceedings in Canada and the U.S.

2 More than seven years later, many Januarys have come and gone and these insolvency proceedings continue. During that time:

- more than 6,800 Nortel former employees or pensioners have died;
- well in excess of $1 billion has been incurred in costs; and
- Nortel's assets have been sold and some $7.3 billion [1] in sale proceeds have been placed in escrow (the "Lockbox Funds").

3 The leave motions now before this court arise from the joint trial dealing with the allocation of the Lockbox Funds. Newbould J. (the "trial judge) of Ontario's Superior Court of Justice (Commercial List) and Judge Gross of the U.S. Bankruptcy Court for the District of Delaware presided over the joint trial. [2] It was held over the course of six weeks. Each judge rendered

separate decisions on May 12, 2015. Each concluded that the Lockbox Funds should be allocated on a *pro rata* basis among the various Nortel debtor estates. Although their analysis differed somewhat, the outcome was the same.

4 Appeal proceedings were initiated in Canada and the U.S. The moving parties were authorized to file their leave materials in the absence of an issued judgment on the basis that counsel would subsequently file the formal judgment. The formal judgment was issued on April 26, 2016 and filed with this court on April 27, 2016.

5 Before this court, the six moving parties, led by the U.S. Debtors, seek leave to appeal the trial judge's judgment pursuant to s. 13 of the *CCAA*. They submit that the trial judge made fundamental errors and that the proposed appeal is of significance to the practice of insolvency and to the parties, and will not delay the completion of the *CCAA* proceedings.

6 The responding parties, led by the Board of the Pension Protection Fund and Nortel Networks UK Pension Trust Limited ("UKPC"), submit that the record supports the trial judge's factual findings, which were integral to his analysis, including his findings that Nortel's assets were jointly created, that the Nortel group of companies operated on a fully-integrated global basis and that Nortel did not operate separate businesses in separate countries. In their submission, the proposed appeal is not *prima facie* meritorious. In addition, the remaining elements of the test for leave to appeal under the *CCAA* have not all been met.

7 After consideration of each of the factums [3] and other materials filed on the leave motions, we agree with the responding parties that the test for leave has not been met. For the reasons that follow, we dismiss the moving parties' motions for leave to appeal.

B. Genesis of Dispute

8 NNC was a publicly-traded Canadian corporation at the helm of a global networking solutions and telecommunications business, and the direct or indirect parent of more than 130 subsidiaries located in more than 100 countries. These companies were collectively referred to as the "Nortel Group" or "Nortel".

9 NNC was the successor to a long line of companies, headquartered in Canada, that date back to the founding of the Bell Telephone Company of Canada in 1883. NNC's principal, direct operating subsidiary was Nortel Networks Limited ("NNL"), also a Canadian company. NNL was the direct or indirect parent of operating companies located around the world. It owned 100 percent of the equity of each of the following entities: NNI, Nortel's operating company in the United States; Nortel Networks UK Ltd. ("NNUK"), Nortel's operating company in the United Kingdom; and, Nortel Networks (Ireland) Ltd. ("NN Ireland"), Nortel's operating company in Ireland. It also owned 91.17 per cent of the equity of Nortel Networks S.A. ("NNSA"), Nortel's operating company in France.

10 Following the insolvency filings, Nortel's initial plan was to downsize and carry on portions of the telecommunications business. However, by June 2009, the decision was made to liquidate Nortel's assets.

11 On June 29, 2009, an Interim Funding and Settlement Agreement ("IFSA") was approved by both the Canadian and American courts. Among other things, it addressed interim funding for NNL and the anticipated sales of Nortel's business lines and residual intellectual property ("IP"). The parties, consisting of the Canadian Debtors, the U.S. Debtors [4], and the EMEA Debtors [5], agreed to cooperate with the sales process and also agreed that the proceeds of sale would be held in escrow. The issue of allocation was deferred.

12 Under the IFSA, there would be no distribution out of escrow without "either (i) agreement of all of the Selling Debtors [6] or (ii) ... determination by the relevant dispute resolver(s) under the terms of the Protocol ... applicable to the Sale Proceeds". The parties were then to negotiate and attempt to reach agreement "on a protocol for resolving disputes concerning the allocation of Sale Proceeds from Sale Transactions (the "Interim Sales Protocol")". Despite numerous attempts at resolution, agreement on both an Interim Sales Protocol and allocation proved to be elusive.

13 Meanwhile, over $7 billion was generated from various asset sales and other realizations. From mid-2009 until March 2011, proceeds of $3.285 billion were generated from the sale of Nortel's various business lines, including some patents. Of that amount, $2.85 billion is available for allocation. In June 2011, proceeds of approximately $4.5 billion were generated from the sale of Nortel's residual intellectual property, consisting of approximately 7,000 patents and patent applications, to the Rockstar consortium. In total, approximately $7.3 billion is currently held in escrow.

14 By orders dated January 21, 2010, the Canadian and U.S. courts approved a "Final Canadian Funding and Settlement Agreement". The Agreement addressed a number of issues and allowed NNI a $2 billion claim against NNL in NNL's *CCAA* proceeding, which claim is not subject to offset or counterclaims.

15 The parties still could not agree on an Interim Sales Protocol or on allocation. In the spring of 2013, the Canadian court and the U.S. bankruptcy court granted orders approving an "Allocation Protocol". The purpose of this Protocol was to set out "binding procedures for determining the allocation of the Sale Proceeds among the Selling Debtors" [7]. It provided for a joint hearing to determine allocation before the Canadian court and the U.S. bankruptcy court. [8] Any party in interest was at liberty to advance any theory on allocation. Leave to appeal that order was denied by this court on June 20, 2013.

16 The issue of allocation of the Lockbox Funds then proceeded to trial.

C. Trial Judge's Decision

(1) Trial Decision

17 The trial judge's reasons may be summarized. He commenced by reviewing the history of the Nortel Group. He described the operations and the four main product groups or lines of business. Before turning to his analysis of the legal issues, he made a number of important findings about the Nortel Group's structure. He found, and repeatedly reiterated, that the Nortel Group operated as a highly-integrated multinational enterprise. For instance, he stated:

> [16] The Nortel Group operated along business lines as a highly integrated multinational enterprise with a matrix structure that transcended geographic boundaries and legal entities organized around the world. Each entity, such as NNL, NNI, NNUK, NN Ireland and NNSA, was integrated into regional and product line management structures to share information and perform research and development ("R&D"), sales and other common functions across geographic boundaries and across legal entities. The matrix structure was designed to enable Nortel to function more efficiently, drawing on employees from different functional disciplines worldwide, allowing them to work together to develop products and attract and provide service to customers, fulfilling their demands globally.
>
> [17] As a result of Nortel's matrix structure, no single Nortel entity, either NNL or any of the other Canadian debtors in Canada, NNI or any of the other US debtors in the United States or NNUK or any of the other EMEA debtors, was able to provide the full line of Nortel products and services, including R&D capabilities, on a stand-alone basis. While Nortel ensured that all corporate entities complied with local laws regarding corporate governance, no corporate entity carried on business on its own.

18 The trial judge also found that R&D, which was performed at labs around the world, was the primary driver of Nortel's value and profit.

19 After reviewing the necessary background, the trial judge turned to the legal issues before him, starting with the interpretation of the Master Research and Development Agreement ("MRDA"). The MRDA dealt with transfer-pricing arrangements, effective from 2001 onwards, among NNL, NNI, NNUK, NNSA and NN Ireland, who were parties to the agreement. [9]

20 The parties took differing and competing positions on the meaning and application of the MRDA:

• The Monitor (on behalf of the Canadian Debtors), supported by the Canadian Creditors' Committee ("CCC"), took the position that under the MRDA, NNL owned the IP whereas other participants to the MRDA were simply licensees. They argued that the proceeds derived from the sale of the residual IP belonged exclusively to NNL.

• The U.S. Debtors and other U.S. interests, including the Bondholders, argued that NNI and the other licensees held all of the rights and value in the IP in their respective exclusive territories as defined in the MRDA.

• The EMEA Debtors asserted that parties to the MRDA jointly owned all of the IP in proportion to their financial contributions to R&D and that all should share in the sale proceeds attributable to IP in those same proportions. The joint ownership arose independent of, but was recognized in, the MRDA.

• The UKPC took the position that the MRDA should not govern allocation and that a *pro rata* allocation based on a *pari passu* distribution should be used. The CCC also adopted this as its alternative position.

21 The trial judge found that, by its terms, the MRDA was to be construed in accordance with, and governed by, Ontario law. He reviewed the applicable principles of contractual interpretation, including the law on factual matrix (surrounding circumstances), commercial reasonableness, and recitals. In reviewing the law, he considered the recent authority from the Supreme Court of Canada on contractual interpretation, *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 (S.C.C.), which was released during the course of the trial. He considered in detail the parties' positions, the language of the MRDA and evidence on factual matrix.

22 He concluded that the MRDA was an operating agreement and was not intended to, nor did it, deal with the disposal of all of Nortel's assets in a situation in which no revenue was being earned and no profits or losses were occurring. Rather, he found that the MRDA was developed for, and driven by, transfer-pricing concepts for tax purposes and did not govern allocation after Nortel ceased operations:

> [177] I accept that the MRDA was a transfer pricing document created for tax purposes. The licenses were a part of it. The licenses granted under it were never dealt with separately from the MRDA. Their only purpose was to support the intended tax treatment resulting from the MRDA.
>
> . . . . .
>
> [185] I conclude that the circumstances surrounding the creation of the MRDA lead to no other result but that the construct of legal title to the NN Technology being in NNL in return for NNL granting exclusive licenses to the Licensed Participants was only for the purpose of supporting the proposed method to split profits or losses on a tax efficient basis while Nortel operated as a going concern business. The agreement in its application was intended to apply only to Nortel while it operated and not to deal with rights after Nortel and its subsidiaries stopped operating its businesses.

23 Thus, he rejected the primary positions of the Monitor, the CCC, the U.S. Debtors and other U.S. interests, as well as the EMEA Debtors' joint ownership theory.

24 Having found that the MRDA did not govern allocation on Nortel's insolvency and having rejected the joint ownership theory, the trial judge turned to the metric to be used to allocate the Lockbox Funds. He found that the intangible assets that were sold were not separately located or owned in any one jurisdiction. Rather, they were created by all of the so-called "Residual Profit Entities" or "RPEs" (namely, NNL, NNI, NNUK, NNSA and NN Ireland), which were located in different jurisdictions. In addition, the matrix structure allowed Nortel to draw on employees from different functional disciplines worldwide, regardless of region or country, according to need.

25 He held that NNL was not entitled to the proceeds of sale simply because the patents were in its name:

> [197] This was not one corporation and one set of employees inventing IP that led to patents. Nortel was a highly integrated multi-national enterprise with all RPEs doing R&D that led to patents being granted. It was R&D that drove Nortel's business. R&D and the intellectual property created from it was the primary driver of Nortel's value and profits. All parties

agree on that. It would unjustly enrich NNL to deprive all of the other RPEs of the work that they did in creating the IP just because the patents were registered in NNL's name.

26 He determined that he had wide powers under the *CCAA* to do what was just in the circumstances. Section 11 of the *CCAA*, which reflected prior jurisprudence, expressly provides that a court may make any order it considers appropriate in the circumstances, subject to the provisions of the Act. He wrote:

> [208] In this case, insolvency practitioners, academics, international bodies, and others have watched as Nortel's early success in maximizing the value of its global assets through cooperation has disintegrated into value-erosive adversarial and territorial litigation described by many as scorched earth litigation. The costs have well exceeded $1 billion. A global solution in this unprecedented situation is required and perforce, as this situation has not been faced before, it will by its nature involve innovation. Our courts have such jurisdiction. [Footnote omitted.]

27 He observed that it is a fundamental tenet of insolvency law that all debts be paid *pari passu* and that all unsecured creditors receive equal treatment. In his view, a *pro rata* allocation could be achieved by directing an allocation of the Lockbox Funds to each Debtor Estate based on the percentage that the claims against that Estate bore to the total claims against all of the Debtor Estates.

28 In reaching this conclusion, the trial judge dealt with the argument that a *pro rata* allocation would amount to substantive consolidation. He concluded that a *pro rata* allocation would not constitute substantive consolidation in the unique circumstances of this case. In any event, even if it were substantive consolidation, there was precedent that justified substantive consolidation in this case: *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]); *PSINET Ltd., Re* (2002), 33 C.B.R. (4th) 284 (Ont. Gen. Div. [Commercial List]); *Northland Properties Ltd., Re* (1988), 29 B.C.L.R. (2d) 257 (B.C. S.C.).

29 Ultimately, he concluded that the Lockbox Funds were to be allocated on a *pro rata* basis in accordance with certain governing principles, which are outlined below.

30 After his reasons were released, the U.S. Debtors supported by the Official Committee, the Ad Hoc Group of Bondholders and the Law Debenture Trust Company of New York filed motions for clarification, reconsideration or amendment in Canada and the U.S. and a number of points were clarified.

31 In the end result, the judgment that was signed, issued and entered on April 26, 2016 provided that the allocation proceed on a *pro rata* basis in accordance with the following principles:

> (a) Each Debtor Estate [10] is to be allocated that percentage of the Lockbox Funds that the total allowed pre-filing claims against that Debtor Estate bear to the total allowed pre-filing claims against all Debtor Estates.
>
> (b) In determining what the claims are against the Debtor Estates, pre-filing claims of the kind provable under the *Companies' Creditors Arrangement Act* that have received court approval and which have been paid may be taken into account to the extent that they have been paid under the settlement.
>
> (c) In determining what the pre-filing claims are against each Debtor Estate, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once.
>
> i. Claims on bonds are to be made on the Debtor Estate of the issuer and shall be included in that Debtor Estate's total allowed claims for the purpose of determining its allocation. A claim can be recognized by the Debtor Estate that guaranteed the bond, but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.
>
> ii. If the UK Pension Claimants make a claim for the approximately £2.2 billion deficit in the NNUK pension plan against NNUK and also against other EMEA Debtors or the EMEA Non-Filed Entities, the claim against NNUK

will be taken into account in determining claims against the Debtor Estates for allocation purposes but the additional claims against the EMEA Debtors or the EMEA Non-Filed Entities will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

(d) Subject to the general proviso in (c), above, in respect of claims that can be made against more than one Debtor Estate, pre-filing intercompany claims against a Debtor Estate shall be included in the determination of the claims against that Debtor Estate for purposes of its allocation.

(e) The following specific pre-filing claims shall be included in the determination of the allowed claims against NNL for purposes of determining its allocation:

i. the US$2.0627 billion claim of NNI against NNL that was approved by this Court and the U.S. Court;

ii. the claims of NNUK and Nortel Networks SpA against NNL pursuant to the Agreement Settling EMEA Canadian Claims and Related Claims dated July 9, 2014; and

iii. the claim of the UK Pension Claimants against NNL recognized in this Court's judgment of December 9, 2014, as such claim is finally determined.

(f) Cash on hand in any Debtor Estate will not be taken into account in determining its allocation. Each Debtor Estate with cash on hand will continue to hold that cash and deal with it in accordance with its administration.

D. Analysis

32 Six moving parties now seek leave to appeal from the trial judge's allocation decision: the U.S. Debtors, the Ad Hoc Group of Bondholders, the Conflicts Administrator of Nortel Networks S.A., the Official Committee of Unsecured Creditors of NNI and others, the Bank of New York Mellon as Indenture Trustee, and the Nortel Trade Claims Consortium.

33 We will commence our analysis by discussing the test for leave to appeal under the *CCAA* and then address the moving parties' positions in relation to that test.

(1) Test for Leave to Appeal

34 Section 13 of the *CCAA* provides that any person dissatisfied with an order or a decision made under the Act may appeal from the order or decision with leave. Leave to appeal is granted sparingly in *CCAA* proceedings and only where there are serious and arguable grounds that are of real and significant interest to the parties. In addressing whether leave should be granted, the court will consider whether:

(a) the proposed appeal is *prima facie* meritorious or frivolous;

(b) the points on the proposed appeal are of significance to the practice;

(c) the points on the proposed appeal are of significance to the action; and

(d) whether the proposed appeal will unduly hinder the progress of the action.

See, for e.g.: *Stelco Inc., Re* (2005), 75 O.R. (3d) 5 (Ont. C.A.), at para. 24; *Timminco Ltd., Re*, 2012 ONCA 552, 2 C.B.R. (6th) 332 (Ont. C.A.), at para. 2; and *Nortel Networks Corp., Re*, 2013 ONCA 427, 5 C.B.R. (6th) 254 (Ont. C.A.), at para. 3.

(a) Whether Appeal is Prima Facie Meritorious

35 The moving parties take the position that leave should be granted because the appeal is *prima facie* meritorious. In making that argument, they raise three main issues — substantive consolidation, the interpretation of the MRDA, and questions of fairness. We will deal with each issue in turn.

(i) Substantive consolidation

Position of the Moving Parties

36 First, the moving parties submit that the trial judge erred in not recognizing that the allocation ordered departed from "corporate separateness" and was a form of substantive consolidation.

37 Secondly, it is alleged that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation.

38 In its supplementary factum, the Bank of New York Mellon, as Indenture Trustee, makes a related argument. It submits that since the Nortel proceeding no longer involves a restructuring, the *CCAA*'s purpose is spent and the proceeds should thereafter be distributed under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), or at least in a manner consistent with the *BIA* scheme. It says the *BIA* does not contemplate consolidation but rather distribution on an entity-by-entity basis.

39 Finally, the Ad Hoc Group of Bondholders makes a related argument. It submits that the allocation decision takes property interests that belong to certain debtor estates and gives them to others. They argue that, even though the authority provided under s. 11 is broad, the *CCAA* does not permit a court to redistribute property in this way.

Analysis

40 The moving parties' arguments on substantive consolidation are not *prima facie* meritorious.

41 Professor Janis Sarra, a leading expert on insolvency law in Canada, describes substantive consolidation in her article "Corporate Group Insolvencies: Seeing the Forest and the Trees" (2008) 24 B.F.L.R. 63, at pp. 80 - 81:

> Substantive consolidation essentially treats member entities of a corporate group as one entity. In the context of liquidation, it creates a common pool of assets to meet creditors' claims. In the context of restructuring, it may create the opportunity f or creditors to share in the future upside potential of a restructured entity or entities by centralizing and negotiating an arrangement in respect of their claims. Canadian courts have recognized substantive consolidation under both the *BIA* and the *CCAA* where there is evidence of intertwined assets and liabilities; integrated administrative functioning and operations; a perception by creditors that they are dealing with an integrated entity; common control and governance structures; where it would be impracticable to separate the affairs of related entities; where it is more cost effective and beneficial to creditors to have the proceedings administered as a single estate; and where it would result in an expeditious and administratively efficient administration of the proceeding.

42 As we have noted, the trial judge concluded that *pro rata* allocation was appropriate, that it did not amount to substantive consolidation, and that even if it could be said that a *pro rata* allocation involved substantive consolidation, it was not precluded by law in the unique circumstances of the case.

43 In reaching those conclusions, he made numerous factual findings, in addition to those already mentioned, including the following:

- "Nortel (a) had fully integrated and interdependent operations; (b) had intercompany guarantees for its primary indebtedness; (c) operated a consolidated treasury system in which generated cash was used throughout the Nortel Group as required; (d) disseminated consolidated financial information throughout its entire history, save for the year before its bankruptcy; and (e) created IP through integrated R&D activities that were global in scope": para. 223.

- "[N]o one entity or region was able to provide the full line of Nortel products and services": para. 202.

- "Nortel's matrix structure also allowed Nortel to draw on employees from different functional disciplines worldwide ... regardless of region or country according to need": para. 203.

• "R&D was organized around a particular project, not particular geographical locations or legal entities, and was managed on a global basis": para. 202.

• "The fact that Nortel ensured that legal entities were properly created and advised in the various countries in which it operated in order to meet local legal requirements [did] not mean that Nortel operated a separate business in each country. It did not": para. 202.

• "The intangible assets that were sold, being by far the largest type of asset sold, were not separately located in any one jurisdiction or owned separately in different jurisdictions": para. 202.

• The assets are "so intertwined that it is difficult to separate them for purposes of dealing with different entities": para. 222.

• There is "no recognized measurable right in any one of the selling Debtor Estates to all or a fixed portion of the proceeds of sale": para 224.

• "Nortel has had significant difficulty in determining the ownership of its princip[al] assets, namely the $7.3 billion representing the proceeds of the sales of the lines of business and the residual patent portfolio", which "constitutes more than 80 per cent of the total assets of all Nortel entities": para. 222.

44 In addition to his factual findings supporting the *pro rata* order, the trial judge explained why the allocation in this case did not constitute substantive consolidation, either actual or deemed:

• The Lockbox Funds were largely due to the sale of IP and no one Debtor Estate had any right to the funds. They did not belong in whole or in part to any one Estate or combination of Estates.

• The various entities and the various Estates were not being treated as one entity and the creditors of each entity would not become creditors of a single entity. Each entity remained separate and with its own creditors.

• Each entity would maintain its own cash on hand and would be administered separately.

• The inter-company claims would not be eliminated.

45 Similarly, Judge Gross explained at p. 554 of his reasons that the *pro rata* allocation, which was not a distribution, "both recognizes the integrity of the corporate separateness and the integrated synergistic operations of Nortel." Furthermore, he noted that a "pro rata allocation does not merge the Nortel Debtors into a single survivor and does not erase intercompany claims": p. 554.

46 In our view, there is no *prima facie* merit to the argument that we should interfere with the trial judge's conclusion that the allocation decision did not amount to substantive consolidation. His conclusion was based on the nature and effect of his allocation decision and his factual findings. He made the findings having heard from 36 witnesses and having received and reviewed thousands of exhibits and dozens of deposition transcripts over the course of a six-week trial. Those factual findings were central to the result. Absent palpable and overriding error, those factual findings are afforded deference by this court: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235 (S.C.C.), at para. 10.

47 The moving parties also allege that the trial judge erred by applying an inappropriately low threshold for the application of substantive consolidation in finding that, even if the allocation did constitute substantive consolidation, it was permissible. They point to *Northland* as the leading authority on substantive consolidation but say that it is time to revisit that decision in Canada.

48 The trial judge correctly observed that while the *CCAA* does not expressly address the issue of substantive consolidation, jurisprudence in Canada has recognized substantive consolidation as being appropriate in certain exceptional circumstances: see, for e.g., *Lehndorff General Partner Ltd.*, *PSINet Ltd.*, and *Northland Properties Ltd.*

49 He also correctly observed that the court has jurisdiction to make any order that it considers appropriate in the circumstances under s. 11 of the *CCAA*. Although that section came into effect after the Nortel filing under the *CCAA*, it reflects past jurisprudence: *Ted Leroy Trucking Ltd., Re*, 2010 SCC 60, [2010] 3 S.C.R. 379 (S.C.C.), at para. 68. Specifically, s. 11 states:

> Despite anything in the *Bankruptcy and Insolvency Act* or the *Winding-up and Restructuring Act*, if an application is made under this Act in respect of a debtor company, the court, on the application of any person interested in the matter, may, subject to the restrictions set out in this Act, on notice to any other person or without notice as it may see fit, make any order that it considers appropriate in the circumstances.

50 That said, since there is no *prima facie* merit to the argument that the *pro rata* allocation constitutes substantive consolidation, there is no need to re-visit the jurisprudence governing substantive consolidation in Canada or to consider whether the threshold for substantive consolidation should be changed.

51 Furthermore, we see no merit in the argument raised by the Bank of New York Mellon that the trial judge erred by failing to allocate the Lockbox Funds in a manner consistent with the *BIA* scheme, which contemplates distribution on an entity-by-entity basis. Under the *CCAA* allocation decision, distribution to creditors will be done on an entity-by-entity basis.

52 Finally, the argument raised by the Ad Hoc Group of Bondholders and the Official Committee also lacks merit. It presumes that the various Nortel companies had distinct and separable property rights in Nortel's IP. The trial judge repeatedly rejected that proposition. As we explain in the following sections, we see no merit in the argument that the trial judge erred in failing to recognize such distinct property rights. As such, we see no merit in the argument that he exercised his authority in a way that ignored such rights.

53 This ground of appeal is not *prima facie* meritorious.

(ii) The Interpretation of the MRDA

Position of Moving Parties

54 The moving parties take the position that the trial judge erred in concluding that the MRDA has no application to the allocation of the Lockbox Funds. On their reading, the MRDA provides NNI and other "Integrated Entities" with valuable rights to Nortel's IP in their respective exclusive jurisdictions. They note that the trial judge and Judge Gross diverged on the issue of IP rights under the MRDA.

55 The thrust of their contractual argument is two-fold: (1) the trial judge misinterpreted the MRDA by disregarding the words of the agreement; and (2) he failed to apply the Supreme Court of Canada's decision in *Sattva Capital Corp.* by taking an impermissibly narrow view of the scope of factual matrix evidence. In particular, they submit that the trial judge failed to take into account evidence relating to, and explaining, the tax-driven nature of the MRDA and the purposes the parties were trying to achieve through the agreement.

Analysis

56 We reject the moving parties' submissions on the interpretation of the MRDA.

57 On August 1, 2014, the Supreme Court of Canada released *Sattva Capital Corp.* The essence of that decision is best captured by excerpts from the reasons of the court written by Rothstein J.:

- "Historically, determining the legal rights and obligations of the parties under a written contract was considered a question of law": para. 43.

• "[T]he historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix": para. 50.

• "[T]his Court in *Housen [v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235] found that deference to fact-finders promoted the goals of limiting the number, length, and cost of appeals, and of promoting the autonomy and integrity of trial proceedings .... These principles also weigh in favour of deference to first instance decision-makers on points of contractual interpretation. The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law": para. 52.

• "[I]t may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law .... Legal errors made in the course of contractual interpretation include 'the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor'": para. 53.

• "However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation": para. 54.

• "The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare": para. 55.

58 Justice Rothstein also discussed the need to consider the surrounding circumstances, or factual matrix of a contract, when interpreting a written agreement. The goal of contractual interpretation is to ascertain the objective intentions of the parties. In doing so, "a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract": para. 47. Recognizing that words do not have an immutable meaning, the court should consider the contract's commercial purpose, taking into account its genesis, background, context, and the market in which the parties are operating.

59 In this case, the moving parties suggest that the trial judge erred in his interpretation of the MRDA and failed to pay heed to *Sattva Capital Corp.* In our view, the moving parties' arguments are not *prima facie* meritorious.

60 We are not persuaded that there is any reason to interfere with the trial judge's interpretation of the agreement on the basis of palpable and overriding error. Nor, in our view, have the moving parties pointed to any extricable legal error warranting intervention by this court.

61 As mentioned, although *Sattva Capital Corp.* was released during the course of the allocation trial, the trial judge nonetheless considered and applied *Sattva Capital Corp.* in interpreting the MRDA. In over 40 paragraphs, he addressed the relevant law on, and evidence of, factual matrix: see paras. 55 - 57, 117 - 157. He properly rejected evidence of subjective intention as being inadmissible.

62 We would also observe that, as noted by the Monitor and the Canadian Debtors, to be fully successful on their appeal, the U.S. Debtors would have to persuade the court that the trial judge should have: (i) concluded that the MRDA controlled allocation of Nortel's assets in the event of insolvency; (ii) adopted the interpretation of the MRDA advanced by the U.S. Debtors; and (iii) accepted the expert valuation evidence tendered by the U.S. Debtors.

63 The trial judge did none of these things. All of his conclusions to the contrary engage questions of fact or mixed fact and law that are well within his province.

64 For instance, the trial judge rejected the U.S. Debtors' valuation evidence as unreliable and the moving parties' factums are silent on how this finding could be overcome. The acceptance or rejection of the evidence of a witness is squarely within the

fact-finding arena of the trial judge. The moving parties have suggested no reason why the trial judge's findings on valuation would be reversed.

65 In conclusion, this ground of appeal does not warrant granting leave to appeal.

(iii) Fairness to the Parties and Related Arguments

Position of Moving Parties

66 Next, the moving parties submit that they were denied procedural fairness in various respects and that the allocation decision is, among other things, arbitrary, and inequitable. In this regard, we do not propose to address every argument in the multitude of factums filed. The principal submissions on fairness and related arguments that merit comment are as follows.

67 The moving parties say they were given no notice or opportunity to make submissions on the remedy granted. Moreover, there was no record before the court on the full spectrum of claims asserted against the Selling Debtors and no one proposed the specific remedy granted.

68 The U.S. Debtors also submit that the remedy did not respond to the question before the court, which they say was the allocation of the Sale Proceeds (i.e. the proceeds from a particular Sale Transaction) among the Selling Debtors (i.e. the Nortel parties to a particular Sale Transaction). In their view, the trial judge did not answer that question but instead allocated the Sale Proceeds to Nortel entities that did not transfer assets in a particular Sale Transaction and were, thus, not entitled to any Sale Proceeds.

69 The Ad Hoc Group of Bondholders similarly submits that the trial judge answered the wrong question. For instance, it says that the only question properly before the court was to determine the relative value of the assets, rights and interests that each Selling Debtor sold or relinquished, which generated the Sale Proceeds. Moreover, they say that the decision disregards their legitimate expectations.

70 The U.S. Debtors further submit that the allocation is arbitrary since there is no logical connection between what will be or will not be counted for allocation purposes. In particular, they point to the fact the allocation excludes $4 billion in bondholder guarantee claims from the U.S. Debtors' allocation. They say that, as a result, the U.S. Debtors will receive no allocation of funds on account of approximately two-thirds of their claims.

71 Similarly, the Ad Hoc Group of Bondholders submits the allocation is arbitrary as it produces a redistribution of assets among debtors that violates the rule that equity holders get paid after creditors.

72 The Conflicts Administrator of NNSA also takes issue with the fairness of the allocation decision. It says that NNSA is prejudiced by the decision because of the relatively small quantum of its creditors' claims in comparison with those of other debtor estates.

73 Finally, the Official Committee, which represents all general unsecured creditors of the U.S. Debtors, complains that the trial judge exercised his discretion in an unprincipled way and strayed into improper "commercial judicial moralism".

Analysis

74 We are not satisfied that there is *prima facie* merit to the moving parties' submissions.

75 As explained, the trial judge was required to "determine the allocation of the Sale Proceeds among the Selling Debtors" under the Allocation Protocol.

76 Given the trial judge's conclusion that the MRDA did not govern allocation and his rejection of the EMEA Debtors' joint ownership theory, the trial judge had to determine what other metric should be used to allocate the Lockbox Funds among the U.S., Canadian and EMEA Debtor Estates.

77 The Allocation Protocol permitted submissions on "any theory of allocation". At trial, the UKPC and the CCC, in the alternative, sought a *pro rata* distribution of the funds held in escrow and each submitted expert reports that supported a *pro rata* result. Moreover, the U.S. Debtors, the Official Committee and the Ad Hoc Group of Bondholders all made submissions before the trial judge opposing a *pro rata* allocation and had an opportunity to test the evidence. They submitted a motion to strike the *pro rata* allocation evidence, attacked the reliability of the expert reports and cross-examined the experts.

78 Thus, all parties knew that a *pro rata* allocation was in play. The fact that the specifics of the allocation ordered by the trial judge were not identical to those advanced by any of the parties does not, in our view, create unfairness to the parties. This is not a situation where the trial judge addressed an issue that was not before him, failed to grapple with the arguments or evidence, or came up with a new theory of the case.

79 The two judges were not required to determine value but allocation. The IFSA provided for a right to receive an allocation of the Sale Proceeds without restricting the basis upon which that allocation might be determined by the two courts. In particular, we note that the trial judges were given authority to decide the issue of allocation. In addition to the terms of the Allocation Protocol, we note s.10(a) of the IFSA:

> [T]his Agreement is not, and shall not be deemed to be, an acknowledgement by any Party of the assumption, ratification, adoption or rejection of the Transfer Pricing Agreements or any other Transfer Pricing methodology employed by the Nortel Group or its individual members for any purpose nor shall it be determinative of, or have any impact whatsoever on, the allocation of proceeds to any Debtor from any sale of assets of the Nortel Group;
>
> [Emphasis added.]

80 We also observe that the trial judge turned his mind to expectations and found that there was no evidence to support the Bondholders' argument that their legitimate expectations would be disregarded by a *pro rata* allocation.

81 Furthermore, we see no basis for the assertion that the allocation framework is arbitrary and unfair since it excludes $4 billion in Bondholder guarantee claims from the U.S. Debtors' allocation. Under the allocation decision, a claim that can be made against more than one Debtor Estate can only be calculated and recognized once for allocation purposes. This principle is applicable to all claims. The allocation decision also specifies that claims on bonds are to be made on the Debtor Estate of the issuer. Claims on those bonds may also be made on the Debtor Estate of the guarantor but those claims will not be taken into account in determining the claims against the Debtor Estates for allocation purposes.

82 On the reconsideration motion, it was argued that the trial judge's decision should be changed to provide that the claims by the bondholders on the guaranteed bonds against the issuer and guarantor Debtor Estates should be included in the claims for allocation purposes. It was contended that, without such a change, there would be a manifest injustice, especially to the creditors of the U.S. Debtors other than the bondholders.

83 The trial judge rejected that argument, noting that the $2 billion admitted claim against NNL endures. Further, cash on hand in the U.S. Debtors' Estates would be available to their creditors. He also noted that the issue of the treatment of the guaranteed bonds, and whether they should be counted once or twice in a *pro rata* allocation, was a live issue in evidence at trial, which was open to the U.S. Debtors to explore. He found, at para. 16, that "any lack of briefing by the U.S. Debtors and the [Official Committee] was a deliberate tactic taken by them in attacking the pro rata allocation method proposed at trial". He concluded that, even if he were to reconsider the double-counting issue, he would not change his mind:

> I see no injustice in the result.... There must also be considered other claims that could be made against more than one Debtor Estate, including the pension claim by the UKPC against NNUK that could be made against other EMEA Debtors and claims that could be made on bonds issued by NNL and guaranteed by NNC. The allocation decision precludes the double counting of any such claims for allocation purposes. The U.S. Debtors and [Official Committee] do not suggest that any of these other claims should be permitted to be claimed twice for allocation purposes. I see no basis to treat

> the guaranteed bonds any differently for allocation purposes. The principles that govern allocation should be applied consistently to each debtor.

84 We are not persuaded that there is *prima facie* merit to the argument that the allocation is arbitrary. The trial judge was clearly alive to the fairness concerns and gave reasons for adopting the approach he did after careful consideration of the evidence and argument at trial.

85 We would also observe that there was no other clear answer to the question of who was entitled to receive the sale proceeds. As Judge Gross noted at p. 500 of his reasons, the parties "submitted widely varying approaches for deciding the issue leaving virtually no middle ground." The U.S. Debtors and Bondholders argued that in excess of $5 billion belonged to the U.S. Estate and that the Canadian Estate should receive only $0.77 billion. The Canadian Debtors and the Monitor, in sharp contrast, argued that in excess of $6 billion belonged to the Canadian Estate and that the U.S. Estate should receive just over $1 billion. The highly integrated nature of the Nortel business operations and the nature of the assets sold defied either outcome.

86 Judge Gross's comments in his reasons on the allocation trial, at pp. 532-533, accurately sum up the context in which the two courts came to adopt the *pro rata* allocation approach:

> The Court is convinced that where, as here, operating entities in an integrated, multi-national enterprise developed assets in common and there is nothing in the law or facts giving any of those entities certain and calculable claims to the proceeds from the liquidation of those assets in an enterprise-wide insolvency, adopting a prorata allocation approach, which recognizes inter-company and settlement related claims and cash in hand, yields the most acceptable result.
>
> There is nothing in the law or facts of this case which weighs in favour of adopting one of the wide ranging approaches of the Debtors. There is no uniform code or international treaty or binding agreement which governs how Nortel is to allocate the Sales Proceeds between the various insolvency estates or subsidiaries spread across the globe.

87 Nor are we satisfied that there is *prima facie* merit to the Official Committee's argument that the trial judge exercised his discretion in an unprincipled way by straying into improper "commercial judicial moralism". To the extent the Official Committee is suggesting that it amounts to judicial moralism when a judge takes into account fairness concerns, we reject that argument. The trial judge considered the evidence before him in considerable detail and worked with the facts presented to him. Based on those facts, he concluded that a *pro rata* order constituted the answer to the allocation issue. The fact that the answer is also fair should not detract from the force of his conclusion.

88 Finally, we are not persuaded that there is any merit to the argument that the allocation violates the rule that equity holders get paid after creditors. The Ad Hoc Group of Bondholders submits that the trial judge's decision results in NNL (NNI's parent company) receiving allocation proceeds from the sale of NNI's assets and rights that ought to have been allocated to the NNI estate for the benefit of NNI's creditors. This argument is premised on NNI having a right to the particular proceeds as a result of the MRDA interpretation advanced by the U.S. Debtors and Bondholders. As we have discussed above, the trial judge rejected that argument.

89 For these reasons, we conclude that none of the fairness and related arguments put forward by the moving parties are *prima facie* meritorious.

(b) Significance of Issues to the Practice

Position of Moving Parties

90 The moving parties submit that the trial judge's decision presents important issues of first impression in the cross-border insolvency context. They submit that, without appellate intervention, there is a risk substantive consolidation will become far more widely available. In addition, they say that it creates significant uncertainty on the separation of subsidiaries within a corporate group and on the consequences of an insolvency proceeding on the rights of stakeholders, including creditors. In their

submission, an appeal would permit this court to clarify these issues. Furthermore, the appeal would allow this court to clarify the proper interpretation and effect of *Sattva Capital Corp.* on commercial agreements.

Analysis

91 As discussed above, the moving parties have raised three main issues they say warrant leave — namely, substantive consolidation, the interpretation of the MRDA, and fairness. Of the three issues, the moving parties submit that the first two raise issues of significant interest to the practice.

92 We disagree.

93 The facts of this case are unique and exceptional. As we have already discussed, substantive consolidation is not engaged and so this case would not provide an opportunity for this court to provide guidance on that question. Nor does this case engage any issues that require any clarification on the application of *Sattva Capital Corp.* . In short, granting leave would not provide an opportunity for this court to provide guidance on legal issues of significance to the practice.

(c) Significance of Issues to the Action

Position of Moving Parties

94 The moving parties state that the allocation of the Lockbox Funds is the overriding issue in the *CCAA* proceedings.

Analysis

95 We accept that the allocation of the Lockbox Funds is a significant issue in this *CCAA* proceeding. That said, we are of the view that, standing alone, this factor is insufficient to warrant granting leave to appeal. To perhaps state the obvious, typically parties tend to seek leave to appeal a decision that is of significance to an action.

(d) Progress of Proceedings

Position of Moving Parties

96 The moving parties submit that the proposed appeal will not unduly hinder the progress of Nortel's *CCAA* proceeding. They state that many steps and issues remain before creditor distributions can be made, including the determination of claims. In addition, the allocation decisions of the Canadian court and the U.S. court must both be final orders in their respective jurisdictions before funds can be released from escrow. It is argued that this court should grant leave to ensure that it maintains the ability to address any issues should Judge Gross's decision be varied or overturned on appeal.

97 The moving parties also make the point that there are no operating businesses that are in the process of restructuring because the Nortel businesses and assets have been liquidated and the joint trial was a "stand-alone component" of the *CCAA* proceeding. Thus, it is argued that the traditional concerns leading courts to "sparingly" grant leave to appeal in *CCAA* proceedings are not applicable here. In fact, the Official Committee submits that where an appeal would have existed as of right under the *BIA*, it is nonsensical to deny leave here simply because Nortel's liquidation proceeded under the *CCAA*.

Analysis

98 This brings us to the final consideration: progress. Repeatedly, the parties have been encouraged to resolve their differences, but without success. For instance, in a 2011 decision, *Nortel Networks Inc., Re*, 669 F.3d 128 (U.S. C.A. 3rd Cir. 2011), the Third Circuit Court of Appeals admonished the parties at p. 143:

> We are concerned that the attorneys representing the respective sparring parties may be focusing on some of the technical differences governing bankruptcy in the various jurisdictions without considering that there are real live individuals who will ultimately be affected by the decisions being made in the courtrooms. It appears that the largest claimants are pension

> funds in the U.K. and the United States, representing pensioners who are undoubtedly dependent, or who will become dependent, on their pensions. They are the Pawns in the moves being made by the Knights and the Rooks.
>
> Mediation, or continuation of whatever mediation is ongoing, by the parties in good faith is needed to resolve the differences. [Footnote omitted.]

99 Former Chief Justice Winkler also encouraged the parties to find a way to resolve this matter. In April 2012, he warned about the "prospect of additional delays and the potential for conflicting decisions" if the parties failed to reach a negotiated settlement.

100 Numerous mediations have been ordered but have failed.

101 In the Annual Review of Insolvency, Kevin P. McElcheran described *Nortel* as a case that has become "an emblem of waste and dysfunction in a system intended to foster consensus based solutions to commercial insolvency", noting that it has "eclipsed all previous Canadian cases in both duration and expense": 2014 Ann. Rev. Insolv. L. 24 at p. 24. And that was in 2014.

102 Consistent allocation decisions have been issued by the Canadian and U.S. courts. A further appeal proceeding in Canada would achieve nothing but more delay, greater expense, and an erosion of creditor recoveries. There are asymmetric appeal routes in Canada and the U.S. However, we do not accept that the separate appeal proceedings in the U.S. somehow diminish the need to bring these proceedings in Canada to a conclusion. In our view, any additional step is a barrier to progress.

103 Furthermore, the fact that this case is a liquidation and not a restructuring does not render delay immaterial, where so many individuals and businesses continue to await a resolution of this proceeding. The potential of an interim distribution, remote or otherwise, does not alter this reality. In addition, the parties acceded to a liquidation under the *CCAA*. They cannot now reject the parameters of that statute, which requires leave to appeal, and where the jurisprudence on the applicable test is settled and long-standing.

E. Standing Issue

104 There is the additional issue of the standing of the Nortel Trade Claims Consortium that needs to be addressed. It represents a group of creditors that collectively holds over $130 million in unsecured claims against NNI and certain of its U.S. affiliates. It includes institutional investors and former Nortel employees. Unlike other U.S. creditors, the Consortium's sole recourse is against the U.S. Debtors' estates.

105 At trial, the Consortium was represented by the Official Committee. It says that, given the trial decision, its interests may diverge from those of the rest of the Official Committee. It submits that the Consortium should have standing to seek leave to appeal. It relies on the court's jurisdiction to grant leave to appeal, pursuant to s. 13 of the *CCAA*, to "any person dissatisfied with an order or a decision made under [the] Act". It argues that the trial judge exceeded his jurisdiction by deciding matters that are properly for the U.S. court to decide.

106 It is unnecessary to decide the standing issue. Even if the Consortium had standing, we would dismiss its leave motion for the same reasons we have dismissed the other leave motions. In any event, we see no merit in its argument that the trial judge exceeded his jurisdiction.

F. Disposition

107 In conclusion, we are not persuaded that the test for leave to appeal has been met. For these reasons, we dismiss all of the motions for leave to appeal.

Motions dismissed.

Footnotes

1 All references to dollars are to U.S. dollars, unless otherwise specified.

2 Judge Gross's reasons are reported at 532 B.R. 494 (U.S. Bankr. D. Del. 2015).

3 In accordance with the directions of the Court of Appeal case management judge, there was one main factum filed on behalf of the moving parties by the U.S. Debtors and one main factum filed on behalf of the responding parties by the UKPC. Six supplementary factums and one reply factum were also filed.

4 With the exception of Nortel Networks (CALA) Inc.

5 The Joint Administrators were also party to the IFSA but only for the purposes of Section 17 (No Personal Liability of the Joint Administrators).

6 A description of "Selling Debtor" is found in s.12 (a) of the IFSA: "Each Debtor hereby agrees that its execution of definitive documentation with a purchaser (or, in the case of any auction, the successful bidder in any such auction) of, or closing of any sale of, material assets of any of the Debtors to which such Debtor (a "Selling Debtor") is proposed to be a party..."

7 Selling Debtors was defined in the Allocation Protocol as the "Canadian Debtors, U.S. Debtors, EMEA Debtors and Nortel Networks Optical Components Ltd., Nortel Networks AS, Nortel Networks AG, Nortel Networks South Africa (Pty) Limited, and Nortel Networks (Northern Ireland) Limited."

8 The EMEA Debtors were held to have attorned to the jurisdiction of the Canadian court and the U.S. bankruptcy court.

9 Nortel Networks Australia was also a party to the agreement. It ceased being a Residual Profit Entity on December 31, 2007.

10 The order defines "Debtor Estate" as "each of the individual legal entities" set out in Schedule B. Schedule B lists the 45 entities, including the Canadian Debtors, the U.S. Debtors, the EMEA Debtors and five "EMEA Non-Filed Entities" who have not commenced insolvency proceedings. See also the similar definition given to Selling Debtors under the Allocation Protocol.

End of Document

Tab 3

2017 ONCA 478
Ontario Court of Appeal

Essar Steel Algoma Inc. (Re)

2017 CarswellOnt 8668, 2017 ONCA 478, 279 A.C.W.S. (3d) 463, 49 C.B.R. (6th) 259, 65 B.L.R. (5th) 218

IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF ESSAR STEEL ALGOMA INC., ESSAR TECH ALGOMA INC., ALGOMA HOLDINGS B.V., ESSAR STEEL ALGOMA (ALBERTA) ULC, CANNELTON IRON ORE COMPANY AND ESSAR STEEL ALGOMA INC. USA

E.A. Cronk, R.A. Blair, K. van Rensburg JJ.A.

Heard: June 2, 2017
Judgment: June 8, 2017
Docket: CA M47815/M47846

Proceedings: refusing leave to appeal *Essar Steel Algoma Inc., Re* (2017), 2017 CarswellOnt 6582, 2017 ONSC 2585, Newbould J. (Ont. S.C.J. [Commercial List])

Counsel: Peter H. Griffin, Matthew B. Lerner, Kim Nusbaum, Robert Trenker, for Moving Parties, GIP Primus LP and Brightwood Loan Services LLC
Patricia D.S. Jackson, Andrew Gray, Jeremy Opolsky, Alexandra Shelley, for Moving Party, Port of Algoma Inc.
Ashley Taylor, Eliot Kolers, Sanja Sopic, for Applicants / Respondents
Clifton P. Prophet, Nicholas Kluge, Delna Contractor, for Monitor, Ernst & Young Inc.

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.b Effect of arrangement
Civil practice and procedure
XXII Judgments and orders
XXII.23 Res judicata and issue estoppel
XXII.23.b Issue estoppel
XXII.23.b.i General principles
Headnote
Bankruptcy and insolvency --- Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — Stay
A Ltd. and P Inc. entered into Cargo Handling Agreement (CHA) — A Ltd. received Companies' Creditors Arrangement Act (CCAA) protection — Under CCAA order, A Ltd. was to continue making payments to P Inc. under CHA — A Ltd. ceased making payments under CHA — P Inc. brought three separate unsuccessful motions for orders directing A Ltd. to resume making payments under CHA — It was breach of terms of DIP loan to permit payments by A Ltd. under CHA without approval of DIP lenders, who did not approve — There was insufficient cash available to A Ltd. to start to pay P Inc. and other creditors — Creditors held guarantee from E Global and no demand was made on guarantee — Decision that payments under CHA resume was stayed pending determination of two remaining oppression claims — P Inc. brought application for leave to appeal — Application dismissed — Leave to appeal was to be granted sparingly in CCAA proceedings — Questions proposed to be

determined on appeal if leave was granted were identical to those already determined adversely against moving parties three times and not appealed — There was no prima facie merit in attempting to seek leave to appeal from third unsuccessful attempt to invoke s. 11.01(a) of Act — Record did not support contention that law had changed or that judge had opened door for re-consideration of issue under s. 11.01(a) of Act when same judge had clearly determined issue against P Inc.'s interests on previous motions — Same legal question involving same parties had now been finally determined twice by presiding judge in court of competent jurisdiction, so issue estoppel applied to bind parties — In doing so, CCAA judge was exercising same discretion that would apply to estoppel issue — While s. 11.01(a) issues had considerable significance for particular proceeding, issues in proposed appeals arose out of unique and inter-related agreements and were of little relevance to general practice.
Civil practice and procedure --- Judgments and orders — Res judicata and issue estoppel — Issue estoppel — General principles
A Ltd. and P Inc. entered into Cargo Handling Agreement (CHA) — A Ltd. received Companies' Creditors Arrangement Act (CCAA) protection — Under CCAA order, A Ltd. was to continue making payments to P Inc. under CHA — A Ltd. ceased making payments under CHA — P Inc. brought three separate unsuccessful motions for orders directing A Ltd. to resume making payments under CHA — It was breach of terms of DIP loan to permit payments by A Ltd. under CHA without approval of DIP lenders, who did not approve — There was insufficient cash available to A Ltd. to start to pay P Inc. and other creditors — Creditors held guarantee from E Global and no demand was made on guarantee — Decision that payments under CHA resume was stayed pending determination of two remaining oppression claims — P Inc. brought application for leave to appeal — Application dismissed — Questions proposed to be determined on appeal if leave was granted were identical to those already determined adversely against moving parties three times and had not been appealed — Same legal question involving same parties had now been finally determined twice by presiding judge in court of competent jurisdiction, so issue estoppel applied to bind parties — Nor did court retain residual discretion to decline to apply doctrine of issue estoppel — In concluding that payments should not resume, CCAA judge considered and weighed all parties' and stakeholders' interests and concluded that it would not be appropriate to lift CCAA stay in respect of those payments — In doing so, CCAA judge was exercising same discretion that would apply to estoppel issue.

Table of Authorities

Cases considered:

Danyluk v. Ainsworth Technologies Inc. (2001), 2001 SCC 44, 2001 CarswellOnt 2434, 2001 CarswellOnt 2435, 54 O.R. (3d) 214 (headnote only), 201 D.L.R. (4th) 193, 10 C.C.E.L. (3d) 1, 7 C.P.C. (5th) 199, 272 N.R. 1, 149 O.A.C. 1, 2001 C.L.L.C. 210-033, 34 Admin. L.R. (3d) 163, [2001] 2 S.C.R. 460, 2001 CSC 44 (S.C.C.) — referred to

Diamond v. Western Realty Co. (1924), [1924] S.C.R. 308, [1924] 2 D.L.R. 922, 1924 CarswellOnt 116 (S.C.C.) — referred to

Ernst & Young Inc. v. Essar Global Fund Ltd. (2017), 2017 ONSC 1366, 2017 CarswellOnt 4049, 46 C.B.R. (6th) 107 (Ont. S.C.J. [Commercial List]) — referred to

Essar Steel Algoma Inc., Re (2016), 2016 ONSC 6459, 2016 CarswellOnt 16408, 41 C.B.R. (6th) 298 (Ont. S.C.J. [Commercial List]) — referred to

Nortel Networks Corp., Re (2016), 2016 ONCA 332, 2016 CarswellOnt 6785, 36 C.B.R. (6th) 1, 130 O.R. (3d) 481, 348 O.A.C. 131 (Ont. C.A.) — referred to

Stelco Inc., Re (2005), 2005 CarswellOnt 6818, 15 C.B.R. (5th) 307, 11 B.L.R. (4th) 185, 204 O.A.C. 205, 261 D.L.R. (4th) 368, 78 O.R. (3d) 241 (Ont. C.A.) — referred to

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11.01(a) [en. 2005, c. 47, s. 128] — considered

Proceeding: Motion/Application for Leave to Appeal.

APPLICATION by creditor for leave to appeal judgment reported at *Essar Steel Algoma Inc., Re* (2017), 2017 ONSC 2585, 2017 CarswellOnt 6582 (Ont. S.C.J. [Commercial List]), dismissing creditor's motion.

Motions for leave to appeal from the order of Justice Frank Newbould of the Superior Court of Justice, dated April 28, 2017

***Per curiam*:**

Background

1 GIP Primus LP and Brightwood Loan Services LLC (collectively "GIP") and Port of Algoma Inc. ("Portco") apply for leave to appeal the order of Newbould J. dated April 28, 2017. The order was made in the context of insolvency proceedings under the CCAA [1] involving Essar Steel Algoma Inc. ("Algoma") and related companies. Newbould J. is the supervising CCAA judge in those proceedings.

2 Algoma and its predecessors are no strangers to restructuring proceedings. The first CCAA proceedings were commenced in 1991. A second CCAA restructuring took place in 2001. By 2014 Algoma was in further need of a cash injection and an attempt was made to address the problem through a solvent restructuring under the *Canada Business Corporations Act*. [2] This resulted in a complex transaction in the course of which GIP advanced $150 million which was then paid to Algoma as the major portion of the purchase price in what is referred to by the parties as the "Port Transaction". That overall transaction involved four basic components:

(i) the sale by Algoma to Portco of the port facilities at Sault Ste. Marie, Ontario;

(ii) a lease of the port lands to Portco for a period of 50 years;

(iii) a Cargo Handling Agreement, whereby Algoma was to pay Portco US$36 million annually, in monthly instalments, for use of the port and cargo-handling facilities; and

(iv) a Shared Services Agreement that required Portco to pay Algoma US$11 million annually, in monthly instalments, in exchange for Algoma providing operation and maintenance services at the port.

3 At the end of the day, Algoma received a total purchase price of US$171.5 million. Of that amount, US$150 million was advanced by GIP to Portco which, in turn, used it to pay Algoma. Portco paid a small further amount itself and the balance of the purchase price was paid by way of a US$19.8 million promissory note from Portco to Algoma (the "Note"). Portco's obligation under the Note was subsequently assumed by Essar Global Fund Ltd. ("EGFL"), the indirect parent company of both Portco and Algoma. The structure of the Cargo Handling Agreement and the Shared Services Agreement was designed to provide Portco with a net stream of payments that would enable it to service the GIP loan.

4 Unfortunately, the restructuring was unsuccessful. Algoma filed for protection under the CCAA in November, 2015. DIP lenders provided financing during the proceedings.

5 Under the Initial CCAA Order, Algoma was required to pay post-filing expenses as set out in a cash-flow budget approved by the DIP lenders, and for a period of time after the filing Algoma continued to make regular payments under the Cargo Handling Agreement. These payments stopped in May, 2016, however, when the DIP lenders refused to approve cash-flow budgets providing for those payments so long as the $19.8 million Note remained outstanding.

6 This triggered proceedings that have ultimately led to these motions for leave to appeal.

The First Motion

7 In June, 2016, Portco brought a motion — supported by GIP — for an order requiring Algoma to resume payments under the Cargo Handling Agreement, relying on the provisions of s. 11.01(a) of the CCAA as the basis for the order. Section 11.01(a) permits a company under CCAA protection to make payment for post-filing goods and services provided to it. Portco argued it was providing post-filing services under the Cargo Handling Agreement.

8 There was also an issue raised by the Monitor and the DIP lenders as to whether there was a right, on the part of Algoma, to set off payments due under the Cargo Handling Agreement against the amount outstanding on the Note.

9 The CCAA Judge dismissed the motion. He held that s. 11.01(a) was not applicable because, in fact, it was Algoma and its employees, and not Portco, who were providing all the services necessary for Portco to fulfill its obligations under the Cargo Handling Agreement. He concluded that it was premature to deal with the set-off issue. In dismissing the motion, he said that the dismissal was "without prejudice to it being brought back on after the set-off issue [had been] determined".

10 No steps were taken to seek leave to appeal from this decision.

The Second Motion

11 Not to be deterred, however, Portco — again supported by GIP — brought a second motion in October, 2016, seeking the same relief. Again Portco and GIP relied on s. 11.01(a). But this time, they presented a different argument. The Cargo Handling Agreement was in reality a licensing agreement, they submitted, and Algoma was not entitled to enter onto the premises without paying under the license.

12 The CCAA Judge dismissed the motion again. First, he held that the issue of s. 11.01(a)'s applicability had been decided on the previous motion — from which no leave to appeal had been sought — and could not be re-litigated under the guise of a different argument which could have been raised on the First Motion. In holding that the s. 11.01(a) issue had already been finally decided against Portco, and with respect to the "without prejudice" aspect of the first order, he was very clear: [3]

> I must say that when I stated that the first Portco motion was dismissed without prejudice to it being brought back on after the set-off issue was determined, it was not intended to enable Portco to raise anew those issues that had been decided against it. It was intended to permit Portco to come back if it succeeded on the set-off point or the issues raised by the Monitor. Portco however continues to raise issues already decided against it.

13 Secondly, and in any event, the CCAA Judge rejected the licensing argument. He further concluded that even if Portco were free to raise the s. 11.01(a) issue — which it was not free to do — he would not have ordered payment of amounts due under the Cargo Handling Agreement at that stage in the face of related oppression remedy proceedings involving the Port Transaction that were pending before him as well.

14 No steps were taken to seek leave to appeal from this second order.

The Oppression Proceedings

15 In September, 2016, the CCAA Judge had authorized the Monitor to commence oppression remedy proceedings on behalf of Algoma with regard to the Port Transaction. EGFL (the obligor under the Note) asserted a counterclaim in those proceedings, arguing that the amounts owing to Portco under the Cargo Handling Agreement could be set off against the $19.8 million Note and that that amount had then been exceeded, with the result that payments should resume under the Cargo Handling Agreement.

16 The oppression remedy proceedings were heard by Newbould J. as well, in early 2017. On March 6, 2017, he released his reasons. He found the Port Transaction was oppressive and unfairly disregarded the interests of Algoma's trade creditors, employees, pensioners and retirees, but did not set aside the transaction. Instead, he ordered that the transaction documents be amended in various ways, the particulars of which are not important to the leave to appeal issues. He declined to deal with the set-off issue in those proceedings, however, concluding instead that "the appropriate place to make this claim is in the CCAA proceedings."

The Third Motion

17 Very quickly — in April, 2017 — the s. 11.01(a) issue was brought back again, this time by way of a GIF motion, supported by Portco. In an April 28th endorsement, Newbould J. once again dismissed the motion. This time he said: [4]

> This is the third time that this argument has been advanced. It was unsuccessfully argued by Portco on two previous motions requesting orders that the payments under the Cargo Handling Agreement resume. On the first occasion, it was argued that Portco was providing services to Algoma on the Port facilities and that section 11.01(a) required immediate payment. I held that Portco was not providing the services but rather Algoma personnel who were doing all of the work. On the second occasion Portco added the argument that Portco was licensing the Port facilities to Algoma and that the payments under the Cargo Handling Agreement were for that purpose and therefore had to be made. I held that it was not open to Portco to make that new argument but that in any event I did not accept it . . .
>
> Portco adds another argument why the access of Algoma to the Port facilities is a licence. Again, that should have been argued in the first go-around on the point. It says that under the Cargo Handling Agreement, Algoma can enter the property only if it makes payment under that agreement. I do not agree. What the Cargo Handling Agreement provides in section 3.3 is that notwithstanding that Algoma's access to the Port is non-exclusive, Algoma shall have priority access so long as it makes its payments due under the Cargo Handling Agreement. That in no way can be construed to be a licence. That section recognizes Algoma's right to access to the Port facilities as provided for in the Lease.
>
> In short, even if it were permissible for Portco or GIP to again raise section 11.01(a), which it is not, I cannot find that there was a licence relationship between Algoma and Portco regarding the Port assets.

18 It is this order that is the subject of these motions for leave to appeal.

Analysis

19 Leave to appeal is to be granted sparingly in CCAA proceedings. This is because of the "real time" dynamic of CCAA matters and the "generally discretionary character underlying many of the orders made by supervising judges in such proceedings" and the deference to be accorded to those decisions. In considering whether to grant leave, the court will consider whether:

> (i) the proposed appeal is *prima facie* meritorious or frivolous;
>
> (ii) the point on the proposed appeal is of significance to the practice;
>
> (iii) the point on the proposed appeal is of significance to the proceeding; and
>
> (iv) whether the proposed appeal will unduly hinder the progress of the action.

See *Stelco Inc., Re*, [2005] O.J. No. 4883 (Ont. C.A.), at paras. 15-20; *Nortel Networks Corp., Re*, 2016 ONCA 332, 130 O.R. (3d) 481 (Ont. C.A.), at para. 34.

20 In our view, the leave motions fail on the first two of these factors.

The Merits

21 GIP and Portco propose identical questions to be determined on the appeal if leave is granted:

> (i) Did the motion judge err in concluding that [GIP and Portco were] precluded from arguing that Algoma is required by section 11.01(a) of the CCAA to make payments under the Cargo Handling Agreement?
>
> (ii) Did the motion judge err in his interpretation of section 11.01(a) of the CCAA?

22 The application and interpretation of s. 11.01(a) of the CCAA are precisely the issues that were addressed by the motion judge in the First Motion, and in the Second Motion (in addition to whether those issues were *res judicata*), and in the Third Motion (which led to the order from which leave to appeal is now sought). In spite of the moving parties' attempts on the Second

and Third Motions to wrap their arguments in different packaging, the issues remained the same: the interpretation of s. 11.01(a) and its application in the particular circumstances of this CCAA proceeding.

23 Those issues have now been determined adversely against the moving parties three times. No steps were taken to obtain leave to appeal from the motion judge's orders on the First Motion or the Second Motion. We are not persuaded there is *prima facie* merit in the attempt now to seek leave to appeal from a third unsuccessful attempt to invoke s. 11.01(a) of the CCAA.

24 The moving parties argue that the landscape has changed since Newbould J.'s determination of the oppression remedy proceedings.[5] They submit that, in declining to deal with the set-off issue in those proceedings and determining that "the appropriate place to make [that] claim is in the CCAA proceedings", he opened the door for a re-consideration of the s. 11.01(a) issue. The record does not support that submission.

25 Newbould J. dealt with the set-off counterclaim in one paragraph at the end of his reasons in the oppression remedy proceedings. He said:[6]

> Portco has made a counterclaim for a declaration that the $19.8 million note has been paid in full as a result of set-off and for payments beyond that amount said to be owing under the Cargo Handling Agreement. When and how the set-off occurred is not in the record and whether that could be affected by the stay of proceedings in the CCAA has not been argued. Nor are the amounts said to be owing set out with any precision. In my view the appropriate place to make this claim is in the CCAA proceedings and I do not intend to deal with it in this counterclaim.

26 We see nothing in this disposition to suggest that Newbould J. had somehow signalled that he was re-opening — even if he were entitled to do so — the s. 11.01(a) issues, which he had clearly determined against the moving parties' interests on the First and Second Motions. Nor is there any indication in his reasons provided on the Third Motion — which was heard *after* his decision in the oppression remedy proceedings had been released — that he intended that to be the case. Indeed, as stated in the passage of his reasons on the Third Motion set out above, quite the opposite was the case.

27 The same parties have now joined issue on the same legal questions (the interpretation and application of s. 11.01(a) in the circumstances of the CCAA proceedings) three times. The CCAA Judge, presiding in a court of competent jurisdiction, had finally determined those legal questions twice before the Third Motion was launched, and there were no attempts to appeal. All the relevant factors for the application of issue estoppel are present and the decisions are binding on the moving parties, absent a successful appeal: see *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 (S.C.C.), at para. 25; *Diamond v. Western Realty Co.*, [1924] S.C.R. 308 (S.C.C.), at para. 35. They deprive the proposed appeal of the merit required for leave to appeal to be granted.

28 The moving parties raise an additional argument, however. They submit that, even if the elements of issue estoppel have been established, the court retains a residual discretion to decline to apply the doctrine, and that the CCAA Judge failed to take that factor into consideration.

29 We disagree. In concluding that payments to Portco under the Cargo Handling Agreement should not resume, the CCAA Judge considered and weighed the interests of all stakeholders involved in the CCAA proceeding — including the fact that to allow the payments to resume would be to permit a breach of the DIP financing then in place, thereby jeopardizing that financing — and concluded that it would not be appropriate in the circumstances to lift the CCAA stay in respect of those payments. In doing so, he was exercising the same discretion that would apply to the estoppel issue. We see no error that would justify granting leave to appeal in the exercise of that discretion.

Significance to the Practice

30 We accept that the s. 11.01(a) issues have considerable significance for this particular CCAA proceeding, but we are not persuaded that they have significance for the practice in the circumstances of this proceeding.

31 Whether s. 11.01(a) is available to benefit the moving parties, thereby giving them an advantage over other stakeholders in terms of the servicing of the GIP loan, depends upon the interpretation and application of the particular agreements that underlie the Port Transaction and upon how they are being carried out in practice. Thus, the proposed appeals arise out of the unique and inter-related agreements that formed the Port Transaction. We see little of assistance to the general practice of insolvency law that would arise in the proposed appeals.

Undue Hindrance of the Proceedings

32 We do not think that granting leave to appeal would unduly hinder the progress of the CCAA proceedings, given that the appeals could be heard together with the pending appeal in the oppression remedy proceedings in August. However, in view of the foregoing conclusions, this does not assist the moving parties in the circumstances.

Disposition

33 For the reasons set out above, the motions for leave to appeal are dismissed.

34 The Monitor and Algoma are each entitled to their costs of the leave motions, fixed in the amount of $3,000, as against the moving parties, jointly and severally.

Application dismissed.

Footnotes

1 *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36.

2 *Canada Business Corporations Act*, R.S.C. 1985, c. C-44.

3 2016 ONSC 6459 (Ont. S.C.J. [Commercial List]), at para. 9.

4 2017 ONSC 2585 (Ont. S.C.J. [Commercial List]), at paras. 10-12.

5 An appeal from that order is scheduled to be heard in this Court in August of this year.

6 [*Ernst & Young Inc. v. Essar Global Fund Ltd.*] 2017 ONSC 1366 (Ont. S.C.J. [Commercial List]), at para. 147.

Tab 4

2008 SKCA 73
Saskatchewan Court of Appeal

Stomp Pork Farm Ltd., Re

2008 CarswellSask 358, 2008 SKCA 73, [2008] 8 W.W.R. 607, 169 A.C.W.S. (3d) 947, 311 Sask. R. 186, 428 W.A.C. 186, 43 C.B.R. (5th) 42

National Bank of Canada (Appellant) and Stomp Pork Farm Ltd. (Respondent) and Farm Credit Canada, Cargill Limited and Meyers Norris Penny Limited, Monitor (Respondents)

Sherstobitoff, Lane, Jackson JJ.A.

Heard: May 13, 2008
Judgment: May 22, 2008
Written reasons: June 5, 2008
Docket: 1627

Proceedings: reversing in part *Stomp Pork Farm Ltd., Re* (2008), 2008 SKQB 179, 2008 CarswellSask 267 (Sask. Q.B.); additional reasons to *Stomp Pork Farm Ltd., Re* (2008), 41 C.B.R. (5th) 126, 2008 SKQB 152, 2008 CarswellSask 207 (Sask. Q.B.)

Counsel: Jeffrey Lee, Linda Widdup for National Bank of Canada
Kim Anderson for Stomp Pork Farm Ltd.
Joel Hesje, Q.C. for Farm Credit Canada
Ian Sutherland for Cargill Limited
Gary Meschishnick for Meyers Norris Penny Limited

Subject: Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.5 Interim financing
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Effect of arrangement — General principles
S owed N $20.5 million secured on S's current assets — N had priority over current assets to extent of $18 million and thereafter shared priority with F, with N's share, over and above $18 million — S became insolvent and applied and received initial order under Companies' Creditors Arrangement Act for stay of proceedings until April 18, 2008 — Order directed F to provide debtor-in-possession ("DIP") financing facility to S — N applied for order substituting it as DIP lender and allocating DIP financing equally between current assets and fixed assets as initially proposed by S and supported by N — Judge ordered monitor to file report with court analyzing S's situation and providing its recommendations on fair and equitable allocation of DIP's lender charge and any future DIP financing — Judge confirmed original decision to secure super-priority for DIP financing on current assets and directed that any future DIP financing be secured 75 percent on current assets and 25 percent on fixed assets — N appealed both decisions — Appeal allowed in part — Court left in place chambers judge's decision with respect to allocation of priority for DIP financing that had already been advanced, but set aside allocation of priority with respect to future DIP financing — Court refused leave pertaining to interim order as court was highly unlikely to intervene and intervention would upset significant arrangement that was already in place — Court granted leave to appeal order pertaining to future DIP financing as court was satisfied that appeal was prima facie meritorious — Appeal was allowed with respect to future financing as there

was no immediate urgency and it was premature to make allocation of priority between secured creditors and such allocation appeared speculative.

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Algoma Steel Inc., Re (2001), 25 C.B.R. (4th) 194, 147 O.A.C. 291, 2001 CarswellOnt 1742 (Ont. C.A.) — referred to

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 1999 CarswellAlta 809, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — considered

Canadian Airlines Corp., Re (2000), 80 Alta. L.R. (3d) 213, 2000 ABCA 149, 2000 CarswellAlta 503, 19 C.B.R. (4th) 33, 261 A.R. 120, 225 W.A.C. 120 (Alta. C.A. [In Chambers]) — referred to

Cavendish Shopping Centre Co. v. Bertrand (May 18, 1993), Doc. C.A. Montreal 500-09-000761-932 (Que. C.A.) — referred to

Charles Osenton & Co. v. Johnston (1941), [1942] A.C. 130, [1941] 2 All E.R. 245, 110 L.J.K.B. 420, 57 T.L.R. 515 (U.K. H.L.) — referred to

Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce (2005), 11 C.B.R. (5th) 72, 2005 SKCA 78, 2005 CarswellSask 416 (Sask. C.A. [In Chambers]) — referred to

Hunters Trailer & Marine Ltd., Re (2001), 2001 CarswellAlta 1636, 2001 ABQB 1094, 30 C.B.R. (4th) 206, 305 A.R. 175 (Alta. Q.B.) — considered

ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd. (2007), 2007 SKCA 72, 2007 CarswellSask 324, [2007] 9 W.W.R. 79, *(*sub nom. *Bricore Land Group Ltd., Re)* 299 Sask. R. 194, *(*sub nom. *Bricore Land Group Ltd., Re)* 408 W.A.C. 194, 33 C.B.R. (5th) 50 (Sask. C.A.) — referred to

Minister of National Revenue v. Temple City Housing Inc. (2008), 2008 ABCA 1, *(*sub nom. *Temple City Housing Inc., Re)* 415 W.A.C. 4, *(*sub nom. *Temple City Housing Inc., Re)* 422 A.R. 4, *(*sub nom. *R. v. Temple City Housing Inc.)* 2008 G.T.C. 1128 (Eng.), [2008] G.S.T.C. 2, [2008] 2 C.T.C. 67, 2008 CarswellAlta 2 (Alta. C.A.) — referred to

Multitech Warehouse Direct Inc., Re (1995), 32 Alta. L.R. (3d) 62, 1995 CarswellAlta 331 (Alta. C.A.) — referred to

New Skeena Forest Products Inc., Re (2005), 7 M.P.L.R. (4th) 153, [2005] 8 W.W.R. 224, *(*sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 210 B.C.A.C. 247, *(*sub nom. *New Skeena Forest Products Inc. v. Kitwanga Lumber Co.)* 348 W.A.C. 247, 2005 BCCA 192, 2005 CarswellBC 705, 9 C.B.R. (5th) 278, 39 B.C.L.R. (4th) 338 (B.C. C.A.) — considered

Pacific National Lease Holding Corp., Re (1992), 72 B.C.L.R. (2d) 368, 19 B.C.A.C. 134, 34 W.A.C. 134, 15 C.B.R. (3d) 265, 1992 CarswellBC 524 (B.C. C.A. [In Chambers]) — referred to

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Temple City Housing Inc., Re (2007), 2007 CarswellAlta 1806, 2007 ABQB 786, [2007] G.S.T.C. 188, [2008] 2 C.T.C. 61 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005, Act to amend the, S.C. 2007, c. 36

Generally — referred to

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Generally — referred to

s. 11 — referred to

s. 13 — considered

Wage Earner Protection Program Act, S.C. 2005, c. 47

Generally — referred to

APPEAL from judgment reported at *Stomp Pork Farm Ltd., Re* (2008), 2008 SKQB 179, 2008 CarswellSask 267 (Sask. Q.B.), ruling on cost allocation of debtor-in-possession financing between current and fixed assets.

***Jackson J.A.*:**

I. Introduction

1 The broad issue in this appeal is the extent to which a Chambers judge has the authority to allocate priority among the assets of pre-filing creditors for debtor in possession ("DIP") financing early in the process of proceedings under the *Companies' Creditors Arrangement Act* [1] ("the *CCAA*"). In the result, the Court left in place the Chambers judge's decision with respect to an allocation of priority for DIP financing that had already been advanced, but set aside the allocation of priority with respect to future and, as yet not required, DIP financing, with reasons to follow. These are those reasons.

II. Facts and Decisions under Appeal

2 The facts are well set out in the two decisions of the Honourable Madam Justice A.R. Rothery under appeal such that I will provide a brief sketch only.

3 Stomp Pork Farm Ltd. ("Stomp") is the second largest commercial hog producer in Saskatchewan owning 27,000 breeding sows. [2] Its two principal lenders are National Bank of Canada ("NBC") and Farm Credit Canada ("FCC").

4 As of March 24, 2008, Stomp owed NBC approximately $20.5 million secured on Stomp's current assets, which comprise livestock inventory and accounts receivable (the "Current Assets"). NBC has priority over the Current Assets to the extent of $18 million and thereafter shares priority with FCC, with NBC's share, over and above the $18 million, being 15%.

5 As of March 27, 2008, Stomp owed FCC approximately $28.5 million secured on Stomp's land, buildings and improvements (the "Fixed Assets"). NBC also holds a security interest in 15% of the Fixed Assets.

6 Due to a variety of factors including high feed prices and currency rate challenges, Stomp became insolvent. On March 27, 2008, it applied *ex parte* and received an initial order under the *CCAA* for a stay of proceedings until April 25, 2008. The *ex parte* initial order was amended on March 28, 2008. This amended order will be called the "Initial Order." [3]

7 The Initial Order directs FCC to provide a DIP financing facility of $3 million to Stomp repayable in 30 days to be secured in the following manner: (i) an administration charge to a maximum of $100,000 to be allocated on a basis of a 50% charge on Current Assets and a 50% charge on Fixed Assets; and (ii) the balance to be secured 100% on the Current Assets including an expected payment of $1.5 million from the Canadian Agricultural Income Stabilization Program — AgriStability Targeted Payment. Paragraph 34 of the Order reads:

> 34. This Court Orders that the DIP Lender shall be entitled to the benefits of and is hereby granted a charge (the "DIP Lender's Charge") on the inventory (including all livestock and breeding livestock) and accounts receivable of the Applicant, and the Canadian Agricultural Income Stabilization Program-Agri-Stability Targeted Payment (the "Security"), which charge shall not exceed the aggregate amount owed to the DIP Lender under the Commitment Letter, filed. The DIP Lender's Charge shall have the priority set out in paragraphs 45 and 48 hereof. [4]

8 On April 2, 2008, NBC applied for an order substituting it as the DIP lender and allocating the DIP financing equally between the Current Assets and Fixed Assets as initially proposed by Stomp on March 27, 2008 and supported by NBC. In the alternative, NBC asked that the DIP lender's charge be allocated against Stomp's assets according to the recommendation of the Monitor in a formal written report to be prepared.

9 Rothery J. agreed to adjourn the reconsideration application pending completion of a report by the Monitor analyzing Stomp's situation [5] and providing its recommendations on the fair and equitable allocation of the DIP lender's charge and any future DIP financing. [6] As part of this exercise, the Monitor was directed to consider the proportionate amounts of total

aggregate indebtedness of Stomp to each of NBC and FCC and the relative liquidation values and fair market values of Stomp's Current Assets and Fixed Assets. [7]

10 On April 23, 2008, Rothery J. confirmed her original decision to secure the super-priority for the DIP financing on the Current Assets and directed that any future DIP financing be secured 75% on the Current Assets and 25% on the Fixed Assets (the "April 23 Order"). [8] The April 23 Order reads:

> 1. The application by National Bank for an Order varying the Initial Order so as to modify the allocation of the DIP Lender's Charge provided for in the Initial Order as it pertains to the FCC DIP Facility shall be and is hereby dismissed.
>
> 2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 75% to current assets of Stomp Pork Farm Ltd. and 25% to fixed assets of Stomp Pork Farm Ltd. [9]

11 NBC applied immediately for leave to appeal both decisions relating to the Initial and April 23 Orders and for an order that the application for leave to appeal be expedited and heard by a panel of three judges of the Court, who would go on to hear the appeal proper if leave were granted. Chief Justice Klebuc granted such an order on April 28, 2008 directing that the leave application be expedited and added to the list of appeals to be heard during the regular sittings of the Court on May 13, 2008.

12 On May 13, 2008, the Court refused the application for leave to appeal the Initial and April 23 Orders insofar as they pertain to the initial DIP financing. The Court granted leave to appeal the April 23 Order as it pertained to an allocation of priority for future DIP financing. Upon announcing these decisions, counsel for NBC indicated that he wished to consult with his client. On May 14, 2008, counsel advised that NBC's position was that the appeal be allowed and the April 23 Order be amended by substituting para. 2 of that order with the following:

> 2. Any future DIP financing will be on the basis that the DIP Lender is granted a superpriority charge on the assets of Stomp Pork Farm Ltd. on a cost allocation of 50% to current assets of Stomp Pork Farm Ltd. and 50% to fixed assets of Stomp Pork Farm Ltd. [10]

In the alternative, NBC submitted that if the Court were prepared to allow the appeal but were not prepared to grant this form of relief, the appropriate course of action would be that para. 2 of the April 23 Order be vacated in its entirety.

13 On May 22, 2008, the Court advised the parties that it was allowing the appeal from the April 23 Order, as it pertained to future DIP financing, and vacating para. 2 of the April 23 Order in its entirety with reasons to follow.

III. Reasons

1. Reasons for Refusing Leave Pertaining to the Interim Order

14 The Court's jurisdiction to hear this appeal is found in s. 13 of the *CCAA*:

> 13. Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs. [11]

15 In a series of cases emanating first from British Columbia [12] and then from Quebec, [13] Alberta [14] and Ontario, [15] there has developed a consensus among the Courts of Appeal that leave to appeal an order or decision made under the *CCAA* should be granted only where there are serious and arguable grounds that are of real significance and interest to the parties and to the practice in general. [16] The test is often expressed as a four-part one:

> 1. whether the issue on appeal is of significance to the practice;

2. whether the issue raised is of significance to the action itself;

3. whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and,

4. whether the appeal will unduly hinder the progress of the action. [17]

16 There can be no question that the issues raised in this appeal are of significance to the practice. The general question of the allocation of priority between the DIP financer, which is a pre-filing creditor, and the other existing creditors has been little explored by the existing jurisprudence. The particular questions of whether the restructuring judge can allocate priority before the outcome of the restructuring is known, and whether he or she may do so with respect to certain assets and not others, appear to be matters of first instance.

17 Nor can it be questioned that the appeal is of significance to the action. By the decision pertaining to interim financing, NBC has had its priority position significantly affected. Beyond the impact on NBC, however, given the large amount of funding involved, whichever decision the Court were to make on this appeal would be significant to the restructuring. Given the procedure that has been followed, it also cannot be seriously contested that the appeal would unduly hinder the action.

18 It is the third factor, however, that is determinative in deciding whether leave to appeal should be granted in relation to the initial DIP financing.

19 Notwithstanding the fact that the leave application and the appeal proper were heard together, the parties were advised at the commencement of the appeal that the Court would consider the question of leave independently from the merits of the appeal. Admittedly, in a case such as this one, where leave to appeal and the appeal proper are heard together, the line between when a judge grants leave and when a court decides the appeal blurs as the court turns more quickly to questioning counsel on the merits of the appeal and the impact on the restructuring than might otherwise occur in Chambers. There can be no question, however, but that the procedure followed in this case provided a rapid result for the parties.

20 With respect to the initial financing, these factors became controlling for the Court. Rothery J. had before her an application made by the debtor requesting a $3 million facility to be provided by NBC to be secured as a super-priority charge allocated 50% against Current Assets and 50% against Fixed Assets. NBC made its position clear that it was prepared to advance the funds if a priority allocation were made in this manner only. FCC opposed this motion. All parties before the Court, however, agreed that it was imperative funds be advanced within hours if arrangements were to be made for Cargill Ltd. to supplement dwindling food stocks to permit the animals to be fed. It appeared to Rothery J. that the only other possible DIP financer before the Court was FCC. Rothery J. ordered FCC to make a $3 million facility available by the next morning, which facility was to be secured primarily on the Current Assets, but in the event that FCC refused to provide that facility, NBC would be permitted to become the DIP financer, in accordance with its proposal, with a 50/50 allocation against Current and Fixed Assets. In sum, Rothery J. was required to make an order, on extremely short notice, with submissions from all parties including NBC, that immediate financing was required.

21 That brings us to the proceedings adjourned to April 23, 2008 wherein Rothery J. agreed to reconsider the allocation following receipt of full argument and the Monitor's Report. Rothery J. reconsidered her decision and confirmed it. On this occasion, she wrote:

> [1] In my fiat of April 7, 2008, cited at 2008 SKQB 152, I directed the Monitor to file a report with the court "to provide its recommendations on the fair and equitable allocation of any future DIP financing," as stated in paragraph 16 of that fiat. National Bank of Canada ("NBC") had brought a motion for me to vary the debtor-in-possession ("DIP") financing charge, and takes the position that the DIP financing provided by Farm Credit Canada ("FCC") may retroactively be allocated in accordance with the Monitor's recommendations.
>
> [2] With respect to FCC's DIP facility, which expired April 22, 2008, my conclusion remains the same as it was when I initially granted the order for FCC's DIP facility. That is, as stated in para. 15 of the April 7, 2008, fiat, "the initial order

> placed the risk with the security that immediately benefitted from it, that is, the current assets." My conclusions on the risk allocation for that first DIP facility have not been changed by the Monitor's report. Oppositely, the Monitor's report supports my assessment that most of the FCC DIP facility was used to ensure that the pigs continued to be fed and that they were prepared for market. This short term DIP facility was equitably allocated among the creditors to the CCAA application. Any application to vary my original order pertaining to the FCC DIP facility is hereby dismissed.
>
> [3] The issue of risk allocation among the secured creditors at such an early stage in a CCAA proceeding is unique. Indeed, it was the focus of much argument by counsel at the initial order proceeding. Any DIP financing proposed was on the basis of a specific allocation between current and fixed assets. The court was required to decide prior to the initial order being made. The factual background is outlined in my April 7, 2008, fiat. [18]

22 We accept these reasons. At this stage of the proceedings, we might add or emphasize these factors: (i) the only DIP lenders available to the Court were pre-existing filing creditors; (ii) no pre-existing filing creditor was prepared to step forward to provide financing secured on all of the assets of the debtor without a priority allocation being made and incurring the risk that such a decision would entail; (iii) all parties appeared to agree that financing was crucial to ensure the aims of the *CCAA*; and (iv) some $2.2 million of the $3 million facility were ultimately required and had already been expended by the time the appeal was heard. On this last point, we accept the argument of FCC that to change the priorities with respect to funds already expended this early in the process plants an unwelcome seed of uncertainty in the process contemplated by the *CCAA*.

23 In sum, the Court refused leave with respect to the initial DIP financing as the Court would be highly unlikely to intervene and intervention would upset a significant arrangement that was already in place.

2. Reasons for Granting Leave to Appeal the Order Pertaining to Future DIP Financing

24 When we turned to consider whether leave should be granted with respect to the April 23 Order as it pertains to future financing, however, other considerations came to the fore. As with the orders pertaining to the initial financing, the issues raised are of significance to the practice and to the action and the appeal would not unduly hinder the progress of the action, but with respect to future financing the Court was satisfied that the appeal was *prima facie* meritorious. Thus, leave was granted with respect to this part of the April 23 Order.

3. Reasons for Allowing the Appeal Pertaining to Future DIP Financing

25 The Court recognizes that there is a general reluctance on behalf of appellate courts to intervene in decisions taken by restructuring judges in *CCAA* matters. The mix of business and legal decisions made in real time can make it difficult to say, after the fact and with any degree of precision, that one particular decision would have been better than another. Further, the Court is hesitant to elevate a decision in one restructuring to a principle of law that will hamper the appropriate exercise of discretion in another. As Dr. Sarra has said:

> There have been a number of judicial pronouncements on the role of the appellate courts during a *CCAA* proceeding. The British Columbia Court of Appeal in *Doman Industries Ltd.* held that where an order is made by the judge who is supervising the *CCAA* proceedings of the insolvent company from the beginning, the court will be very reluctant to grant leave to appeal the order. The appellate court will exercise its power sparingly when asked to intervene with respect to decisions made during the course of a *CCAA* proceeding, as the *CCAA* judge is undertaking a careful and delicate balancing of numerous interests; and appellate proceedings may upset that balance and frustrate that process. The appellate courts have held that they will be cautious about intervening in *CCAA* proceedings at an early stage, particularly where the order contains a come-back clause that allows parties to bring their concerns regarding a decision to the judge supervising the *CCAA* proceeding. [19] [Emphasis added.]

In this Court, leave has been refused in recent times based on these principles. See: *Community Pork Ventures Inc. v. Canadian Imperial Bank of Commerce* [20] and *ICR Commercial Real Estate (Regina) Ltd. v. Bricore Land Group Ltd.* [21]

26 Notwithstanding this high level of deference, as Dr. Sarra indicates, appellate courts will intervene in certain cases:

> Appellate courts will accord a high degree of deference when asked to interfere with the exercise of discretion of a *CCAA* court. At the same time, discretionary decisions are not immune from review if the appellate court reaches the clear conclusion that there has been a wrongful exercise of discretion or there is a fundamental question of the lower court's jurisdiction. Leave will be refused by the appellate court [if] the appeal is of no general significance to the practice and where granting leave would disrupt the proposed plan that has been approved by the creditors.[22] [Emphasis added]

27 As Newbury J.A. stated in *New Skeena Forest Products Inc., Re*,[23] discretionary decisions in this area are not immune from review. Quoting from Viscount Simon L.C. in *Charles Osenton & Co. v. Johnston*,[24] she wrote:

> [20] ... At the same time, discretionary decisions are not immune from review. As Viscount Simon L.C. stated in the same case:
>
> > But if the appellate tribunal reaches the clear conclusion that there has been a wrongful exercise of discretion in that no weight, or no sufficient weight, has been given to relevant considerations such as those urged before us by the appellant, then the reversal of the order on appeal may be justified. [at 138]
>
> (See also *Harelkin v. University of Regina*, [1979] 2 S.C.R. 561 at 588, where it was said that in refusing to take into consideration a "major element for the determination of the case", the trial judge had failed to exercise his discretion on relevant grounds and thus gave the Court of Appeal "no choice" but to intervene.)[25] [Emphasis added]

28 It is now well established that a superior court supervising the restructuring of an insolvent corporation under the *CCAA* may confer upon a lender, providing DIP financing to the insolvent corporation, the benefit of a court-ordered "super-priority" charge on the assets of the insolvent corporation and that, in certain circumstances, the DIP lender's charge may rank in priority to the existing security held by secured creditors of the insolvent corporation. It is sufficient to cite as an example in support of this proposition the most recent decision on point: *Temple City Housing Inc., Re*[26]

29 While the above aspect of the law appears settled, few reported decisions consider the question of the appropriate allocation of DIP financing as between major secured creditors of the corporate debtor. Some principles are, however, more clear than others. The leading decision is *Hunters Trailer & Marine Ltd., Re*[27]

30 The basic determination that a *CCAA* judge must make in deciding how to allocate the DIP financing charge amongst the assets of the debtor is what allocation would be most equitable, a task that is left initially to the discretion of the *CCAA* judge:

> 15 Equity informs the decisions made by courts in the exercise of their jurisdiction under the *CCAA*. While each case must be judged on its own facts, in my view it is equitable in the present case that all of the major secured creditors be liable for a portion of the *CCAA* costs. That is not to say that equity call for an equal allocation of costs.[28]

The equitable allocation of a DIP financing charge will need to balance, among other things, the creditors' various positions, the purpose of the DIP financing in particular and the *CCAA* regime in general:

> ... The court, in balancing prejudices, will weigh the possibility of a going-concern solution that potentially creates long-term upside value for numerous stakeholders, with the risk of further depletion of value that may be able to satisfy claims on a short-term basis. This balancing of interest and prejudice is at the heart of most financing judgments. Notwithstanding these potential benefits to all stakeholders, absent careful scrutiny of the terms of the DIP financing agreement, granting access to short-term capital can increase the risk of harm to stakeholders if the terms approved by the court lead to a *CCAA* plan that prejudices their interests more than a liquidation outcome.[29] [Emphasis added.]

31 In *Hunters Trailer & Marine Ltd.*, the Court altered the allocation of the charge in relation to DIP financing near the end of the process, noting that the restructuring process was for the benefit, or potential benefit, of all creditors, including the creditor whose only security was in the real property. The Court appeared to allocate the charge on the basis of the extent of the benefit, or potential benefit, to the creditor of the DIP financing in relation to the assets over which it held a security:

> [20] I agree that it would be unfair to ignore differences in the type of security held by various creditors and the degree of potential benefit that might be derived by them from *CCAA* proceedings. The *CCAA* recognizes that there may be different classes of creditors for purposes of voting on a plan of arrangement or compromise. Would UMC as first and second mortgagee of Hunters' real property have been placed in a different class than the other secured creditors? There is no significant difference in the nature of the debt giving rise to the claim. However, there is a difference in the nature and priority of UMC's security, the remedies that were available to it and the extent of its recovery.
>
> . . . . .
>
> [22] Under the Interim Receiver's proposal, UMC is not allocated any of the DIP financing costs. The Interim Receiver and UMC take the position that UMC received no benefit from the DIP financing and therefore should not be required to contribute to repayment of these funds.
>
> [23] Not only UMC but all of the secured creditors can point to costs that cannot be attributed to the assets over which they hold security. However, DIP financing was granted to meet the debtor company's urgent needs during the sorting-out period. That was for the benefit, at least the potential benefit, of all creditors.
>
> [24] Approximately 62 percent of the DIP financing to October 31, 2001 was used for wages. Outside of bankruptcy, wages would have no priority to UMC's interest in Hunters' real property but would have priority to the personal property interests of the other secured creditors. Nevertheless, certain of those wages may be attributable to building maintenance. In addition, some of the DIP financing was used in order to provide security on the premises.
>
> [25] An additional 20 percent of the DIP financing was applied to life insurance premiums. Strictly speaking, not all of the premiums can be considered *CCAA* costs as the premiums continue to be paid from the monies advanced for DIP financing. UMC holds an assignment on one of the life insurance policies. While it has made full recovery on the debt owing through the sale of Hunters' land holdings, at the outset of the *CCAA* proceedings there could have been no certainty as to the sale price of the land or UMC's share of the *CCAA* costs. Protecting their security in the life insurance policy by payment of the monthly premiums was at least of potential benefit to UMC, particularly given that UMC may wish to look to this security in the event that its allocation of *CCAA* costs exceeds the amount remaining from sale of Hunters' real property after payment of the initial debt.
>
> [26] I am of the view that UMC must bear a proportion of the DIP financing costs. I recognize that any means of calculating that percentage will be arbitrary. A strict accounting on a cost-benefit basis would be impractical. I am prepared to allocate five percent of the DIP financing costs to UMC, in addition to that share of the Monitor's fees and legal expenses identified above. [30]
>
> [Emphasis added]

Dr. Sarra makes the following observation about *Hunters Trailer*:

> The court's recognition of the need for an equitable allocation is aimed at a mid-ground between one creditor bearing all the costs and all creditors sharing equally. The notion that financing is a potential benefit to all creditors is critical to the equitable allocation of costs. [31]

32 Turning to the case at hand, only some statements may be made with certainty. There is in place a *pari passu* agreement between the principal lenders NBC and FCC. The nature of this arrangement is discussed fully in the decisions under appeal.

33 The estimated liquidation value of the Current Assets of Stomp, identified by the Monitor, ranges from a low of $12,949,616 and a high of $12,974,232. [32] The estimated liquidation value of the Fixed Assets of Stomp, identified by the Monitor, ranges between a low of $11,056,000 and a high of $13,004,000. [33]

34 The Monitor's Second Report concluded with the following recommendation as to the equitable method of allocating the DIP Lender's Charge: [34]

> There is no prescribed formula and any means of calculating the allocation of a DIP Lenders Charge will be arbitrary. Section 9 outlines that 93.6% of DIP financing is projected to apply towards Current Assets. However, it is important to appreciate that the Fixed Assets stand to gain a significant increase in value through a successful CCAA.
>
> All things considered, it is suggested that allocating the cost of the DIP Lenders Charge equally to Fixed Assets and Current Assets is a fair and equitable approach.
>
> Applying the 85/15 split under the *Pari Passu* agreement would result in NBC's share being 57.5% and FCC responsible for 42.5% of the DIP Lenders Charge.
>
> [Emphasis added]

FCC, as might be expected, resists the Monitor's conclusion that it will derive any benefit from the restructuring, on the basis that it is prepared to ride out the current economic cycle, with or without hogs, until such time as the Fixed Assets can be sold. There is, of course, no evidence of this and the Monitor's Report appears at this time to be the best evidence of a contrary position.

35 When Rothery J. made her initial decision, she was presented with no case law and little evidence beyond that which was necessary to demonstrate that if an order were to be made under s. 11 of the *CCAA*, it had to be accompanied by a DIP financing order. Then, by April 23, indeed by April 7, the DIP funds had been expended in accordance with a priority regime that accorded FCC priority. The same points cannot be made in relation to the future DIP financing.

36 With respect to future financing, there is no immediate urgency and, with the benefit of case law, evidence and the Monitor's Reports, it can be said that it is premature to make an allocation of the priority between the secured creditors, and indeed such an allocation appears speculative at this time.

37 None of the parties before this Court, including Stomp and FCC, argued in support of a split of 75% and 25%. With the benefit of full argument, it became apparent to all that the question of how to allocate the priority of the future DIP financing would best be left to further negotiation, and decision if necessary, as the restructuring process unfolds.

38 NBC and FCC will each bear their own costs. If there is any issue with respect to the costs of the other parties, an application may be transmitted to the panel through the office of the Registrar.

Appeal allowed in part.

Footnotes

1 R.S.C. 1985, c. C-36.

2 Appeal Book, Vol. 2, pp. 180a and 182a, Affidavit of Ivan Stomp sworn March 26, 2008, paras. 4, 5 and 19.

3 Appeal Book, pp. 13a-35a, Amended Ex Parte Initial Order issued March 28, 2008.

4 *Ibid*., p. 27a.

5 2008 SKQB 152 (Sask. Q.B.), para. 15.

6 *Ibid.* para. 16.

7 *Ibid.*

8 2008 SKQB 179 (Sask. Q.B.), paras. 2 and 10.

9 April 23 Order, Appeal Book, p. 169a.

10 Letter dated May 14, 2008 to the Registrar, Court of Appeal.

11 *CCAA*, *supra* note 1.

12 *Pacific National Lease Holding Corp., Re* (1992), 15 C.B.R. (3d) 265 (B.C. C.A. [In Chambers]).

13 *Cavendish Shopping Centre Co. v. Bertrand*, [1993] Q.J. No. 860 (Que. C.A.) [hereinafter Steinberg].

14 *Multitech Warehouse Direct Inc. (Re)* (1995), 32 Alta. L.R. (3d) 62 (Alta. C.A.); *Blue Range Resource Corp., Re* (1999), 1999 ABCA 255, 244 A.R. 103 (Alta. C.A.); *Canadian Airlines Corp., Re* (2000), 2000 ABCA 149, 80 Alta. L.R. (3d) 213 (Alta. C.A. [In Chambers]).

15 *Algoma Steel Inc.* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.).

16 See, for example, *Multitech*, *supra* note 14 at para. 3, summarizing *Steinberg*, *supra* note 13.

17 *Blue Range*, *supra* note 14 at para. 4; *Stelco Inc. (Re)* (2005), 78 O.R. (3d) 254 (Ont. C.A.) at para. 13; *Minister of National Revenue v. Temple City Housing Inc.*, 2008 ABCA 1, 422 A.R. 4 (Alta. C.A.) at para. 12.

18 2008 SKQB 179 (Sask. Q.B.), *supra* note 8.

19 Janis P. Sarra, *Rescue! The Companies' Creditors Arrangement Act* (Toronto: Thomson Carswell, 2007) at 89 [footnotes omitted].

20 2005 SKCA 78 (Sask. C.A. [In Chambers]).

21 2007 SKCA 72 (Sask. C.A.)at para. 49, [2007] 9 W.W.R. 79 (Sask. C.A.).

22 Sarra, *supra* note 19 at 89 [footnotes omitted].

23 2005 BCCA 192, [2005] 8 W.W.R. 224 (B.C. C.A.).

24 [1941] 2 All E.R. 245 (U.K. H.L.).

25 *New Skeena*, *supra* note 23.

26 2007 ABQB 786 (Alta. Q.B.), affirmed *Temple*, *supra* note 17. The Court also notes that Bill C-12, *An Act to amend the Bankruptcy and Insolvency Act, the Companies' Creditors Arrangement Act, the Wage Earner Protection Program Act and chapter 47 of the Statutes of Canada, 2005*, 39th Parliament, 2d Session, 2007, received Royal Assent on December 14, 2007, but it is not in force as the *Act* it amends, being *An Act to establish the Wage Earner Protection Program Act, to amend the Bankruptcy and Insolvency Act and the Companies' Creditors Arrangement Act and to make consequential amendments to other Acts*, S.C. 2005, c. 47 is not yet in force. When these amendments come into effect, they will confirm an authority that the courts have been exercising for some time.

27 , (2001), 2001 ABQB 1094, 305 A.R. 175 (Alta. Q.B.).

28 *Ibid.*

29 Sarra, *supra* note 19 at 96-97 [footnotes omitted].

30 *Hunters Trailer*, *supra* note 27.

31 Sarra, *supra*, note 19 at 112.

32 Appeal Book, Vol. 1, p. 94a, Monitor's Second Report, s. 8.1.2.3.

33 *Ibid*., p. 95a, s. 8.2.

34 *Ibid*., pp. 99a and 100a, s. 13.0.

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Tab 5

2022 ONCA 607
Ontario Court of Appeal

Mundo Media Ltd. (Re)

2022 CarswellOnt 11824, 2022 ONCA 607, 2022 A.C.W.S. 3568, 2 C.B.R. (7th) 8

In the Matter of Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended, and in the matter of Section 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended

Royal Bank of Canada (Applicant) and Mundo Media Ltd., Mundo Inc., 2538853 Ontario Ltd., 2518769 Ontario Ltd., 2307521 Ontario Inc., 36 Labs, LLC., Active Signal Marketing, LLC, Find Click Engage, LLC, FLI Digital, Inc., Mundo Media (US), LLC, M Zone Marketing Inc., Appthis Holdings, Inc., Movil Wave S.A.R.L., Mundo Media (Luxembourg) S.A.R.L., and Mogenio S.A. (Respondents)

J.A. Thorburn J.A.

Heard: July 25, 2022
Judgment: August 22, 2022
Docket: CA M53436

Proceedings: refusing leave to appeal *Royal Bank of Canada v. Mundo Media Ltd.* (2022), 99 C.B.R. (6th) 221, 2022 ONSC 21472022 CarswellOnt 6024, Penny J. (Ont. S.C.J. [Commercial List])

Counsel: Matthew P. Gottlieb, Bradley Vermeersch, Xin Lu (Crystal) Li, for Moving Party, SPay Inc.
Scott McGrath, Rachel Nicholson, Stuart Clinton, for Responding Party, Ernst & Young Inc., solely in its capacity as the court-appointed receiver of Mundo Media Ltd. and its subsidiaries

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.1 Stay of proceedings
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Stay of proceedings
Debtor was placed in receivership by court order issued under s. 243 of Bankruptcy and Insolvency Act (BIA) — Appointment order authorized receiver to exercise all remedies available to debtor to collect money owed to it and to prosecute proceedings with respect to debtor and its property — SP had contracts with debtor, receiver claimed that SP owed debtor $4,124,000, and it proposed to assert claim on behalf of debtor's creditors by motion for judgment in receivership proceedings in Ontario — SP claimed it was owed substantial money by debtor which it would be asserting by way of set-off in any collection proceedings brought by receiver — SP's motion seeking stay of receiver's motion for judgment and direction that receiver must pursue any claim against it by way of arbitration in New York was dismissed — Trial judge found debtor and SP were parties to arbitration agreement and subject matter of dispute fell within terms of arbitration clause — Trial judge found it was impractical for question of whether claims should be dealt with by New York arbitrator to be referred to arbitration, and issue must be decided in Ontario receivership proceedings — Trial judge found claims by debtor against third party may be required to be heard in insolvency proceedings rather than in jurisdiction or proceedings that would otherwise have applied, and determining factor was degree of connection of claim to insolvency proceeding — Trial judge found s. 243 of BIA provides supervising judges with broadest possible mandate in insolvency proceedings to enable them to react to unique circumstances of each case and to do what justice dictated and practicality demanded — Trial judge found SP also threatened to assert its own claim against debtor for money

owing to it by way of defence or set-off — Trial judge found SP would not suffer any prejudice by requiring it to defend and assert set-off in these proceedings — SP brought motion for leave to appeal — Motion dismissed — No error in finding that matter should be heard by court — Arbitrator was not sole arbiter of arbitrability — Only court can determine receiver's powers and obligations, which includes determining whether receiver has authority to prosecute debt through single proceeding model — Although International Commercial Arbitration Act (ICAA) requires stay in favour of arbitration agreement, legislation expressly provides room for courts to find that agreement is inoperative — Single proceedings were preferable — SP was third party to insolvency proceeding, but was also owed most to debtor, and was not stranger to bankruptcy because outcome of its proposed set-off would determine amount of single biggest account receivable and size of bankrupt's estate affecting all other creditors — Allowing appeal to proceed would result in undue delay, additional litigation costs and deterioration of assets of receivership.

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Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — referred to

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Cosa Nova Fashions Ltd. v. The Midas Investment Corporation (2021), 2021 ONCA 581, 2021 CarswellOnt 11909, 95 C.B.R. (6th) 240 (Ont. C.A.) — referred to

Eagle River International Ltd., Re (2001), 2001 SCC 92, 2001 CarswellQue 2725, 2001 CarswellQue 2726, 30 C.B.R. (4th) 105, *(*sub nom. *Sam Lévy & Associates Inc. v. Azco Mining Inc.)* 207 D.L.R. (4th) 385, *(*sub nom. *Lévy (Sam) & Associés Inc. v. Azco Mining Inc.)* 280 N.R. 155, *(*sub nom. *Sam Lévy & Associés Inc. v. Azco Mining Inc.)* [2001] 3 S.C.R. 978, 2001 CSC 92 (S.C.C.) — referred to

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s. 193(a)-193(d) — referred to

s. 193(e) — considered

s. 243 — referred to

International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sched. 5

Generally — referred to

Sched. 2 — referred to

Sched. 2, Article 8 — referred to

Treaties considered:

UNCITRAL Model Law on International Commercial Arbitration, 1985, 24 I.L.M. 1302

Generally — referred to

Proceeding: Motion/Application for Leave to Appeal.

MOTION by business for leave to appeal judgment reported at *Royal Bank of Canada v. Mundo Media Ltd.* (2022), 2022 ONSC 2147, 2022 CarswellOnt 6024, 99 C.B.R. (6th) 221 (Ont. S.C.J. [Commercial List]), dismissing stay of motion for judgment in matter related to bankruptcy.

***J.A. Thorburn J.A.*:**

OVERVIEW

1 The issue to be decided on this motion is whether the moving party, SPay Inc. ("SPay"), should be granted leave to appeal the motion judge's decision not to stay the receiver's motion for judgment.

2 On April 9, 2019, Mundo Media Ltd. ("Mundo") was placed in receivership by the Ontario Superior Court of Justice pursuant to s. 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B–3, as amended (the "*BIA*"). The responding party, Ernst & Young Inc., is the court-appointed receiver and manager of all assets belonging to Mundo and its subsidiaries (the "receiver").

3 The receiver brought a motion for an order directing SPay to pay US$4,124,000 to Mundo for a number of unpaid invoices, pursuant to contractual agreements between Mundo and SPay or its predecessor. These agreements were signed in 2017, prior to the receivership.

4 SPay sought to stay the receiver's motion on the basis that the agreements contain an international commercial arbitration clause which requires all disputes to be resolved by arbitration in New York pursuant to New York law.

5 The motion judge refused SPay's request. He held that the arbitration provisions in the agreements were rendered inoperative by the "single proceeding model" in Ontario.

6 The single proceeding model applies to insolvency proceedings. This model favours litigation concerning an insolvent company to be dealt with in a single jurisdiction rather than fragmented across separate proceedings. A creditor "who cannot claim to be a 'stranger to the bankruptcy', has the burden of demonstrating 'sufficient cause'" to have the proceedings fragmented across multiple jurisdictions: Sam Lévy & Associés Inc. v. Azco Mining Inc., 2001 SCC 92, [2001] 3 S.C.R. 978, at para. 76.

7 The motion judge held that SPay is not a "stranger" to the insolvency proceeding as it will seek to set off some or all of the monies owing to Mundo. As such, it is part of the single proceeding model.

8 SPay claims that the proposed appeal should be allowed to proceed as it meets the three-prong test for granting leave to appeal: (i) there is a real prospect of success as SPay is a stranger to the bankruptcy and its set-off does not render it an interested party to the proceeding; (ii) the proposed appeal involves an issue of public importance that will provide guidance to receivers, third parties and insolvency courts in addressing the enforceability of international arbitration agreements with third parties where a defence of set-off is raised by the third party; and (iii) the short time required to hear the appeal will not prejudice the receiver.

9 The receiver claims the chances of success are unlikely as SPay's intended set-off of Mundo's single largest account receivable is in substance a claim such that it should be part of one proceeding along with all other creditors of Mundo, as contemplated by the single proceeding model. The receiver further claims that this appeal does not involve a matter of general importance; rather, the decision below is rooted in the motion judge's specific findings of fact, to which deference is owed. Moreover, the receiver claims that allowing the motion for leave to appeal would result in undue delay and additional costs.

10 For the reasons that follow, the motion for leave to appeal is dismissed.

BACKGROUND FACTS

11 The moving party, SPay, is a sports management technology company incorporated in Delaware and headquartered in Texas. It provides an integrated technology platform for sports league management, payment administration, sports recruiting, event support and sponsorship.

12 Mundo is an advertising technology company that provided online marketing services to clients. It carried on business in Canada, the United States and Luxembourg.

13 In or around March 2017, Mundo began to provide SPay's predecessor, Stack Media, Inc. with services, the terms of which were set out in a Publisher Agreement and a Maintenance and Support Agreement, both executed in July 2017. Each agreement contains an identical arbitration clause which requires all disputes, including the arbitrability of the dispute, to be determined by arbitration in New York. The substantive law of the contracts is New York law.

14 On April 9, 2019, as a result of Mundo's substantial decline in revenue, the Superior Court of Justice appointed the receiver. The receiver was authorized to take all necessary steps to collect Mundo's accounts receivable.

15 The receiver claims that SPay owed Mundo US$4,124,000 as of the date of the appointment order. According to the receiver, this is Mundo's biggest account receivable.

16 SPay claims that certain amounts were incurred by Stack Media Inc. before SPay bought that corporation's assets, and that the remaining amount owing, if any, would be set off against the amount that Mundo owes to SPay. SPay has not commenced any set-off proceedings against Mundo.

17 On May 10, 2021, after making efforts to collect the account receivable for two years, the receiver brought a motion directing SPay to pay Mundo US$4,124,000. The receiver filed no evidence on the motion.

18 On June 30, 2021, SPay moved to stay the receiver's motion in favour of arbitration in New York pursuant to the arbitration clauses in the agreements and the *UNCITRAL Model Law on International Commercial Arbitration*, adopted by the United Nations Commission on International Trade Law on June 21, 1985, as amended on July 7, 2006 (the "*UNCITRAL Model Law*"). The *UNCITRAL Model Law* is incorporated by reference in the International Commercial Arbitration Act, 2017, S.O. 2017, c. 2, Sch. 5 (the "*ICAA*"), giving it the force of law in Ontario: s. 5.

19 The *ICAA* requires the court to refer a matter to arbitration upon a party's request, unless there are grounds on which the court should refuse the stay. A stay must be granted unless there is some cogent reason to ignore the express terms of the arbitration clause, such as "the agreement is null and void, inoperative or incapable of being performed": *ICAA*, at Schedule 2, art. 8.

20 The motion judge framed the substantive issue to be determined on the motion as follows:

> [D]oes the fact that claims by and against Mundo are being administered by the court-appointed Receiver in insolvency proceedings in Ontario under the BIA mean that the arbitration agreements between SPay and [Mundo] are rendered null and void, inoperative or incapable of being performed? The answer to this question, in my view, turns on the applicability of the single proceeding model to the circumstances of this case.

21 SPay argued that the single proceeding model is only meant to centralize claims by creditors *against* a debtor, not claims *by* a debtor against third parties. SPay filed expert evidence that under New York law the arbitration clauses in the agreements would be enforced even if the plaintiff was bankrupt, and that a receiver is generally bound by arbitration agreements executed prior to an appointment order. SPay claimed that it was not a creditor, as a set-off is a defence rather than a claim against the debtor. As such, SPay asserted that the single proceeding model should not apply to it.

THE MOTION JUDGE'S REASONS

22 There was no dispute that the receivership proceedings were properly commenced in Ontario, or that the receiver's claim related to monies owed to Mundo and the prosecution of proceedings to recover same.

23 The motion judge held that it would be impracticable to have an arbitrator in New York decide the question of whether a receiver appointed by an Ontario court is bound by an arbitration clause in the context of insolvency proceedings. The motion judge explained that the receiver is an officer of the Ontario court and answers only to that court.

24 The motion judge then addressed whether the arbitration clauses in the agreements were rendered null and void, inoperative or incapable of being performed by virtue of the single proceeding model. He noted that "the single proceeding model . . . is not strictly limited to claims against a debtor; it also applies to claims advanced by the debtor against a third party." He further noted that, in cases where the third party is not a stranger to the bankruptcy, courts have invoked the single proceeding model to allow a claim by a debtor against a third party to be commenced in the jurisdiction where the bankruptcy occurred, referring to Re: Essar Steel Algoma Inc. Et al,2016 ONSC 595, 33 C.B.R. (6th) 313, at para. 31, and Montréal, Maine & Atlantic Canada Co., 2013 QCCS 5194, at para. 29.

25 The motion judge held that the "determining factor" in deciding whether a party is a stranger to the proceeding "is the degree of connection of the claim to the insolvency proceedings."

26 The motion judge held that SPay was not a stranger to the proceeding because: (i) the receiver was seeking to realize on a significant Mundo asset for the benefit of all creditors; (ii) SPay "intends to assert . . . its own claim against Mundo by way of the defence of set-off"; and (iii) "nothing turns on whether the money SPay claims to be owed under the Publisher Agreement is a counterclaim or set-off. It is in substance a claim against Mundo."

27 For these reasons, on April 26, 2022, the motion judge dismissed the motion to stay the receiver's claim to collect against SPay, holding as follows:

> Requiring the Receiver to commence arbitration proceedings in New York would be unfair to Mundo's creditors and inconsistent with the object of the BIA to, among other things, enhance efficiency and consistency and avoid the chaos and inefficiency of multiple proceedings and of potentially sending the Receiver "scurrying to multiple jurisdictions".

THE TEST TO BE MET ON LEAVE TO APPEAL

28 SPay requires leave of this court to pursue an appeal pursuant to s. 193(e) of the BIA. Sections 193(a)-(d) of the BIA provide that an appeal lies to the Court of Appeal from an order of the court in specified scenarios, barring which there is no automatic right to appeal. Instead, leave to appeal may be granted by a judge of the Court of Appeal "in any other case", pursuant to s. 193(e) of the BIA. Thus, leave is required in this case and a single judge of this court can determine whether leave should be granted.

29 On a motion for leave to appeal under s. 193(e) of the BIA, the moving party must satisfy three criteria, as set out by Blair J.A. in Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29.

30 First, the proposed appeal must be *prima facie* meritorious; that is, the proposed appeal must raise "legitimately arguable points . . . so as to create a realistic possibility of success on the appeal": see Ravelston Corp. (Re)200524 C.B.R. (5th) 256 (Ont. C.A.), at para. 29. This can include a finding that the decision "(a) appears to be contrary to law, (b) amounts to an abuse of judicial power or (c) involves an obvious error causing prejudice for which there is no remedy": *Pine Tree Resorts*, at para. 31. Of course, this assessment needs to be conducted against the backdrop of s. 243 of the BIA, which has been interpreted to give supervising judges a broad mandate to resolve issues in bankruptcy: see Third Eye Capital Corporation v. Ressources Dianor Inc./Dianor Resources Inc., 2019 ONCA 508, 435 D.L.R. (4th) 416, at paras. 57–58. Commercial list judges with experience in insolvency proceedings are alive to the legal and business realities faced by debtors, creditors and the receiver, and substantial deference is therefore owed to their decisions: see Romspen Investment Corporation v. Courtice Auto Wreckers Limited, 2017 ONCA 301, 138 O.R. (3d) 373, at para. 84, leave to appeal refused, [2017] S.C.C.A. No. 238, referring to *Royal Crest Lifecare*

Group Inc. (Re), (2004), 181 O.A.C. 115 (C.A.), at para. 23, leave to appeal refused, [2004] S.C.C.A. No. 104, and Grant Forest Products Inc. v. The Toronto-Dominion Bank, 2015 ONCA 570, 387 D.L.R. (4th) 426, at paras. 97–99.

31 Second, the proposed appeal must raise an issue or issues of general importance.

32 Third, the proposed appeal must not unduly delay the progress of the proceedings: Cosa Nova Fashions Ltd. v. The Midas Investment Corporation, 2021 ONCA 581, 95 C.B.R. (6th) 240, at para. 37, citing Marchant Realty Partners Inc. v. 2407553 Ontario Inc., 2021 ONCA 375, 90 C.B.R. (6th) 39, at para. 12, *Pine Tree Resorts, at para. 29, and* McEwen (Re), 2020 ONCA 511, 452 D.L.R. (4th) 248, at para. 76.

ANALYSIS AND CONCLUSION

33 In determining whether SPay's proposed grounds of appeal are *prima facie* meritorious, the first question is whether the motion judge erred in holding that, as a matter of law, the issue of arbitrability should be decided by the motion judge rather than an arbitrator.

34 SPay claims that, as a general rule, mandatory arbitration provisions shall apply absent "very clear language" to the contrary: *Automatic Systems Inc. v. Bracknell Corp.*, (1994), 18 O.R. (3d) 257 (C.A.), at p. 266; see also Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34, [2007] 2 S.C.R. 801, at paras. 84–85, and Uber Technologies Inc. v. Heller, 2020 SCC 16, 447 D.L.R. (4th) 179, at para. 34, citing Rogers Wireless Inc. v. Muroff, 2007 SCC 35, [2007] 2 S.C.R. 921, at para. 11.

35 However, the receiver is appointed by the court and the receiver's authority emanates solely from the court order. As a matter of law therefore, only the court can determine the receiver's powers and obligations, which includes determining whether the receiver has the authority to prosecute the debt through the single proceeding model.

36 The court must therefore assess the limits on the receiver's powers pursuant to the court order, including whether the presence of an arbitration clause precludes the receiver from asserting claims by the debtor against third parties not involved in the insolvency proceeding under the agreement in which that clause is found: see Canada (Attorney General) v. Reliance Insurance Co.(2007), 87 O.R. (3d) 42 (S.C.), at pp. 51–54; Luscar Ltd. v. Smoky River Coal Ltd., 1999 ABCA 179, 175 D.L.R (4th) 703, at para. 33, leave to appeal requested but application for leave discontinued, [1999] S.C.C.A. No. 381.

37 Moreover, although article 8 of Schedule 2 to the ICAA requires a stay in favour of the arbitration agreement, the legislation expressly provides room for courts to "find[] that the agreement is . . . inoperative". This express carve-out, read in conjunction with the broad discretion that courts exercise under s. 243 of the BIA in supervising bankruptcy matters, enables bankruptcy courts to preclude the operation of the *ICAA* by virtue of the operation of the single proceeding model.

38 As such, I find the first ground of the proposed appeal is not *prima facie* meritorious.

39 The second ground of the proposed appeal is whether SPay is a stranger to the insolvency proceeding such that the arbitration between the debtor (Mundo) and the third party (SPay) should be permitted to proceed. As noted by the motion judge, "The answer to this question, in my view, turns on the applicability of the single proceeding model to the circumstances of this case." [1]

40 The single proceeding model is a judicial construct used to group all claims against a debtor. The objective of the single proceeding model is to bring efficiency to the insolvency process and maximize returns for the benefit of all creditors: see Century Services Inc. v. Canada (Attorney General), 2010 SCC 60, [2010] 3 S.C.R. 379, at para. 22, citing Roderick J. Wood, *Bankruptcy and Insolvency Law* (Toronto: Irwin Law, 2009), at pp. 2–3; *Rompsen Investment Corporation*, at para. 70.

41 The advantages of the single proceeding model were outlined by Deschamps J. in Century Services, at para. 22:

> The single proceeding model avoids the inefficiency and chaos that would attend insolvency if each creditor initiated proceedings to recover its debt. Grouping all possible actions against the debtor into a single proceeding controlled in a single forum facilitates negotiation with creditors because it places them all on an equal footing, rather than exposing them

> to the risk that a more aggressive creditor will realize its claims against the debtor's limited assets while the other creditors attempt a compromise. With a view to achieving that purpose, . . . the *BIA* allow[s] a court to order all actions against a debtor to be stayed while a compromise is sought. [Emphasis added.]

42 In *Essar Steel*, at paras. 31 and 33, Newbould J. outlined the considerations to be taken into account when applying the single proceeding model to third parties:

> [In this case, the] issues are completely interwoven and it would make no sense to require [the applicants] to litigate its claim against [the moving parties] in the United States when [the moving parties'] claim against [the applicants] must be dealt with in this Court in Ontario. The claim of [the applicants] against [the moving parties] is an asset of the applicants to be dealt with in this Court.
>
> . . .
>
> For the single control model to apply, the [third party] . . . must not be a stranger to the insolvency proceedings. [Emphasis added; footnotes omitted.]

See also: *Montréal, Maine & Atlantic Canada Co.* , at para. 29.

43 SPay claims that it is a stranger to this proceeding because: (i) it has not filed a claim against Mundo; and (ii) it proposes to assert a set-off rather than make a claim. A set-off is a defence, SPay submits, and there is no suggestion that the monies SPay claims it is owed exceed the amount payable by SPay to Mundo. SPay states that it does not intend to issue a claim against Mundo, file a proof of claim or receive a distribution from the estate: see P.I.A. Investments Inc. v. Deerhurst Ltd. Partnership200020 C.B.R. (4th) 116 (Ont. C.A.), at para. 32; Thorne v. College of the North Atlantic, 2022 NLCA 31, at para. 15.

44 SPay does not dispute that, had it commenced an action against Mundo, SPay would then be a creditor subject to the single proceeding model.

45 The question then is, what difference does it make, if any, that the third party seeks to reduce or eliminate the amount payable to the debtor by way of a set-off but does not issue a claim seeking those same monies from the debtor?

46 Canadian jurisprudence distinguishes between a set-off defence and a claim, and further, between legal and equitable set-off: *P.I.A. Investments Inc.* , at para 32. However, the form of a proceeding may be less significant in the context of bankruptcy as the treatment of the bankrupt estate's largest account receivable is inextricably interwoven with the bankruptcy proceeding.

47 As noted by Zarnett J.A. of this court, "Although equitable set-off is a defence, . . . [i]t is a way of raising, as a defence, a plaintiff's liability to take into account a loss it occasioned to the defendant in reduction of the plaintiff's claim. It is often referred to as a 'claim for equitable set-off'": 3113736 Canada Ltd. v. Cozy Corner Bedding Inc., 2020 ONCA 235, 150 O.R. (3d) 83, at para. 37.

48 It would seem therefore that the format of the proceeding is not determinative. The fact that a claim is made by a third party by way of a set-off to recover monies from a debtor may be of great significance to all creditors in the single proceeding model; this is particularly so where the debtor's largest account receivable is at stake. To approach this matter differently would defeat the purpose of the "single proceeding model", which is intended to "avoid the inefficiency and chaos" of a decentralized receivership process: *Century Services* , at para. 22.

49 In this case, SPay is a third party to the insolvency proceeding, but is also Mundo's largest debtor. The receiver claims that SPay owes Mundo US$4,124,000 as of the date of the appointment order. SPay's proposed set-off may, if successful, eliminate all debt owing by SPay to Mundo.

50 SPay is not a stranger to bankruptcy because the outcome of its proposed set-off will determine both the amount of Mundo's single biggest account receivable and the size of the bankrupt's estate, thereby affecting all other creditors. As noted

by the Supreme Court, the most significant debtor of a bankrupt estate is "[f]ar from being a 'stranger' to the bankruptcy": *Sam Lévy* , at para. 49.

51 Whether SPay initiates a claim or claims a set-off, it will inevitably step into the shoes of Mundo's creditor, and should therefore be treated in the same way as all other unsecured creditors under a single proceeding. The form of proceeding does not change SPay's substantive role in this regard as a creditor of Mundo. SPay should not be entitled to use the form of proceeding to obtain priority where none is otherwise warranted as this would violate the basic principle of equal treatment in bankruptcy. As noted by the motion judge, if SPay's dispute with Mundo is not brought within the single proceeding model, the purpose of this model, to avoid the chaos and inefficiency of a decentralized receivership process, would be defeated.

52 I appreciate that the single proceeding model is typically used as a 'shield' to protect debtors from having to defend claims in multiple proceedings or jurisdictions, rather than as a 'sword' to enable receivers to pursue claims against a third party. However, I see nothing in the jurisprudence precluding this result. On the contrary, the motion judge identified two decisions — *Essar Steel* and *Montréal, Maine & Atlantic Canada Co.* — which employed the single proceeding model in the very manner contested by the moving party. The motion judge's decision is also in keeping with the purpose of the single proceeding model as outlined by the Supreme Court in *Century Services* — to promote efficiency and maximize returns for creditors — and accords with the jurisprudence that parties should not be allowed to contract out of the single proceeding model where one party may make claims that will seriously adversely affect all creditors. I see no principled reason for drawing the distinction urged by the moving party.

53 I note that the motion judge did not state that set-offs always, or even often, render a third party part of the single proceeding model. Rather, he held that "claims by a debtor against a third party *may* be required to be heard in the insolvency proceedings", and that "[t]he determining factor is the degree of connection of the claim to the insolvency proceedings". The "dominating considerations" for the motion judge in this case were that "the Receiver is seeking to realize on a significant Mundo asset for the benefit of all creditors and that SPay intends to assert, in whatever forum is ordered, its own claim against Mundo by way of the defence of set-off."

54 Therefore, the motion judge's conclusions rest on findings of fact about the specific situation in which these parties find themselves, having regard to the vast amount of this account receivable relative to Mundo's other debtors. The motion judge's findings of fact, upon which he based his decision that there is a strong connection between SPay's dispute with Mundo and the receivership, are findings to which deference is owed.

55 For these reasons, I do not find that the second proposed ground of appeal is *prima facie* meritorious.

56 SPay certainly articulates issues that may be characterized as issues of some importance, namely: (i) when the single proceeding model renders an arbitration clause in an international commercial agreement inoperative; (ii) when a party is a "stranger" to the single model proceeding; and (iii) whether a determination of arbitrability by an arbitrator would be impracticable. Nonetheless, in this case, I see no error in the motion judge's articulation of the law. More importantly, on this point, the issues of concern raised by SPay are really about the application of the law to the specific facts in this case, and are not necessarily issues of more general importance. This is especially true in light of the infrequency with which these issues arise, as evidenced by the scarcity of available jurisprudence with comparable facts.

57 Moreover, allowing the appeal to proceed would result in undue delay, additional litigation costs and deterioration of the assets of the receivership. The receiver has been trying to pursue its largest account receivable since May 24, 2019, after dealing with multiple counsel purporting to act for SPay. The receiver served its motion record on May 10, 2021. Since then, there have been other delays as a result of limited court resources, flowing in part from the COVID-19 pandemic.

58 For these reasons, the motion for leave to appeal is dismissed. Costs of this motion are awarded to the responding party in the amount of $15,000, as agreed upon by the parties.

59 I would like to thank counsel for their excellent advocacy.

Motion dismissed.

Footnotes

1 The receiver also argued before the motion judge that the decision in Petrowest Corporation v. Peace River Hydro Partnersrs, 2020 BCCA 339 (B.C. C.A.) , 43 B.C.L.R. (6th) 8, leave to appeal granted and appeal heard and reserved January 19, 2022, [2021] S.C.C.A. No. 30 (S.C.C.) , was dispositive of SPay's motion. The motion judge considered that decision and said that he was "not persuaded by the logic and reasoning" in it. After noting that the decision was under appeal at the Supreme Court of Canada, and that he was not bound by it, he declined to follow it. Neither party has resurrected an argument that relies on *Petrowest* and, as such, I make no comment on its applicability to this case.

End of Document

Tab 6

2018 ONSC 3437
Ontario Superior Court of Justice

Potentia Renewables Inc. v. Deltro Electric Ltd.

2018 CarswellOnt 12310, 2018 ONSC 3437, 295 A.C.W.S. (3d) 502, 62 C.B.R. (6th) 10

POTENTIA RENEWABLES INC. (Applicant) and DELTRO ELECTRIC LTD. (Respondent)

T. McEwen J.

Heard: April 30; May 9, 2018
Judgment: July 27, 2018
Docket: CV-17-587425-00CL

Counsel: George Benchetrit, Michael Kril-Mascarin, for Applicant
Michael C. Mazzuca, Fred A. Platt, for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Civil practice and procedure
XVIII Summary judgment
XVIII.5 Requirement to show no triable issue
Civil practice and procedure
XVIII Summary judgment
XVIII.7 Effect of counterclaim
Headnote
Civil practice and procedure --- Summary judgment — Effect of counterclaim
Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged that producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2,000,000 USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount — Producer also sought appointment of receiver of property and assets for company — Producer applied for above-noted relief — Application granted — There was no entitlement to equitable set-off on part of company — There was no deductible cross-claim by company.
Bankruptcy and insolvency --- Receivers — Appointment
Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged that producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2,000,000 USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount — Producer also sought appointment of receiver of property and assets for company — Producer applied for above-noted relief — Application granted — Receiver was to be appointed if company could not repay outstanding funds within 30 days.
Civil practice and procedure --- Summary judgment — Requirement to show no triable issue
Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged that producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2,000,000 USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount —

Producer also sought appointment of receiver of property and assets for company — Producer applied for above-noted relief — Application granted — Trial was not necessary to determine issues, which could be determined on record before court — Court had jurisdiction to hear application — There was no judicial estoppel — It was within court's powers to appoint receiver — Company's claim that final approval was obtained was not supported — Conversations took place, but no approval was signed or agreed upon — Having failed to obtain final approval, company was obligated to pay back $1,500,000 USD of $2,000,000 USD owing — Remaining payment of $500,000 USD was payable, based on terms of letter of intent — Company could not disavow terms of letter, then recover on same contract.

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Algoma Steel Inc. v. Union Gas Ltd. (2003), 2003 CarswellOnt 115, 39 C.B.R. (4th) 5, 169 O.A.C. 89, 63 O.R. (3d) 78 (Ont. C.A.) — followed

BG Checo International Ltd. v. British Columbia Hydro & Power Authority (1993), [1993] 2 W.W.R. 321, [1993] 1 S.C.R. 12, 147 N.R. 81, 75 B.C.L.R. (2d) 145, 99 D.L.R. (4th) 577, 20 B.C.A.C. 241, 35 W.A.C. 241, 14 C.C.L.T. (2d) 233, 5 C.L.R. (2d) 173, 1993 CarswellBC 10, 1993 CarswellBC 1254 (S.C.C.) — considered

Bank of Nova Scotia v. Freure Village on Clair Creek (1996), 40 C.B.R. (3d) 274, 1996 CarswellOnt 2328 (Ont. Gen. Div. [Commercial List]) — considered

BlackBerry Ltd. v. Marineau-Mes (2014), 2014 ONSC 1790, 2014 CarswellOnt 3522, 2014 C.L.L.C. 210-030, 18 C.C.E.L. (4th) 51 (Ont. S.C.J.) — referred to

Business Development Bank of Canada v. 2197333 Ontario Inc. (2012), 2012 ONSC 965, 2012 CarswellOnt 2062, 94 C.B.R. (5th) 28 (Ont. S.C.J. [Commercial List]) — followed

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — referred to

Cuddy Food Products v. Puddy Bros. Ltd. (2002), 2002 CarswellOnt 2722, [2002] O.T.C. 580, 35 C.P.C. (5th) 159 (Ont. S.C.J.) — considered

Ebert v. Atoma International Inc. (1997), 1997 CarswellOnt 1478, 28 C.C.E.L. (2d) 158, 97 C.L.L.C. 210-013, 31 O.T.C. 101 (Ont. Gen. Div.) — referred to

Fasco Motors Ltd. v. General Refrigeration Inc. (1998), 1998 CarswellOnt 1827, 62 O.T.C. 276 (Ont. Gen. Div.) — considered

Federal Commerce & Navigation Co. v. Molena Alpha Inc. (1978), [1978] Q.B. 927, [1978] 3 All E.R. 1066, [1978] 3 W.L.R. 309, [1978] 2 Lloyd's Rep. 132 (Eng. Q.B.) — considered

Hryniak v. Mauldin (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 27 C.L.R. (4th) 1, (sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 2014 CSC 7, 453 N.R. 51, 12 C.C.E.L. (4th) 1, 314 O.A.C. 1, 95 E.T.R. (3d) 1, 21 B.L.R. (5th) 248, [2014] 1 S.C.R. 87, 2014 SCC 7 (S.C.C.) — followed

Ivey v. Oakrun Farm Bakery Ltd. (2002), 2002 CarswellOnt 2522, 27 B.L.R. (3d) 143 (Ont. S.C.J.) — referred to

Langille v. Keneric Tractor Sales Ltd. (1987), [1987] 2 S.C.R. 440, (sub nom. *Keneric Tractor Sales Ltd. v. Langille)* 43 D.L.R. (4th) 171, (sub nom. *Keneric Tractor Sales Ltd. v. Langille)* 82 N.S.R. (2d) 361, 79 N.R. 241, (sub nom. *Keneric Tractor Sales Ltd. v. Langille)* 207 A.P.R. 361, 1987 CarswellNS 343, 1987 CarswellNS 390, 30 B.L.R. 1, 67 N.S.R. (2d) 404, 19 D.L.R. (4th) 652 (S.C.C.) — followed

Niro v. Caruso (2015), 2015 ONSC 7446, 2015 CarswellOnt 19557 (Ont. S.C.J.) — referred to

Royal Bank of Canada v. CFNDRS Inc. (2017), 2017 ONSC 7661, 2017 CarswellOnt 20429 (Ont. S.C.J.) — considered

Telford v. Holt (1987), 21 C.P.C. (2d) 1, [1987] 2 S.C.R. 193, 41 D.L.R. (4th) 385, 78 N.R. 321, (sub nom. *Holt v. Telford)* [1987] 6 W.W.R. 385, 54 Alta. L.R. (2d) 193, 81 A.R. 385, 37 B.L.R. 241, 46 R.P.R. 234, 1987 CarswellAlta 188, 1987 CarswellAlta 583 (S.C.C.) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 2010 BCSC 477, 2010 CarswellBC 855, 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171 (B.C. S.C. [In Chambers]) — referred to

Total Electrical Systems Inc. v. Collège Boréal d'Arts appliqués & de technologies (2011), 2011 ONSC 4586, 2011 CarswellOnt 7779, 107 O.R. (3d) 27, 8 C.L.R. (4th) 129 (Ont. S.C.J.) — considered

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 BCSC 640, 2003 CarswellBC 1084, 9 R.P.R. (4th) 279, 15 B.C.L.R. (4th) 347 (B.C. S.C. [In Chambers]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 243 — considered

s. 243(1)(a) — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

Generally — referred to

s. 101 — considered

APPLICATION by power producer, for declaratory relief and judgment on outstanding funds from respondent company as well as appointment of receiver.

***T. McEwen J.*:**

1 The applicant, Potentia Renewables Inc. ("Potentia"), seeks a declaration that the respondent, Deltro Electric Ltd. ("Deltro"), is indebted to it in the amount of $2,000,000.00 USD [1] ; judgment for that amount; and the appointment of BDO Canada Ltd. ("BDO") as receiver of the property, assets, and undertakings of Deltro, with certain limited powers.

2 The dispute between the parties stems from agreements they entered into with respect to the development of a ground-mount solar project in the Barbados (the "Barbados Project").

3 For the reasons below, I am granting the declaration that Deltro is indebted to Potentia for the amount of $2,000,000.00 and the resulting judgment. I am also, subject to the terms and conditions below, appointing a receiver over the property and assets and undertakings of Deltro.

OVERVIEW

4 Potentia is an independent power producer focused on developing, owning and operating renewable energy facilities throughout the Americas. It has its head office in Toronto.

5 Deltro, amongst other things, provides business development services with respect to renewable energy projects. Its head office is in Mississauga. As a part of the Barbados Project, Deltro incorporated Deltro Group Ltd. ("DGL") to develop the Barbados Project.

6 In 2014, Deltro began to explore expansion of its business into the Caribbean market. In May 2015 the Barbadian government expressed interest in accepting a proposal from Deltro with respect to the Barbados Project in Saint Michael, Barbados. The Barbados Project envisioned the creation of the ground-mount solar facility which would produce 24 MW of direct current (D/C) energy that would be converted into 20 MW of alternating current (A/C) of energy for consumer use.

7 On May 15, 2016 Potentia and DGL entered into a letter agreement (the "LOI"). The LOI set out the essential elements of their agreement with respect to the Barbados Project. Essentially, DGL would seek the approval of the ground-mount solar facility, develop it, and Potentia would ultimately purchase the Barbados Project from DGL.

8 Of note is the fact that, in 2016, Potentia and Deltro also entered into a number of agreements with respect to development of renewable energy projects in the Dominican Republic (the "DR Projects"). For reasons I will outline below, those projects are of relevance in this application, although this application only involves the Barbados Project.

9 Paragraph 4 of the LOI set out the purchase price and various milestones for which payments would be made by Potentia to DGL. The relevant portions are as follows [2]:

> **4. Purchase Price.**
>
> Subject to the terms and assumptions set out in this Letter, to be confirmed by the Lenders' Independent Engineer, the Purchaser would receive anunlevered rate of return of its negotiated annual interest rateof third party non-recourse Project debt financing plus 400 basis points which is agreed not to exceed 12% per annum. The unlevered rate of return calculated on the term of the PPA, without any consideration of option extensions, will determine the total value of the SPV. It is further agreed that any and all amounts in excess of the final unlevered rate of return after consideration of the final constructed cost of the Project will be paid to Deltro for Deltro's interest in the SPV and the Project ("Purchase Price"). For greater certainty the calculation of the Purchaser's return shall be calculated net of any applicable local forecasted cash taxes payable by the SPV. The characterization of such payment shall be as determined by the parties and set out in the Binding Agreements (as defined below). **The timing of payments shall be as follows:**
>
> i. *$500,000 USD on signing of this Letter;*
>
> ii. *$1.5 million USD on formal zoning and site approval from the Barbados Town and Country Planning;*
>
> iii. $1 million USD upon receiving a Generators license, with a legally binding prescribed electricity rate that the generator would receive for each kwh delivered to the Barbados electricity grid, from the Government of Barbados or entering into a PPA, whichever is earlier;
>
> iv. 50% of the total Purchase Price (inclusive of the progress payments) on Financial Close; and
>
> v. the balance of the Purchase Price on the Final Payment Date, meaning for greater certainty, the 15th business day after the Project's Commercial Operation Date is achieved and accepted by the Utility.
>
> **If Financial Close is not achieved within 12 (twelve) months following the date of execution and delivery of the Binding Agreements, then the Purchaser shall have the right to sell all of the acquired interest in the SPV back to Deltro for an amount equal to the progress payments, such that the parties shall be returned to the position they were in prior to the execution of this Letter. Deltro's obligation to repay the progress payments as provided above shall be secured in a manner acceptable to the Purchaser within commercially reasonable terms.** [Emphasis Added]

10 As can be seen from the above, the parties contemplated the execution of Binding Agreements. It is not disputed that the Binding Agreements were never executed. It is also not disputed that Financial Close was not achieved. This is of some importance because as can be seen from the emphasized portion of paragraph 4, if Financial Close was not achieved within 12 months following the delivery of the Binding Agreements then Potentia would have the right to sell all of its acquired interest in the Barbados Project back to Deltro for an amount equal to the aforementioned progress payments. Potentia rightfully does not base its claim in DGL's failure to achieve Financial Close, but rather on later events described below.

11 The first payment of $500,000.00 was advanced on May 30, 2016. Thereafter, a dispute arose between the parties as to whether DGL had received the necessary formal zoning and site approval from the Barbados Town and Country Planning Office ("BTCPO") as required by subsection (ii) above which would generate the second payment of $1,500,000.00.

12 In an effort to resolve the dispute as to whether formal zoning and site approval had been granted by the BTCPO for the Barbados Project, Potentia, Deltro and DGL, entered into another agreement (the "Amendment") on November 15, 2016. The Amendment specifically identified the dispute between the parties.

13 The Amendment also, amongst other things, contained the following relevant provisions:

> Whereas the parties have not reached an agreement as to whether the final formal zoning and site approval has been granted by the Barbados Town and Country Planning Office for the Project, or any other Barbados governmental body that has the authority to grant the said approval, in accordance with the *Town and Country Planning Act*, Cap. 240 (Barbados) or any other applicable legislation (the "Final Approval"); nonetheless, Potentia has agreed to advance the Second Progress Payment to Deltro Electric pending the receipt of the Final Approval, the whole subject to the terms and conditions of this letter agreement.
>
> 1. Advance of Second Progress Payment. Subject to Deltro Electric's acceptance of the terms and conditions of this letter agreement, *which terms shall take precedence over the terms of the LOI with respect only to these matters*, Potentia hereby agrees to advance to Deltro Electric the Second Progress Payment on the terms and conditions herein upon execution of this Letter and GSA (as defined below). On the date hereof, Deltro Electric shall provide to Potentia the wire transfer details of the bank account to which the Second Progress Payment is to be transferred.
>
> 4. Security. As security for the advance of the Second Progress Payment and as **security for all its liability or indebtedness hereunder**, Deltro Electric, has agreed to deliver prior to the date on which the advance of the Second Progress Payment is disbursed, a general security agreement ("**GSA**") providing for a charge and security interest on the Collateral (as defined in the GSA).
>
> 5. Final Approval Obtained. If, within twelve (12) months from the date of disbursement (the "Term"), the Final Approval is granted by the Barbados Town and Country Planning Office or any other Barbados government body that has the authority to grant the Final Approval, the Second Progress Payment shall be kept by Deltro Electric and the security interest granted pursuant to the GSA shall be released by Potentia promptly thereafter.
>
> 6. Final Approval Not Obtained. **If the Final Approval is not granted during the Term, Potentia shall have the right (but not the obligation) to demand full and immediate repayment of the Second Progress Payment by sending a twenty (20) business days written repayment notice to Deltro Electric**. In addition to its repayment request right set out in this Section 6, Potentia shall have the right to setoff any other progress payments or any other payments that may have become due after the date hereof and withheld pursuant to Section 7 below up to and against the Second Progress Payment (including by way of setoff), the security interest granted pursuant to the GSA shall be released by Potentia promptly thereafter. [Emphasis Added]

14 As can be seen from the above sections, the Amendment was to take precedence over the terms of the LOI with respect to the issue of Final Formal Zoning and Site Approval (the "Final Approval"). Deltro was to receive the Second Progress Payment of $1,500,000.00 and had to obtain Final Approval within 12 months.

15 Further, and importantly, the clock was now ticking as the Amendment provided, as per paragraph 6, that if Final Approval was not obtained within 12 months Potentia could demand repayment of the Second Progress Payment. Also, of significance, is that Deltro, in paragraph 4, agreed to provide security for the advance of the Second Progress Payment for all of Deltro's liability and indebtedness under the Amendment. As security, Deltro granted a general security interest over all of its assets in favour of Potentia by way of a General Security Agreement (the "GSA").

16 On November 15, 2016 Potentia and Deltro also executed the GSA which provided for the aforementioned charge and security over all of Deltro's assets. As noted, the GSA was to be released if Final Approval was obtained or if full repayment of the Second Progress Payment was made by Deltro should Final Approval not be granted.

17 Final Approval was defined in the Amendment and GSA as:

> " . . . formal zoning and site approval . . . granted by the Barbados Town and Country Planning Office for the Project, or any other Barbados governmental body that has the authority to grant the said approval, in accordance with the *Town and Country Planning Act*, Cap. 240 (Barbados) or any other applicable legislation."

18 The Barbados Project as defined in the LOI, the Amendment, and the GSA continued to be a "24 MW(DC)/20 MW(AC) ground-mount solar project".

19 After entering the Amendment and GSA the relationship between the parties continued to deteriorate.

20 On January 28, 2017 counsel for Deltro/DGL sent a letter to Potentia alleging that Potentia had repudiated a letter of intent dated July 28, 2016 between Potentia and Deltro concerning one of the DR Projects (the "DR LOI").

21 The letter stated in part:

> We are hereby putting you on notice that Potentia has repudiated the Letter including but not limited to engaging in surreptitious communications and negotiations with respect to the Monte Plata Solar Project (located in the Dominican Republic) and without the knowledge or consent of Deltro. Such activity has been purposely and intentionally concealed from Deltro and motivated in order deprive and divest Deltro of its lawful entitlements and interests. Your conduct is very serious and has caused inter alia a serious breach of trust and confidence and accordingly impacted all projects and agreements between the parties. As a result, Deltro is no longer under any contractual or other obligation to sell, assign, transfer, notify or deliver any interests in any project under any agreement between the parties.
>
> Potentia shall immediately refrain from taking any further steps of any kind with respect to any of the projects listed in Schedule A of the Letter as well as any projects or region under any other agreements between the parties, including the Barbados Solar Project (St. Michael).

22 As can be seen from the above excerpt, Deltro took the position that it was no longer under any contractual or other obligation with respect to the Barbados Project, notwithstanding the fact that it did not take the position that Potentia had breached any of the agreements relating to the Barbados Project.

23 Counsel who was acting for Potentia at the time responded on February 6, 2017 stating, amongst other things, that Potentia had not breached or repudiated the DR LOI. Potentia's counsel further took the position that even if Potentia had breached the DR LOI there was no basis in law that would give Deltro the right to unilaterally terminate all of the existing contractual relationships with Potentia including those involving the Barbados Project.

24 The letter went on to state that Potentia accepted Deltro's repudiation of the Projects, including the Barbados Project and was treating the Barbados Project as being at an end. The letter also stated that the $2,000,000.00 that had been advanced pursuant to the LOI and the Amendment was now due and payable to Potentia by Deltro.

25 The letter further stated that since Final Approval had yet not been obtained and since Deltro obviously did not intend to proceed to Final Approval, an event of default had occurred within the meaning of the GSA. The letter concluded by stating that if Deltro failed to pay the $2,000,000.00 within 20 business days, as per the Amendment, Potentia would take steps to enforce its security interest under the GSA which could include appointing a receiver and taking possession of Deltro's collateral under the GSA.

26 Thereafter, on March 27, 2017 Potentia issued a statement of claim against Deltro with respect to the Barbados Project only.

27 On April 11, 2017, Deltro launched a lawsuit against Potentia with respect to only the DR Projects.

28 Twelve months after the Amendment was entered into Potentia took the position that Final Approval as defined in the Agreements had not been achieved. In addition to its statement of claim, Potentia then brought this application seeking the declaration that Deltro is indebted to it in the amount of $2,000,000.00 along with judgment, the appointment of the receiver and other related relief in accordance with the terms of the LOI and the Amendment (collectively the "Agreements").

ANALYSIS

29 The dispute between the parties raises a number of issues and Deltro has raised a multitude of defences with respect to these issues.

30 I will deal with each of the issues and the defences in turn below.

Is a trial of an action necessary?

31 I do not believe a trial is required to deal with the issues raised in the application. Further, it is my view, that this application can properly be dealt with notwithstanding the existence of the two actions.

32 Deltro submits that a trial of an action is required with respect to the issues surrounding the Barbados Project. In particular, Deltro submits that the issues with respect to the creation of the LOI, the issues concerning Final Approval and the issue of equitable set-off require a full evidentiary record and *viva voce* of evidence. I disagree. The parties have put before the court voluminous materials including hundreds of pages of cross-examination. Although some of the issues raised, as will be seen below, are complicated, I am of the view that they can be determined on the record before me.

33 In some cases the parties have made decisions not to provide certain evidence. For example, Potentia did not produce affidavit evidence from some current and former executives who had knowledge of the matters important to this application. Similarly, Deltro chose not to produce affidavit evidence from individuals who had information as to whether Final Approval had been obtained and took no steps to examine those representatives, current and former, of Potentia that did not swear affidavits in this application.

34 Those decisions, presumably tactical in nature, did not assist in determining the issues, but a suitable record exists. There are no significant credibility issues and the parties had every opportunity to address evidence concerning the factual issues in dispute.

Does this court have jurisdiction to hear this application?

35 Deltro submits that there are two reasons for which I lack jurisdiction to hear this application. Neither has merit.

36 First, Potentia previously brought a motion before Justice Hainey, the Team Lead for the Commercial List, to transfer both of the aforementioned actions that were commenced by way of statement of claim from the Civil List to the Commercial List. Justice Hainey allowed the transfer. Deltro submits that Potentia conceded in the transfer request that both actions were "inextricably linked". Deltro therefore submits that Potentia is attempting to make "end run" around these two actions by pursuing this application and is estopped from pursuing this application after conceding that the two actions were linked.

37 In this regard, Deltro submits that Potentia is seeking to inappropriately proceed with the application in priority to the other two actions.

38 Deltro argues the doctrine of judicial estoppel therefore applies and Potentia is estopped from now singularly proceeding with the application concerning the Barbados Project when it previously took the position that the two actions involving the Barbados Project and the DR Projects were inextricably linked. Deltro also further submits that, based on what transpired, I lack jurisdiction to hear the application.

39 I disagree. While I agree that it makes sense to have the two actions tried together since the parties are the same and the causes of action arise out of similar subject matter it must be kept in mind that they arise from different contracts as between the Barbados Project and the DR Projects. It must also be kept in mind that since the two statements of claims were issued the 12 months period during which Deltro was to obtain Final Approval has expired. Pursuant to the terms of the Amendment Potentia takes the position that it can now proceed to demand a refund and to appoint a receiver pursuant to the provisions of the Amendment and GSA. I agree with Potentia that there is nothing prohibiting it from doing so. If it was unsuccessful in this application, which it is not, the two actions would then proceed in the normal fashion. Nothing in Potentia's approach to this

litigation and the transfer to the Commercial List, in my view, estops it from proceeding with this application and it has not taken an inconsistent position. Further, there is no genuine issue concerning my jurisdiction in this regard.

40 Second, Deltro submits that I do not have jurisdiction to appoint a receiver under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 (the "*CJA*") or s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 (the "*BIA*"). Again, I disagree.

41 Deltro conflates the concept of jurisdiction with the issue as to whether a receiver ought to be appointed in the circumstances of this case.

42 In submitting that I do not have jurisdiction to appoint a receiver under s.101 of the *CJA* Deltro relies upon the decision in *Royal Bank of Canada v. CFNDRS Inc.*, 2017 ONSC 7661 (Ont. S.C.J.). In that decision the court discussed the distinction between s. 101 of the *CJA* and s. 243 of the *BIA*.

43 I respectfully disagree that this decision assists Deltro. Indeed, as shown in the reasoning of R.S.J. Morawetz in *Business Development Bank of Canada v. 2197333 Ontario Inc.*, 2012 ONSC 965 (Ont. S.C.J. [Commercial List]), an application for the appointment of a receiver can be brought by way of application pursuant to s. 101 of the *CJA*. R.S.J. Morawetz relied on earlier Court of Appeal authority in this regard.

44 Deltro also takes the position that I cannot appoint a receiver pursuant to s. 243 of the *BIA* since Potentia has not established that Deltro is insolvent as required by s. 243(1)(a). I agree with Deltro that the record before me does not establish that Deltro meets the definition of an insolvent person. The evidence that Potentia relies upon has been disputed by Deltro and the evidence filed on the motion is not conclusive one way or the other. I am simply unable, based on the myriad of financial information and affidavit evidence filed, to determine this issue.

45 In any event, based on the provisions of s. 101 of the *CJA* and the provisions of the GSA, I have the jurisdiction and ability to appoint a receiver in the appropriate circumstances.

46 The question simply is whether this is an appropriate case.

47 The jurisprudence supports such a conclusion. In *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]), the British Columbia Supreme Court held that where a mortgagor provided an express covenant agreeing with the appointment of receiver in the event of a default the court should not ordinarily interfere with the contract between the parties.

48 Further, in *Bank of Nova Scotia v. Freure Village on Clair Creek* (1996), 40 C.B.R. (3d) 274 (Ont. Gen. Div. [Commercial List]) ("*Freure Village*") Justice Blair (as he then was) similarly noted the significance of a contractual right to a court appointed receiver in stating at para. 13:

> While I accept the general notion that the appointment of a receiver is an extraordinary remedy, it seems to me that where the security instrument permits the appointment of a private receiver — and even contemplates, as this one does, the secured creditor seeking a court appointed receiver — and where the circumstances of default justify the appointment of a private receiver, the "extraordinary" nature of the remedy sought is less essential to the inquiry. Rather, the "just or convenient" question becomes one of the Court determining, in the exercise of its discretion, whether it is more in the interests of all concerned to have the receiver appointed by the Court or not. This, of course, involves an examination of all the circumstances which I have outlined earlier in this endorsement, including the potential costs, the relationship between the debtor and the creditors, the likelihood of maximizing the return on and preserving the subject property and the best way of facilitating the work and duties of the receiver-manager.

49 Nothing in the *CJA*, or the *BIA*, for that matter, ousts the jurisdiction of this court to consider the issue as to whether a receiver ought to be appointed.

50 Further, in any event, the GSA, signed by the parties, provides that a receiver may be appointed. In these cases it is up to the court to determine, in the exercise of its discretion, whether it is more in the interest of all concerned to have a receiver

appointed. The relief is no longer considered to be extraordinary: *Freure Village*, at para. 13, and *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]), at para. 75.

51 Based on the above, I have jurisdiction to hear the application.

Did DGL obtain Final Approval as required by the Amendment?

52 DGL did not obtain the required Final Approval.

53 One of the most contentious disputes between the parties is whether Final Approval was obtained as required by the Amendment. As noted, the Amendment required that Deltro obtain Final Approval within 12 months of the $1,500,000.00 being advanced.

54 Final Approval is defined in the Amendment and GSA as, "the final formal zoning and site approval . . . granted by the Barbados Town and Country Planning Office for the Project, or other Barbados governmental body that has the authority to grant the set of approval, in accordance with the *Town and Country Planning Act*, CAP. 240 (Barbados) or any other applicable legislation."

55 At the outset I should note that the parties dispute who bears the burden of proof as to whether Final Approval was obtained. Deltro takes the position that Potentia bears the burden of proof since it is the applicant. Potentia submits that Deltro bears the burden of proof since it was the one that was charged with the responsibility of obtaining Final Approval.

56 In my view, Deltro bears the burden of proof. That said, however, it is immaterial as the evidence falls far short of establishing that Final Approval was obtained, notwithstanding who bears the burden of proof.

57 In support of its contention that Final Approval was obtained Deltro relies on the affidavits of its president, Mr. Del Mastro. In addition to his own statement that Final Approval was obtained, he relies upon a memorandum and three letters attached to his affidavit.

58 In my view, this documentation falls well short of establishing that Final Approval was obtained.

59 I will deal with the memorandum and each letter in turn.

The Chief Town Planner Memorandum dated October 21, 2016 (the "CTP memorandum")

60 The CTP memorandum was prepared specifically with respect to the Barbados Project. It is a lengthy 19 page document that provides an analysis of the application for the Barbados Project, the nature of the proposal, and other related information.

61 A review of the CTP memorandum, however, demonstrates that it did not provide Final Approval.

62 The CTP memorandum is addressed to the Prime Minister's Office. The memorandum clearly states in the first sentence that Deltro's application "is referred to the Minister for a decision in accordance with s. 18(1) of the *Town and Country Planning Act*". Further, at page 16, paragraph 10, it is clear that the Chief Town Planner who prepared the memorandum is recommending permission for Final Approval, but that the Final Approval was subject to 19 conditions. At page 16 of the CTM memorandum the Chief Town Planner then went on to conclude that he was "recommending permission". The Chief Town Planner went on to state that the matter is "referred accordingly".

63 Further, of significance, is that the CTP memorandum refers to permission being potentially granted for only a 10 MW solar farm and not the Barbados Project as defined between the parties as being a 20 MW solar project. Potentia agreed to invest in a 20 MW solar farm and never agreed to lower the scope of the project to a 10 MW solar farm [3] .

Letter of Michael Yearwood, dated May 10, 2017

64 Mr. Yearwood, a Barbadian lawyer, wrote to Mr. Del Mastro on May 10, 2017 (over three months after Deltro's lawyers wrote to Potentia advising that they were no longer under any contractual obligations with respect to the Barbados Project). The letter purports to provide an update concerning the Barbados Project. Although Deltro's materials do not make clear Mr. Yearwood's relationship to Deltro, it appears as though Mr. Yearwood was acting in some legal capacity for Mr. Del Mastro and/or Deltro and DGL.

65 In any event, the letter, which is unattached to any affidavit, when addressing the issue of Final Approval states as follows:

> Town and Country Planning completed their review of the application as of October 21, 2016, and sent notification that they had approved the application **subject to conditions** . . . There is nothing further required of Deltro in this regard, all requirements of the approval are satisfied . . . The approved land parcel at the Waterford site meets the full requirements for the 20 MW solar generation project as originally envisioned . . . [Emphasis Added].

66 As can be seen from the plain wording of the above excerpt the application was still "subject to conditions". In my view, this is not evidence of Final Approval. It is also consistent with the CTP memorandum which, approximately 6 months earlier, also noted that Final Approval was recommended subject to 19 conditions.

67 Overall, however, the letter largely consistent of hearsay and falls far short of constituting evidence of Final Approval.

Letter of the Honourable David Eastwick, Minister of Agricultural, Food, Fisheries and Water Resource Management, dated May 11, 2017

68 Although Minister Eastwick's letter was promising, it did not constitute formal approval. It was also obtained after litigation began.

69 In totality it reads as follows:

> Following the approval from the Town and Country Development Planning Office, the public land required a modification to its designation to include renewable energy as a public purpose. **That matter, which required consideration from the Cabinet, is being dealt with and I fully expect will be resolved very soon.**
>
> Keep in mind that an element of the planning approval was the consultation of all impacted departments and ministries, all of whom indicated their support for the project at Waterford. As such, there is no reason for any concern. I do understand that the processes and approvals related to the project have been taken quite some time, **but they are all but completed**. [Emphasis Added]

70 First, it is not clear what role Minister Eastwick played in the Barbados Project given the fact that he is the Minister of Agriculture, Food and Fisheries and Water Resource Management. In any event, Minister Eastwick in his rather brief letter refers to "the approval from the Town and Country Development Planning Office". It does not however elaborate on exactly what "approval" he is referring to. There is nothing in the letter to lead one to the conclusion that he is referring to the Final Approval.

71 In any event, the letter goes on to discuss a modification to "public land" that was necessary and had not yet been resolved and, as a result, all of the "processes and approvals" are "all but completed". In my view, even if it pertained to Final Approval of the Barbados Project this does not constitute evidence of a Final Approval and, conversely, BTCPO was still awaiting Final Approval from cabinet.

Letter of the Honourable Denis Lowe, Minister of Environment and Drainage, dated December 13, 2017

72 This letter was prepared almost a year after Deltro advised Potentia that the contract concerning the Barbados Project was at an end, several months after both statements of claim were issued and shortly after this application was issued.

73 In my view, this letter is also equivocal.

74 Minister Lowe, who appears to be the Minister in charge, on the critical issue concerning Final Approval wrote as follows:

> I am writing to confirm that I attended a dinner meeting at your invitation with representatives of DELTRO, as well as Mr. Fernando Joffre [4] from Potentia Renewables on Thursday, October 26, 2016.
>
> The meeting was convened to clarify and run through the remaining processes and approvals necessary to break ground on the 20 MW Solar Farm which DELTRO has been working to develop at the intersection of Waterford and ABC Highway in Barbados.
>
> Mr. Joffre asked a number of pointed questions which I was happy to answer and I recalled him making it clear, that he was pleased to learn of the progress that had been made. Of specific interest to him was the approval from the Town and Country Planning Department, something I had made clear that the project had obtained as the Chief Town Planner had actually signed off on the project the previous week **and sent notice to the Prime Minister of the approval**.
>
> This meeting followed a previous meeting that I had with the senior Potentia Renewable representatives, Messrs. Chris Asimakis and Jeff Jenner on April 8, 2016. During that meeting my colleague, the Minister of Energy, Senator Darcy Boyce, **indicated very clearly that he supported the project and intended to sign-off on the necessary Generators License once Town and Country Planning had issued their approval**. It was a good exchange that once again made clear that progress was made and underscored very broadly the government's support, while describing and explaining the remaining processes and approvals necessary for the project. [Emphasis Added]
>
> I trust this satisfies your request to confirm my meetings with representatives from Potentia as well as what was discussed and confirmed to them during these meetings.

75 As can be seen from the second paragraph of the letter the meeting was convened five days after the CTP memorandum was prepared and the second paragraph of the letter seems to refer to that memorandum. At that time there was no Final Approval since, as noted, the CTP memorandum was subject to several conditions and dealt with a smaller solar farm.

76 The letter also simply refers to a number of conversations that took place wherein Minister Lowe advises the representative of Potentia, Mr. Joffre, that the Chief Town Planner had signed off on the Project and sent notice to the Prime Minister for approval. This is clearly not what is stated in the CTP memorandum. There is also no evidence that in the five days between the time the CTP memorandum was prepared and the dinner meeting took place that Final Approval actually occurred and, given the contents of the CTP memorandum, it is impossible to draw such a conclusion. Also the letter is silent on the issue of the size of the project. The CTP memorandum, as noted, only referred to the smaller 10 MW solar project, not the 20 MW project contemplated by the parties.

77 Simply put, the letter simply refers to a conversation and not Final Approval of a 20 MW solar project.

78 The above three letters and CTP memorandum constitute essentially all of the evidence that the respondent was able to produce in support of Deltro's position other than Mr. Del Mastro's affidavit evidence which, simply states that Final Approval had been obtained without reference to any other documentation. When I asked counsel what further evidence Deltro would produce at trial, there was none proffered.

79 In my view, the above documents contained in Mr. Del Mastro's affidavit fall well short of establishing Final Approval had been obtained. The letters are inconsistent and equivocal. Deltro had plenty of time to produce cogent affidavit evidence or make efforts to provide *viva voce* evidence on this point. Instead, it chose to rely primarily upon a memorandum and three letters unsupported by accompanying affidavit evidence of the persons who prepared those documents [5].

80 In addition to the above, it is extremely significant that Deltro has been unable to, or has failed or refused to, produce any official documentation prepared by the government of the Barbados which provides for Final Approval. One would think that had Final Approval been achieved some sort of official document would have been prepared by a ministerial office or cabinet.

No such document has been produced. Instead, Deltro relies upon the aforementioned CTP memorandum and correspondence which, for the reasons above, is not persuasive.

81 Based on the above, there is no cogent evidence to support Deltro's position that the BTCPO or other Barbados governmental body granted Final Approval. The conditional approval of the BTCPO for a 10 MW solar farm was subject to ministerial approval. The correspondence that followed is equivocal and unhelpful.

82 It bears noting that Deltro submits that a trial is necessary to determine the issue of Final Approval.

83 Deltro could have attempted to adduce evidence by way of affidavit from the authors of the correspondence but chose not to do so. It did not also attempt to have *viva voce* evidence available at the hearing of the application. It simply submitted that a trial was necessary.

84 Last, I should note that both parties attempted to refer to online newspaper articles at the hearing of the application. I have not relied upon in these reasons. In my view, they are of no probative value. They were largely based on second and third hand information and innuendo.

Is Deltro obliged to repay the $2,000,000.00 pursuant to the terms of the LOI and the Amendment?

85 Deltro is obliged to repay the $2,000,000.00.

86 Deltro submits that it is under no obligation to repay either the $500,000.00 or $1,500,000.00 amounts advanced by Potentia.

87 In support of its position it relies upon sections 7 and 12 of the LOI which provide as follows:

> **7. Other Projects and Right of First Refusal.**
>
> The Purchaser and Deltro will work together in good faith to jointly develop solar assets, where the Purchaser will be the owner at commercial operation, in jurisdiction for Caricom member states and the Dominican Republic. In a situation where Deltro has independently of the Purchaser, developed a solar project and received a bona fide offer to purchase specific solar assets from a third party, Deltro shall grant the Purchaser a Right of First Refusal ("**ROFR**") to match the offer and the Purchaser shall have 30 days to do so. If the Purchaser matches an offer for the acquisition of specific solar power assets on substantially the same terms and conditions, Deltro will be obligated to sell to the Purchaser. In the event that the Purchaser declines to match the bona fide third party offer and Deltro does not execute the contemplated sale within three (3) months on substantially the same terms as disclosed to the Purchaser ROFR in respect to the project shall be reinstated as jointly developed project.
>
> **In the event that the Project does not reach commercial operations, any milestone payments paid to Deltro by the Purchase towards the Project's Purchase Price shall not be refunded by Deltro but may, at the Purchaser's sole option, be credited against any payments due to Deltro by the Purchaser in relation to any other transaction between the Parties.** [Emphasis Added]
>
> **12. Terminations.**
>
> This Letter may be terminated:
>
> a) by written notice of the Purchaser and Deltro;
>
> b) by the Purchaser upon written notice to Deltro to the Expiry of the Exclusivety Period;
>
> c) by Deltro upon within notice to the Purchaser at any time following the expiration of the Exclusivity Period; or
>
> d) 5:00 pm (EST) 90 days from the date of this letter, unless extended by mutual agreement between the Parties;

> provided, however, that the termination of this Letter shall not affect the liability of a party for breach of any of the provisions prior to the termination. Upon termination of this Letter, the parties shall have no further obligations hereunder, **except for their obligations which under their terms shall survive any such termination**. [Emphasis Added]

88 First, with respect to the $1,500,000.00 payment, the LOI does not apply. As noted, the $1,500,000.00 payment is governed by paragraph 1 of the Amendment which states that the LOI is superseded by the terms of the Amendment with respect to the Second Progress Payment of $1,500,000.00.

89 Further, if Final Approval is not obtained within 12 months from the time that the Second Progress Payment was made Potentia could demand repayment, failing which it could act upon the GSA.

90 As I have found Deltro failed to obtain Final Approval and it has failed to repay the $1,500,000.00 as demanded by Potentia.

91 This amount is therefore due and owing.

92 The first payment of $500,000.00 was not subject to the Amendment and one must therefore look to the terms of the LOI to determine whether it is refundable. In my opinion it is.

93 Deltro relies upon section 7 which states that if the Barbados Project does not reach commercial operations then the milestone payments are not refundable but may be credited to any other transactions between the parties. They also rely on section 12 which states that, if the LOI is terminated, Deltro would have no obligations to Potentia except obligations which under the terms of the LOI survive termination.

94 In my view, these sections do not assist Deltro. First, as noted in paragraph 4, Potentia was entitled to a refund of the Progress Payments if Financial Close was not achieved. It was therefore contemplated by the LOI that Potentia was entitled to a refund of the monies advanced if Financial Close was not achieved within 12 months following the execution of the Binding Documents. As further noted, the Binding Documents were never prepared but when one reviews the overall intention of the LOI and the subsequent Amendment the logical conclusion of the overall thrust of the two agreements was that if the Barbados Project did not come to fruition Potentia was entitled to a refund of the advance payments. In my view, this was the intention of the parties as revealed by the plain, literal and ordinary meaning of the words considered in the context of the two agreements as a whole.

95 As held in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.), where Rothstein J.A. stated at para. 47:

> The overriding concern is to determine "the intent of the parties and the scope of their understanding" . . . To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. [Citations Omitted].

96 In addition, where two clauses seemingly contradict, La Forest and McLachlin JJ. stated at para. 9 of *BG Checo International Ltd. v. British Columbia Hydro & Power Authority*, [1993] 1 S.C.R. 12 (S.C.C.):

> Where there are apparent inconsistencies between different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving reasonable consistency to the terms in question cannot be found will the court rule one clause or the other ineffective: . . . In this process, the terms will, if reasonably possible, be reconciled by construing one term as a qualification of the other term: . . . A frequent result of this kind of analysis will be that general terms of a contract will be seen to be qualified by specific terms — or, to put it another way, where there is apparent conflict between a general term and a specific term, the terms may be reconciled by taking the parties to have intended the scope of the general term to not extend to the subject-matter of the specific term. [Citations Omitted]

97 While there is no doubt that the wording of section 4 and section 7 are somewhat contradictory in that section 7 provides for no refunds (whereas section 4 specifically contemplates them) it is my view that section 7, by its wording, is limited to situations where there are other projects in place between the parties. Since, as noted below, Deltro has repudiated its obligations to Potentia, it is questionable whether there are any other projects in place which would trigger the operation of section 7. In any event, I find that the overall intention of the contract was to permit Potentia to recoup its investment in the case of Deltro's non-performance. It cannot have been the intention of the parties to permit Deltro to keep Potentia's money with no apparent remedy should Deltro decide to abandon their end of the bargain.

98 Given the wording of paragraphs 4, 7 and 12 I conclude that it was the intention of the parties that Potentia could demand a refund of the monies advanced if the project was not concluded as per section 4 of the LOI and paragraph 6 of the Amendment. For the reasons noted, neither section 7 nor section 12 relieves Deltro from repaying the $2,000,000.00 advanced.

99 Further, and in any event, as I will note below, it is my view that Deltro repudiated the agreements and therefore Potentia is entitled to repayment of the $2,000,000.00. In particular, I find that Deltro cannot disavow its obligations to Potentia and then turn around and attempt to invoke provisions from the very same contract it had just repudiated (see: *Ebert v. Atoma International Inc.*, 1997 CarswellOnt 1478 (Ont. Gen. Div.), at para. 23 and *Ivey v. Oakrun Farm Bakery Ltd.*, 2002 CarswellOnt 2522 (Ont. S.C.J.), at para. 28.). In other words, Deltro cannot accept Potentia's money, repudiate the agreement, and then rely on a clause from the very same agreement as justification for keeping the money.

Did Deltro repudiate the Agreements with Potentia?

100 As stated above, the answer is "yes".

101 Just two months after the Agreement and GSA had been executed, Deltro took the position that it was no longer under any contractual obligations to Potentia with respect to the Barbados Project. It did not allege any breaches committed by Potentia with respect to the Barbados Project but instead relied upon breaches concerning the DR LOI. It later took the position that it was also not obligated to return the $2,000,000.00 that it had obtained from Potentia with respect to the Barbados Project.

102 It is important to note that, in the letter provided by Deltro's counsel to Potentia on January 20, 2017, it simply alleged that Potentia had repudiated the DR LOI. It never alleged that Potentia repudiated any agreements concerning the Barbados Project, but simply stated that it was no longer obliged to honour any contractual or other obligations to Potentia, including the Barbados Project.

103 It is also important to note that in the action commenced by Potentia against Deltro, Deltro in its statement of defence and counterclaim, in very general terms, without any particularity whatsoever, alleges that Potentia breached the Barbados Agreement. Tellingly, Deltro seeks no specific damages. These bald allegations are completely unsupported by any contemporaneous documentation prepared by the parties and, as noted, in the January 28, 2017 letter from counsel for Deltro/DGL to Potentia there are no allegations whatsoever that Potentia breached the Barbados Agreement. Rather that Deltro took the position that it was no longer obligated to perform under the Agreement concerning the Barbados Project given Potentia's conduct with respect to the DR Projects.

104 Deltro has also never attempted to resile from the position set out in the January 28, 2017 letter wherein it was stated that "Deltro is no longer under contractual or other obligation" to Potentia with respect to the Barbados Project.

105 As previously noted, the solicitors acting for Potentia at the time responded to Deltro's counsel advising in part as follows:

> We are counsel for Potentia Renewables Inc. (formerly Potentia Solar Inc.) ("Potentia").
>
> We have received your letter dated January 28, 2017, in which you assert that Potentia has "repudiated" the Letter of Intent between the Potentia and Deltro Group dated July 28, 2016" (the "DR Letter Agreement") and that as a result of that alleged repudiation. "Deltro is no longer under any contractual or other obligation to sell, assign, transfer, notify or delivery any interests in any project under any agreement between the parties".

Potentia has not breached, let alone repudiated, the DR Letter Agreement or any other agreement with Deltro. Rather, Potentia has at all times conducted itself in good faith and in accordance with the terms of the agreements between the parties.

Even if Potentia had engaged in conduct that could amount to a breach of the DR Letter Agreement (which it did not), there is no basis at law on which such conduct could give Deltro the right to unilaterally terminate all existing contractual relationships with Potentia. Accordingly, by the positions taken in its letter dated January 28, 2017, Deltro, not Potentia, has now wrongfully repudiated the following existing contractual agreements between Potentia and Deltro:

- The letter agreement between Potentia Solar Inc. and Deltro Electric Inc. dated May 15, 2016 in respect of the ground-mount solar project in Barbados (the "Barbados Project"), as amended by the letter agreement dated November 15, 2016 providing for the advance by Potentia of a Second Progress Payment to Deltro (the "Barbados Letter Agreement"); and

- The DR Letter Agreement, and any other agreement in furtherance thereof or related thereto.

Potentia accepts Deltro's repudiation, and will now treat these Agreements as being at an end. In the circumstances, our client has no obligation to provide the undertakings referred to in the first two paragraphs of page 2 of your letter, including because Potentia has the right to mitigate the damages caused by Deltro's repudiation.

106 Deltro's counsel later responded by way of letter dated February 22, 2017 that Deltro had obtained Final Approval and asked for the GSA to be discharged. Potentia's counsel refused, issued a statement of claim and demanded to inspect documents with respect to Deltro's claim that it achieved Final Approval, which Deltro refused to produce.

107 Potentia takes the position that Deltro repudiated the Agreements concerning the Barbados Project. Deltro, rather curiously, takes the position it was actually Potentia that repudiated the agreements. In my view, Deltro's position is unsustainable in law.

108 In these circumstances Deltro repudiated its Agreements with Potentia. Potentia, therefore, was entitled to accept the repudiation which it did. As of that time the parties were discharged from their prospective obligations under the contract, but the prospective obligations embodied in the contract is relevant for the assessment of damages.

109 In this regard I rely upon the Supreme Court of Canada decision in *Langille v. Keneric Tractor Sales Ltd.*, [1987] 2 S.C.R. 440 (S.C.C.). In that decision the court held as follows:

24. In order to answer this question we must go back to first principles in the law of contract. If a party to a contract breaches a term of sufficient importance the other party has the right to treat the contract as terminated and consider himself discharged from any future obligations under it: Pigott Construction Co. v. W. J. Crowe Ltd. (1961), 27 D.L.R. (2d) 258 (Ont. C.A.), at pp. 269-72; Alkok v. Grymek, [1968] S.C.R. 452, at p. 456; Hongkong Fir Shipping Co. v. Kawasaki Kisen Kaisha Ltd., [1962] 2 Q.B. 26 (C.A.), per Diplock L.J., at pp. 65-66, 71; Cehave N.V. v. Bremer Handelsgesellschaft m.b.H., the "Hansa Nord", [1976] Q.B. 44 (C.A.) An identical right arises where one party to a contract by words or conduct indicates to the other party that he does not intend to perform his contractual obligations. In the latter instance the first party is said to have repudiated the contract: see Sir W. R. Anson, Anson's Law of Contract (26th ed. by A. G. Guest), pp. 470-84; G. C. Cheshire, C. H. S. Fifoot and M. P. Furmston, Law of Contract (11th ed. 1986), pp. 521-33. The question at hand is whether the assessment of damages in a case of termination based on breach of a term of the contract should be any different from the assessment of damages in a case of termination based on repudiation.

. . .

28. The modern view is that when one party repudiates the contract and the other party accepts the repudiation the contract is at this point terminated or brought to an end. The contract is not, however, rescinded in the true legal sense, i.e., in the sense of being voided *ab initio* by some vitiating element. The parties are discharged of their prospective obligations

> under the contract as from the date of termination but the prospective obligations embodied in the contract are relevant to the assessment of damages: see *Johnson v. Agnew*, [1980] A.C. 367, [1979] 1 All E.R. 883 (H.L.), and *Moschi v. Lep Air Services Ltd*, [1973] A.C. 331, [1972] 2 All E.R. 393 (H.L.) Such is the law for contracts generally and it is this law which should apply equally to breaches of chattel leases.

110 Based on the above, Deltro repudiated its Agreements with Potentia concerning the Barbados Project by way of its January 20, 2017 letter, which repudiation was accepted by Potentia as per its counsel's letter dated February 22, 2017.

Is Potentia Entitled to Damages as a result of Deltro's Failure to Obtain Final Approval and its Repudiation?

111 Given Deltro's failure to obtain Final Approval, its breach and repudiation of the Agreements, Potentia is entitled to damages of $2,000,000.00.

112 This includes damages in the amount of $500,000.00 given the provisions of the LOI and Deltro's repudiation.

113 It also includes damages of $1,500,000.00 given the wording of the Amendment and given Deltro's repudiation. Further, and in any event, based on the decision in *Sattva*, I am of the view that even if Financial Close had been achieved Potentia would still be entitled to a return of the $2,000,000.00 advanced to Deltro given the wording of the LOI and Amendment and the repudiation.

Is Deltro Entitled to Set-Off?

114 Deltro is not entitled to set-off.

115 Deltro concedes it is not entitled to legal set-off but submits that it is entitled to equitable set-off. In this regard Deltro submits that the proceedings commenced by Potentia with respect to the Barbados Project are connected to the DR LOI.

116 In part, Deltro relies on the portion of paragraph 7 of the LOI which provides as follows:

> In the event that the Project does not reach commercial operations, any milestone payments paid to Deltro by the Purchaser towards the Project's Purchase Price shall not be refunded by Deltro but may, at the Purchaser's sole option, be credited against any payments due to Deltro by the Purchaser in relation to any other transaction between the Parties.

117 I do not accept that this creates the necessary linkage. While this portion of paragraph 7 does allow Potentia a credit of payments due between the parties in any other transaction (which would presumably include the DR LOI), it is a right that is afforded exclusively to Potentia. Neither the LOI nor the Amendment provides Deltro with any rights that would invoke any linkage between the two projects.

118 The Court of Appeal summarized the principles applicable to equitable set-off in the case of *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) ("*Algoma Steel*"), as follows:

> (a) The party relying on a set-off must show some equitable ground for being protected against the adversary's demands.
>
> (b) The equitable ground must go to the very root of the Plaintiff's claim.
>
> (c) A cross-claim must be so clearly connected with the demand of the plaintiff that it would be manifestly unjust to allow the plaintiff to enforce payment without taking into consideration the cross-claim.
>
> (d) The Plaintiff's claim and the cross-claim need not arise out of the same contract.
>
> (e) Unliquidated claims are on the same footing as liquidated claims.

119 Both the Court of Appeal in *Algoma Steel* and the Supreme Court of Canada in *Telford v. Holt*, [1987] 2 S.C.R. 193 (S.C.C.) referred with approval to the statement of Lord Denning, M. R. in *Federal Commerce & Navigation Co. v. Molena Alpha Inc.*, [1978] 3 All E.R. 1066 (Eng. Q.B.):

> We have to ask ourselves: what should we do now so as to ensure fair dealing between the parties? . . . This question must be asked in each case as it arises for decision: and then, from case to case, we shall build up a series of precedents to guide those who come after us. But one thing is quite clear: it is not every cross-claim which can be deducted. It is only cross-claims that arise out of the same transaction or are closely connected with it. And it is only cross-claims which go directly to impeach the plaintiff's demands, that is, so closely connected with his demands that it would be manifestly unjust to allow him to enforce payment without taking into account the cross-claim.

120 In *Fasco Motors Ltd. v. General Refrigeration Inc.*, 1998 CarswellOnt 1827 (Ont. Gen. Div.) Justice Ground stated:

> . . . it is settled law that a party may not maintain a set-off claim based upon rights it may have arising from a contract to purchase different goods, under a different contract, at a different time, from the same vendor.

121 In *Cuddy Food Products v. Puddy Bros. Ltd.*, 2002 CarswellOnt 2722 (Ont. S.C.J.), the plaintiff had moved for summary judgment for the price of goods sold and delivered. The defendant counterclaimed and claimed equitable set-off based on an alleged breach of another contract between the parties. In finding that equitable set-off was not available to the defendant, Justice Lane opined:

> In my view there is no connection between these claims at all, beyond the identity of the parties. The claim of the defendant is based upon the 1999 agreement for the same of equipment to debone turkeys and release some of the product to the plaintiff. That agreement came to an end, for practical purposes, if not legal ones, with the termination/repudiation of it in November, 1999. The subsequent sales of chicken are not connected to that agreement. One may test this by asking, in Lord Denning's phrase, whether the defendant's claims about the deboning agreement "go directly to impeach" the plaintiff's claim for the price of the goods. Clearly not; the two are totally separate matters.

122 Deltro's claim for damages in connection with the DR LOI is not remotely connected to the Barbados Project. I accept Potentia's submissions that, pursuant to terms of the contract, the damages claimed by Deltro in the DR LOI involved different agreements between the parties and a different country. I can see no legal connection between the Barbados Project and the DR LOI except for section above which, as mentioned, provides no comfort to Deltro. As such, Deltro may not maintain a claim for set-off based on the rights that it might have arising from a different contract involving a different subject matter. There is no connection between the claims beyond the identity of the parties. In these circumstances, since they are two separate matters, equitable set-off is not allowed.

123 It also bears noting that, with respect to the DR LOI, Deltro sought an interlocutory injunction against Potentia from having any further involvement in the Project primarily on the basis that Potentia misused confidential information provided by Deltro.

124 Justice Belobaba in his reasons dated July 5, 2017 was critical of Deltro's position. In his reasons he concluded that Deltro had failed to show a *prima facie* case, let alone a strong *prima facie* case. He observed that Potentia, if it used any confidential information, did so "precisely as intended" for due diligence and project evaluations. He further found that there was no "end run around Deltro" and significantly:

> it appears that Deltro terminated its relationship with PRI Potentia at the 11th hour in large part because it was unhappy about the projected amount of the contingent fee that it would receive. [6]

125 Further, Deltro also has a counterclaim against Potentia in the action concerning the Barbados Project, which it relies upon in support of its assertions of equitable set-off. As previously stated, however, the counterclaim is a bald pleading and is devoid of any particularity and unsupported by contemporaneous documents. No specific damages or dollar amount is sought.

In this case, I agree with the decision of Hennessy J. in *Total Electrical Systems Inc. v. Collège Boréal d'Arts appliqués & de technologies*, 2011 ONSC 4586 (Ont. S.C.J.) ["*Total*"], where the court found that a bald allegation of set-off does not provide an arguable defence to a summary disposition proceeding.

126 While I appreciate that *Total* was determined in the context of a summary judgment, where the respondent has a positive obligation to put their best evidentiary foot forward, I find that the same principle applies in this context. It is Deltro that commenced the counterclaim and is now relying on it in support of their claim for equitable set-off. Despite this, they have provided no cogent evidence which can be used to support their allegations.

127 Based on the above jurisprudence Deltro has not satisfied me that it has a cross-claim which can be deducted.

128 Based on the all of the above, and the principles set out in *Algoma Steel*, Deltro is not entitled to equitable set-off.

129 It bears noting that Deltro took the position at the application that a trial was necessary to determine whether it is entitled to equitable set-off. Deltro submits that when considering the issues of equitable set-off the first three principles set out in *Algoma Steel* also require a complete record involving *viva voce* evidence.

130 I disagree. In my view, the pleadings adequately set out the basis for the Barbados Project and the DR LOI which I have concluded are separately and distinct and lack any tangible connection, particularly from Deltro's prospective.

131 Deltro could have provided all of its evidence in this regard by way of affidavit.

132 As case management judge, I am of the view that there was sufficient record before me to determine the issues of Final Approval, repudiation and equitable set-off and my decision to do so is in keeping with the principles in set out in *Hryniak v. Mauldin*, 2014 SCC 7 (S.C.C.) where the court has urged trial judges to dispose of matters in the most expeditious and economical way possible (see also: *BlackBerry Ltd. v. Marineau-Mes*, 2014 ONSC 1790 (Ont. S.C.J.); *Niro v. Caruso*, 2015 ONSC 7446 (Ont. S.C.J.)).

Should A Receiver Be Appointed Given The Above Findings?

133 A receiver should be appointed subject to terms.

134 Given the answer to the questions above, I am of the view that a receiver ought to be appointed where:

- Deltro willingly entered into a GSA over its assets.
- It failed to obtain Final Approval.
- It repudiated the Agreements.
- It has refused to repay any of the $2,000,000.00.
- It has never provided particulars of any claim it has against Potentia with respect to the Barbados Project.

135 Deltro submits, however, that it is in no way insolvent and has adduced financial documentation in support of this claim.

136 While I am skeptical of the strength of this documentation, particularly where many of its assets include intercompany loans which may be of a dubious nature given the fact that there are no financial statements or list of assets available for these related parties, Deltro should be provided with an opportunity to repay the $2,000,000.00 before a receiver is appointed.

137 I am therefore making the following order in this regard:

i. No receivership will be appointed for 30 days to afford Deltro the opportunity to repay the $2,000,000.00;

ii. after 30 days an interim receiver will be appointed to run the business but not to interfere with the business. It will control receipts and disbursements for 30 days to determine if a sensible plan of repayment can be made;

iii. if after 30 days the interim receiver determines that Deltro is incapable of repayment with a reasonable timeline Potentia is entitled to the order sought to have a receiver appointed over the assets, properties and undertakings of Deltro to affect a sale.

138 Deltro objects to BDO being appointed as receiver given the fact that the proposed partner at BDO indicated on his cross-examination that he had a personal relationship with one of the principles of Potentia and was currently engaged by Potentia to provide with advice.

139 In these circumstances I agree with Deltro that another receiver ought to be appointed who would be viewed as completely impartial, disinterested and able to deal with the parties in a fair manner.

DISPOSITION

140 Potentia is therefore entitled to the declaration it seeks that Deltro is indebted to it in the amount of $2,000,000.00 and is entitled to judgment and pre-judgment interest on that amount.

141 A receiver will be appointed as per the terms above.

142 Pre-judgment interest shall run at the rate of 12% per annum, to be calculated daily, as per section 2 of the Amendment.

143 With respect to the $500,000.00 pre-judgment interest will run as per the provisions of the *CJA*.

144 I can be spoken to with respect to the specific terms of the order.

145 If the parties cannot agree on costs they are to provide me with written submissions not to exceed five pages, excluding the bill of costs.

146 Brief submissions can be provided when the matter returns to settle the form of order.

Application granted.

Footnotes

1 All funds referred to in these Reasons are expressed in United States Dollars (USD).

2 Typographical errors are in the original text.

3 While it is true that the Barbados Project could be built in two phases of 10 MW each it is significant that there is no mention of overall approval for a 20 MW solar farm.

4 Mr. Joffre was a Senior Executive of Potentia responsible for Caribbean Projects.

5 Deltro did raise a number of other minor arguments, such as the fact it had ordered a generator. I have considered them but do not propose to deal with each in detail.

6 Endorsement of Justice Belobaba dated July 5, 2017. An appeal from this decision was dismissed on October 6, 2017.

2019 ONCA 779
Ontario Court of Appeal

Potentia Renewables Inc. v. Deltro Electric Ltd.

2019 CarswellOnt 15397, 2019 ONCA 779, 311 A.C.W.S. (3d) 240, 73 C.B.R. (6th) 165

Potentia Renewables Inc. (Applicant / Respondent) and Deltro Electric Ltd. (Respondent / Appellant)

M. Tulloch, L.B. Roberts, B.W. Miller JJ.A.

Heard: June 5, 2019
Judgment: October 2, 2019
Docket: CA C65744

Proceedings: affirming *Potentia Renewables Inc. v. Deltro Electric Ltd.* (2018), 2018 ONSC 3437, c, 62 C.B.R. (6th) 10, T. McEwen J. (Ont. S.C.J.)

Counsel: Fred Platt, Michael Mazzuca, for Appellant
George Benchetrit, Aryan Ziaie, for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.iii Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — General principles
Applicant power producer entered into agreement with respondent company for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged producer had repudiated letter of intent regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2 million USD due and payable from company — Producer sought declaratory relief as to amount owed and sought appointment of receiver of property and assets for company — Company was ordered to repay producer amount in Canadian currency sufficient to purchase $2 million USD and application judge appointed interim receiver (KSV) over company's assets and undertakings for 30 days to determine if "a sensible plan of repayment" could be made, failing which, producer would be entitled to have KSV appointed as receiver of all company's property — Company did not repay amounts ordered and KSV became receiver to ensure payment was made — Company appealed — Appeal dismissed — Appeal turned on application judge's interpretation of documents exchanged between parties and procedural underpinnings of proceedings initiated — Application was properly brought under R. 14 of Rules of Civil Procedure (Rules) — While in accordance with R. 14.06(3) of Rules, producer should have stated rule or statute under which application was brought, which was procedural, not substantive, requirement — Its omission did not invalidate application that otherwise complied in substance with R. 14.02 of Rules — It was open to application judge to conclude that documents proffered by company, including proposed fresh evidence, fell short of demonstrating that final approval had been granted — Application judge's interpretation was reasonable and was owed deference on appeal — Moreover, application judge was not obliged to accept fresh affidavits or re-open application — Application judge correctly

observed, prior to its request to re-open application, that company had never advanced position that it was not party letter of intent — Decisions for repayment and appointment of receiver if failure to pay were decisions that represented reasonable exercise of application judge's discretion as case management judge of Commercial List of Ontario Superior Court of Justice — There was no dispute that KSV qualified as receiver — Further, application judge understood that he was not obliged to limit receiver's liability to gross negligence or wilful misconduct — KSV's limited liability permitted orderly execution of its duties without concern that it would be subject to needless litigation.

Bankruptcy and insolvency --- Receivers — Appointment

Applicant power producer entered into agreement with respondent company, for energy project to take place in Barbados — Relationship between parties deteriorated — Company alleged producer had repudiated letter of intent, regarding project — Producer disputed that breach had taken place, but accepted that contract was at end — Producer claimed amount of $2 million USD due and payable from company — Producer sought declaratory relief as to amount owed, and judgment on amount and sought appointment of receiver of property and assets for company — Company was ordered to repay producer amount in Canadian currency sufficient to purchase $2 million USD and upon failure to repay within 30 days, application judge appointed interim receiver (KSV) over company's assets and undertakings for 30 days to determine if "a sensible plan of repayment" could be made, failing which, producer would be entitled to have KSV appointed as receiver of all company's property — Company did not repay amounts ordered and KSV became receiver to ensure payment was made — Company appealed — Appeal dismissed — Decisions for repayment and appointment of receiver if failure to pay were decisions that represented reasonable exercise of application judge's discretion as case management judge of Commercial List of Ontario Superior Court of Justice — There was no dispute that KSV qualified as receiver — Further, application judge understood that he was not obliged to limit receiver's liability to gross negligence or wilful misconduct — KSV's limited liability permitted orderly execution of its duties without concern that it would be subject to needless litigation.

Table of Authorities

Cases considered by *L.B. Roberts J.A.*:

Jethwani v. Damji (2017), 2017 ONSC 1702, 2017 CarswellOnt 3783, 46 C.B.R. (6th) 96 (Ont. S.C.J. [Commercial List]) — referred to

Western Larch Ltd. v. Di Poce Management Ltd. (2013), 2013 ONCA 722, 2013 CarswellOnt 16223, 117 O.R. (3d) 561, 313 O.A.C. 108, 21 B.L.R. (5th) 47 (Ont. C.A.) — referred to

671122 Ontario Ltd. v. Sagaz Industries Canada Inc. (2001), 2001 SCC 59, 2001 CarswellOnt 3357, 2001 CarswellOnt 3358, 11 C.C.E.L. (3d) 1, [2001] 4 C.T.C. 139, 204 D.L.R. (4th) 542, 274 N.R. 366, 17 B.L.R. (3d) 1, 150 O.A.C. 12, 12 C.P.C. (5th) 1, 8 C.C.L.T. (3d) 60, [2001] 2 S.C.R. 983, *(*sub nom. *Sagaz Industries Canada Inc. v. 671122 Ontario Ltd.)* 2002 C.L.L.C. 210-013, 55 O.R. (3d) 782, 2001 CSC 59 (S.C.C.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — considered

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 2.01 — referred to

R. 14 — considered

R. 14.02 — considered

R. 14.05(3)(d) — considered

R. 14.05(3)(g) — considered

R. 14.06(3) — considered

APPEAL by company from judgment reported at *Potentia Renewables Inc. v. Deltro Electric Ltd.* (2018), 2018 ONSC 3437, 2018 CarswellOnt 12310, 62 C.B.R. (6th) 10 (Ont. S.C.J.), ordering repayment to producer and failing repayment, appointing receiver over company's assets, undertakings and property.

***L.B. Roberts J.A.*:**

1 The appellant, Deltro Electric Ltd., appeals from the order that it repay to the respondent, Potentia Renewables Inc., the amount in Canadian currency sufficient to purchase $2 million USD and that, failing repayment, a receiver be appointed over the appellant's assets, undertakings and property.

2 For the reasons that follow, I would dismiss the appeal.

A. BACKGROUND FACTS AND PROCEDURAL HISTORY

3 As this appeal turns on the application judge's interpretation of documents exchanged between the parties and the procedural underpinnings of the proceedings initiated by them, it is useful to set out a brief summary of the background facts and procedural history.

4 The respondent's application was one of three proceedings arising out of the parties' failed business relationship in relation to the development of a ground-mount solar project in Barbados ("the Barbados project") and an unrelated renewable energy project in the Dominican Republic. The other two proceedings were actions that the respondent and appellant instigated against each other. The application judge was appointed to case manage these proceedings on the Commercial List of the Superior Court of Justice in Toronto.

5 The application judge determined that the appellant, as part of a group of related companies, controlled by Mr. Del Mastro, referenced as the "Deltro Group of Companies", had entered into a number of obligations with the respondent to finance and complete the Barbados project, as largely memorialized in the letter of intent ("LOI") dated May 15, 2016, and the amendment to the letter of intent ("ALOI") and General Security Agreement ("GSA") dated November 15, 2016. In accordance with those agreements, the respondent advanced $2 million USD in two tranches to the appellant: $500,000 USD under the LOI and $1.5 million USD pursuant to the ALOI and GSA.

6 By its counsel's letter on behalf of the "Deltro Group of Companies", dated January 28, 2017, the appellant advised the respondent that as a result of the latter's alleged misconduct in relation to an unrelated solar project in the Dominican Republic, "Deltro is no longer under any contractual or other obligation to sell, assign, transfer, notify or deliver any interests in any project under any agreement between the parties." In its counsel's responding letter of February 6, 2017, the respondent denied the allegations of misconduct but accepted the appellant's repudiation of all agreements, including the Barbados project, and demanded repayment of the $2 million USD that it had advanced.

7 In its counsel's subsequent correspondence of February 23, 2017, the appellant advised that it had obtained final approval of the Barbados project, as required under the parties' agreements, and demanded that the GSA be discharged. Responding by its counsel's letter of February 28, 2017, the respondent did not accept that the appellant provided proper proof of the requisite final approval and advised that, in any event, it was not obligated to discharge the GSA in light of the appellant's repudiation that the respondent had accepted.

8 Taking the position that final approval had not been achieved and that the appellant had repudiated the LOI and ALOI, the respondent brought an application seeking the appointment of a receiver, as well as a declaration of the appellant's indebtedness and corresponding judgment.

The application judge's decisions

9 The application judge rejected the appellant's argument that final approval of the Barbados project had been obtained and concluded that the appellant had breached and repudiated its obligations and was therefore required to repay the respondent

the equivalent of $2 million USD. In the event that the appellant failed to make payment within 30 days, the application judge appointed KSV Kofman Inc. ("KSV") as an interim receiver over the appellant's assets and undertakings for 30 days to determine if "a sensible plan of repayment" could be made, failing which, the respondent would be entitled to have KSV appointed as receiver of all the appellant's property. The appellant did not repay the amounts ordered and KSV became receiver to ensure payment was made.

10 The appellant asked the application judge to re-open the application, arguing that the appellant could not have repudiated the LOI because it was not a party to it; and the appellant had not breached the ALOI because final approval of the Barbados project had been obtained, in support of which the appellant tendered as fresh evidence the affidavits of two former Barbadian ministerial officials.

11 The application judge refused to re-open the application. He precluded the appellant from raising the new argument that it was not a party to the LOI. He also rejected the fresh evidence, holding that it was, at best, equivocal as to whether final approval had been obtained, and would not therefore have changed the outcome of the application.

B. ISSUES

12 The appellant pursued the following issues on the hearing of the appeal:

1. The application judge had no jurisdiction to grant any of the relief requested on the application and should have directed it proceed to trial with the other two actions that were ordered to be heard together.

2. The application judge erred in finding that the appellant had failed to obtain final approval of the Barbados project and had repudiated the ALOI, and in failing to admit fresh evidence and re-open the application on this issue.

3. The application judge erred in finding that the appellant had repudiated and breached the LOI to which it was not a party, and in failing to re-open the application on this issue.

13 The appellant relied on its factum for the other discrete issues raised on this appeal, namely: the application judge erred in appointing KSV as receiver and in limiting KSV's liability as receiver to gross negligence or wilful misconduct.

C. ANALYSIS

(i) The application judge's jurisdiction

14 The appellant submits that the application judge should not have allowed the proceeding to be commenced by application as it was not authorized under r. 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194. The appellant also argued that the application judge lacked jurisdiction to appoint a receiver under s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 that allows only for interlocutory orders to be granted. Moreover, no recourse could be had to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 that permits the appointment of a receiver where the debtor is insolvent because, as the application judge found, the appellant was not insolvent.

15 I would not accept these submissions.

16 The application was properly brought under r. 14 of the *Rules of Civil Procedure.* While, in accordance with r. 14.06(3), the respondent should have stated the rule or statute under which the application is brought, this is a procedural, not a substantive, requirement. Its omission does not invalidate an application that otherwise complies in substance with r. 14.02: see r. 2.01 of the *Rules of Civil Procedure*.

17 Here, the substance of the application was in respect of a matter under r. 14.05(3)(d): "the determination of rights that depend on the interpretation of a . . . contract or other instrument". This included the interpretation of the LOI, ALOI and GSA, about which there were no issues of credibility that required a trial to resolve. Rule 14.05(3)(g) permitted the respondent's

request for a "declaration", "the appointment of a receiver" and damages, as "other consequential relief when ancillary to relief claimed in a proceeding properly commenced by a notice of application".

18 Moreover, there was no need for the respondent or the application judge to resort to s. 101 of the *Courts of Justice Act* or s. 243 of the *Bankruptcy and Insolvency Act*, for authority to appoint a receiver. Article 6.1(l) of the GSA specifically allows the respondent to "appoint, by an instrument in writing delivered to the [appellant], a receiver, manager or a receiver and manager (a "Receiver") . . . or institute proceedings in any court of competent jurisdiction for the appointment of a Receiver", upon the appellant's default.

19 As a result, the application judge had jurisdiction to hear and determine the respondent's application and to grant the requested relief.

(ii) Final approval of the Barbados project

20 It is common ground that according to the LOI, the second progress payment of $1.5 million USD was payable by the respondent when the final formal zoning and site approval by the Barbados Town and Country Planning for the Barbados project was obtained. The dispute between the parties as to whether final approval had been obtained led them to enter into the ALOI and the GSA to secure the second progress payment.

21 There is also no dispute that the ALOI provided that the appellant could keep the second progress payment if, within 12 months of the date of the disbursement, final approval was granted by the Barbados Town and Country Planning Office or any other Barbados governmental body with the authority to grant the final approval. But, if final approval was not obtained within this 12-month period, the ALOI stipulated that the respondent "shall have the right (but not the obligation) to demand full and immediate repayment" of the $1.5 million USD progress payment. Following full repayment, the GSA would be discharged.

22 The appellant does not dispute that if final approval were not obtained within the stipulated period, it would be obliged to make the $1.5 million USD repayment. However, it maintains that the application judge made palpable and overriding errors in his interpretation of the various letters and affidavits of the former Barbadian ministers which, according to the appellant, established that final approval had been granted. The application judge erred, according to the appellant, in failing to admit the fresh evidence of the ministers' affidavits and in failing to reopen the application. As a result, the appellant argues, the GSA should have been discharged and there was no obligation to repay the $1.5 million USD progress payment.

23 I disagree.

24 First, it was open to the application judge to conclude that the documents proffered by the appellant, including the proposed fresh evidence, fell far short of demonstrating that final approval had been granted. His interpretation was reasonable and is owed deference on appeal. Moreover, he was not obliged to accept the fresh affidavits of the former Barbadian ministers or re-open the application.

25 It has long been established that, absent an error of law, an appellate court should not interfere with the exercise by a trial judge of his or her discretion in the conduct of a trial. Appellate courts should defer to the trial judge who is in the best position to decide whether, at the expense of finality, fairness dictates that the trial be reopened. Further, the case law dictates that the trial judge must exercise his discretion to reopen the trial "sparingly and with the greatest care" so that "fraud and abuse of the Court's processes" do not result: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983 (S.C.C.), at paras. 60-61.

26 I see no error in the application judge's refusal to re-open the application based on the fresh evidence of the former ministers' affidavits. As already noted, his conclusion that the fresh evidence would not have affected the outcome was reasonable. There is no basis to interfere with it.

27 Further and in any event, as the application judge found, regardless if final approval were ultimately obtained, that approval came too late because it followed the appellant's clear repudiation of the ALOI by its counsel's January 28, 2017 letter and

the respondent's equally clear acceptance of its repudiation. Upon the respondent's acceptance of the appellant's repudiation, the appellant's obligation to obtain final approval, among other obligations, came to an end but its obligation to repay $1.5 million USD arose.

28 I would therefore reject this ground of appeal.

(iii) Did the appellant repudiate the LOI?

29 Nor do I accept the appellant's argument that the application judge erred in finding that the appellant had repudiated the LOI when, according to the appellant, it was not a party to that agreement. Accordingly, the application judge was not required, as the appellant submits, to re-open the application to correct any error or to prevent a miscarriage of justice.

30 With respect to the appellant's request to re-open the application, the application judge concluded:

> The argument now advanced by Deltro was available when the matter first appeared before me. I have, however, reviewed my Reasons, the documents Deltro produced for this motion, and considered Deltro's argument. I see no basis to change the relevant findings in my Reasons. This is particularly so in light of Deltro's admission at this motion that the January 28, 2017, letter sent by counsel for the "Deltro Group of Companies" to Potentia included both/either Deltro and DGL.

31 As the application judge correctly observed, prior to its request to re-open the application, the appellant had never advanced the position that it was not a party to the LOI. Indeed, the artificial and technical distinction that the appellant now advocates for is not supported by the evidence or its pleadings. Rather, the appellant's correspondence with the respondent, its pleadings, and the appellant's supporting affidavits on the application establish that the appellant consistently represented itself and operated as part of an integrated group of related companies of which Mr. Del Mastro is the directing mind and will, and which was a party to the LOI.

32 In particular, in its statement of defence and counterclaim to the action commenced by the respondent, the appellant does not differentiate itself from the other members of the "Deltro Group of Companies". Instead, the appellant describes itself in para. 4 as a company that "together with its related companies, conducts business development, financing, construction, and operations of renewable energy projects . . . throughout the Caribbean". Importantly, in para. 6 of its statement of defence and counterclaim, the appellant expressly admits that it entered into the LOI:

> In response to Paragraphs 4 and 5 of the Statement of Claim, [the appellant] admits that it entered into . . . the [LOI] . . . with [the respondent], the former with respect to the Barbados Project.

33 This admission formed the basis for the appellant's claim for damages in paras. 25 to 28 of its counterclaim "related to [the respondent's] breach of contract of the [LOI] . . . for the greater of the expectation interest that [the appellant] would have reasonably expected to receive under the [LOI] but for [the respondent's] breach or in the alternative [the appellant's] reliance interest for funds it has expended in reliance of the said agreement".

34 The appellant has never sought to withdraw its admission, amend its pleadings or withdraw its counterclaim.

35 As a result, I see no error in the application judge's refusal to re-open the application.

36 Given the application judge's finding that the appellant had repudiated the LOI, it was reasonable for him to determine that ss. 7 and 12 of the LOI are of no assistance to the appellant. As the application judge stated: "Deltro cannot accept Potentia's money, repudiate the agreement, and then rely on a clause from the very same agreement as justification for keeping the money". I see no error in the application judge's conclusion.

(iv) KSV's appointment as Receiver and the exclusion of liability

37 The appellant submits that the application judge erred in appointing KSV as receiver because it has a conflict of interest given its ongoing professional relationship with the respondent's counsel in other receivership matters. Further, the appellant

submits that the application judge erred in limiting the receiver's liability to gross negligence or wilful misconduct in the formal order.

38 I would not give effect to these submissions. In my view, both these decisions represented a reasonable exercise of the application judge's discretion as a case management judge of the Commercial List of the Ontario Superior Court of Justice in Toronto.

39 Absent reviewable error, deference must be shown to the reasonable case management decisions of the highly specialized judges who sit on the Commercial List: see *Western Larch Ltd. v. Di Poce Management Ltd.*, 2013 ONCA 722, 117 O.R. (3d) 561 (Ont. C.A.), at para. 16. Established in 1991, the Commercial List of the Ontario Superior Court of Justice specializes in the hearing and case management of only commercial law cases, including receiverships. Matters on the Commercial List are governed by a Practice Direction that sets out special procedures specifically adopted for the hearing of matters on the Commercial List. The Practice Direction anticipates that the same judge who determines a substantive component of a proceeding will continue to hear all substantive matters. It is also expected that the proceeding shall be subject to a form of case management. See: *Consolidated Practice Direction Concerning the Commercial List*, effective July 1, 2014.

40 With that context in mind, I turn first to the appointment of KSV as receiver. I see no error in the exercise of the application judge's discretion to appoint KSV. There is no dispute that KSV was qualified to act as receiver. Moreover, KSV was independent; it had no connection with the respondent or the appellant. The fact that KSV has worked professionally with the respondent's counsel on other unrelated matters does not raise a disqualifying conflict or prevent it from complying with its professional obligations to the court. As the application judge reasonably observed, it is not unusual for professional law and accounting firms specializing in insolvency matters to have had previous or ongoing professional relationships. Finally, it must be recalled that KSV, as the court-appointed receiver, is an officer of the court, accountable to the court and all interested parties, including the appellant: see *Jethwani v. Damji*, 2017 ONSC 1702 (Ont. S.C.J. [Commercial List]), at para. 8.

41 With respect to the application judge's limitation of the receiver's liability in the receivership order, I similarly see no basis for appellate intervention.

42 The provisions of the receivership order, with which the appellant takes issue, are standard provisions that form part of the model receivership order prescribed by the Commercial List Users' Committee for the use of practitioners and the court. While not bound by them, counsel is expected to use the model orders developed by the Users' Committee as templates for the draft orders they put before the Court, appropriately adapted as the particular circumstances of each case require, with suggested revisions black-lined. This follows the direction in para. 57 of Part XVIII of the Practice Direction: "[t]he prior preparation of draft orders for consideration by the court at the end of a hearing will greatly expedite the issuance of orders. Where relevant model orders have been approved by the Commercial List Users' Committee, a copy of the draft order blacklined to the model order and indicating all variations sought from the model order must be filed."

43 The theory and approach behind the recommended model orders promote the Commercial List's purposes of efficiency, expediency and uniformity in commercial law matters, while recognizing that any model order serves only as a guide and must be tailored to suit the circumstances of each case before the court. While model orders are extremely useful to parties and the court, they are only tools and must be treated with care. They are not mandatory. Not every provision in the model orders will be suitable in every case. A judge must always appropriately exercise discretion to determine what provisions are reasonable in the circumstances.

44 For ease of reference, I have highlighted the impugned provisions in the text of para. 20 of the order, reproduced below:

> THIS COURT ORDERS that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, **save and except for any gross negligence or wilful misconduct on its part**, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation. [Emphasis added.]

45 The appellant objected to these provisions on the basis that there was no reason to limit the receiver's liability beyond negligence as the ordinary standard of liability to gross negligence or wilful misconduct. The application judge did not accept this submission and determined, in the circumstances of this case, that it was appropriate to include the standard limiting provisions of the model order.

46 In my view, the application judge's decision was reasonable. The application judge understood that he was not obliged to limit the receiver's liability to gross negligence or wilful misconduct. He did not indicate that he was obliged to follow the model order or that the model order was determinative. Rather, he properly exercised his discretion to include the impugned provisions based on the circumstances of the case before him.

47 Why then was it reasonable in this case to include the limited liability shield for the receiver?

48 It is a fair inference, in my view, that, without it, KSV may have refused to act as receiver in the circumstances of this case. A qualified receiver considering accepting an appointment can legitimately take into account whether the limited liability shield will be in place, as contemplated in the model order, to allow for the proper and orderly conduct of the receivership and avoid unnecessary and unjustified proceedings. As observed in the explanatory notes for the 2004 version of the model receivership order:

> the Receiver is not a legitimate target for the competing creditors . . . . [A] gross negligence floor has been continued as the standard of culpability in order to limit the ability of creditors or the debtor from seeking to mount a challenge to the reasonableness of every exercise of the Receivers' discretion.

49 The reasonable expectation of a limited liability shield is also reflected in the respondent's engagement letter to BDO, the proposed predecessor receiver, which provided that it would indemnify the receiver for all liabilities incurred in connection with the receivership, "excepting only any liabilities . . . that arise out of a wrongful act of [the receiver] which is proven to have been committed by it wilfully or out of gross negligence".

50 While it may not be appropriate or required in all cases, KSV's limited liability permits the orderly execution of its duties without the concern that it will be subject to needless litigation, especially in the circumstances of this case, with a recalcitrant debtor who has already objected to KSV's appointment. Recall KSV's mandate in this case: while the scope of its powers is broad, its narrow purpose is to ensure payment of the $2 million USD debt to the respondent, which the appellant has steadfastly refused to pay notwithstanding its liability under the LOI, ALOI and GSA. The limitation of KSV's liability to gross negligence and wilful misconduct lessens the likelihood that the appellant will interfere with the completion of the receiver's mandate.

51 That said, the limitation of its liability does not mean that KSV can act with impunity. KSV is a court-appointed receiver whose conduct of the receivership is subject to the court's scrutiny in which process the appellant will actively participate.

52 As a result, I see no basis to interfere with the provisions of the application judge's order that limit the receiver's liability to gross negligence and wilful misconduct.

D. DISPOSITION

53 For these reasons, I would dismiss the appeal.

54 In accordance with the provisions of the GSA, the respondent is entitled to its full indemnity costs that I would fix in the amount of $50,000, inclusive of disbursements and applicable taxes.

***M. Tulloch J.A.*:**

I agree.

***B.W. Miller J.A.*:**

I agree.

Appeal dismissed.

End of Document

Tab 7

Most Negative Treatment: Distinguished
Most Recent Distinguished: SR Télécom & Co. v. Apex - Micro Manufacturing Corp. | 2008 BCSC 1768, 2008 CarswellBC 2780, [2009] B.C.W.L.D. 1328, 15 P.P.S.A.C. (3d) 136, 52 C.B.R. (5th) 204, 173 A.C.W.S. (3d) 749 | (B.C. S.C., Dec 22, 2008)

2005 CarswellOnt 1188
Ontario Court of Appeal

Stelco Inc., Re

2005 CarswellOnt 1188, [2005] O.J. No. 1171, 138 A.C.W.S. (3d) 222, 196 O.A.C. 142, 253 D.L.R. (4th) 109, 2 B.L.R. (4th) 238, 75 O.R. (3d) 5, 9 C.B.R. (5th) 135

In the Matter of the Companies' Creditors Arrangement Act, R.S.C., c. C-36, as amended

And In the Matter of a proposed plan of compromise or arrangement with respect to Stelco Inc. and the other Applicants listed in Schedule "A"

Application under the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

Goudge, Feldman, Blair JJ.A.

Heard: March 18, 2005
Judgment: March 31, 2005
Docket: CA M32289

Proceedings: reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List])); reversed *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 743, [2005] O.J. No. 730, 7 C.B.R. (5th) 310 ((Ont. S.C.J. [Commercial List])); additional reasons to *Stelco Inc., Re* ((2005)), 2005 CarswellOnt 742, [2005] O.J. No. 729, 7 C.B.R. (5th) 307 ((Ont. S.C.J. [Commercial List]))

Counsel: Jeffrey S. Leon, Richard B. Swan for Appellants, Michael Woollcombe, Roland Keiper
Kenneth T. Rosenberg, Robert A. Centa for Respondent, United Steelworkers of America
Murray Gold, Andrew J. Hatnay for Respondent, Retired Salaried Beneficiaries of Stelco Inc., CHT Steel Company Inc., Stelpipe Ltd., Stelwire Ltd., Welland Pipe Ltd.
Michael C.P. McCreary, Carrie L. Clynick for USWA Locals 5328, 8782
John R. Varley for Active Salaried Employee Representative
Michael Barrack for Stelco Inc.
Peter Griffin for Board of Directors of Stelco Inc.
K. Mahar for Monitor
David R. Byers (Agent) for CIT Business Credit, DIP Lender

Subject: Corporate and Commercial; Insolvency; Property; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.7 Miscellaneous
Business associations
III Specific matters of corporate organization
III.1 Directors and officers
III.1.b Appointment

III.1.b.i General principles

Headnote

Business associations --- Specific corporate organization matters — Directors and officers — Appointment — General principles

Corporation entered protection under Companies' Creditors Arrangement Act — K and W were involved with companies who made capital proposal regarding corporation — Companies held approximately 20 per cent of corporation's shares — K and W, allegedly with support of over 30 per cent of shareholders, requested to fill two vacant directors' positions of corporation, and be appointed to review committee — K and W claimed that their interest as shareholders would not be represented in proceedings — K and W appointed directors by board, and made members of review committee — Employees' motion for removal of K and W as directors was granted and appointments were voided — Trial judge found possibility existed that K and W would not have best interests of corporation at heart, and might favour certain shareholders — Trial judge found interference with business judgment of board was appropriate, as issue touched on constitution of corporation — Trial judge found reasonable apprehension of bias existed, although no evidence of actual bias had been shown — K and W appealed — Appeal allowed — K and W reinstated to board — Court's discretion under s. 11 of Act does not give authority to remove directors, which is not part of restructuring process — Trial judge erred in not deferring to corporation's business judgment — Trial judge erred in adopting principle of reasonable apprehension of bias.

Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Miscellaneous issues

Corporation entered protection under Companies' Creditors Arrangement Act — K and W were involved with companies who made capital proposal regarding corporation — Companies held approximately 20 per cent of corporation's shares — K and W, allegedly with support of over 30 per cent of shareholders, requested to fill two vacant directors' positions of corporation and be appointed to review committee — K and W claimed that their interest as shareholders would not be represented in proceedings — K and W appointed directors by board, and made members of review committee — Employees' motion for removal of K and W as directors was granted and appointments were voided — Trial judge found possibility existed that K and W would not have best interests of corporation at heart, and might favour certain shareholders — Trial judge found interference with business judgment of board was appropriate, as issue touched on constitution of corporation — Trial judge found reasonable apprehension of bias existed, although no evidence of actual bias had been shown — K and W appealed — Appeal allowed — K and W reinstated to board — Court's discretion under s. 11 of Act does not give authority to remove directors, which is not part of restructuring process — Trial judge erred in not deferring to corporation's business judgment — Trial judge erred in adopting principle of reasonable apprehension of bias.

Table of Authorities

Cases considered by *Blair J.A.*:

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Algoma Steel Inc., Re (2001), 2001 CarswellOnt 1742, 25 C.B.R. (4th) 194, 147 O.A.C. 291 (Ont. C.A.) — considered

Algoma Steel Inc. v. Union Gas Ltd. (2003), 2003 CarswellOnt 115, 39 C.B.R. (4th) 5, 169 O.A.C. 89, 63 O.R. (3d) 78 (Ont. C.A.) — referred to

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Baxter Student Housing Ltd. v. College Housing Co-operative Ltd. (1975), [1976] 2 S.C.R. 475, [1976] 1 W.W.R. 1, 20 C.B.R. (N.S.) 240, 57 D.L.R. (3d) 1, 5 N.R. 515, 1975 CarswellMan 3, 1975 CarswellMan 85 (S.C.C.) — referred to

Blair v. Consolidated Enfield Corp. (1995), 128 D.L.R. (4th) 73, 187 N.R. 241, 86 O.A.C. 245, 25 O.R. (3d) 480 (note), 24 B.L.R. (2d) 161, [1995] 4 S.C.R. 5, 1995 CarswellOnt 1393, 1995 CarswellOnt 1179 (S.C.C.) — considered

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Catalyst Fund General Partner I Inc. v. Hollinger Inc. (2004), 1 B.L.R. (4th) 186, 2004 CarswellOnt 4772 (Ont. S.C.J.) — referred to

Country Style Food Services Inc., Re (2002), 2002 CarswellOnt 1038, 158 O.A.C. 30 (Ont. C.A. [In Chambers]) — considered

Dylex Ltd., Re (1995), 31 C.B.R. (3d) 106, 1995 CarswellOnt 54 (Ont. Gen. Div. [Commercial List]) — referred to

Hongkong Bank of Canada v. Chef Ready Foods Ltd. (1990), 51 B.C.L.R. (2d) 84, 4 C.B.R. (3d) 311, (sub nom. *Chef Ready Foods Ltd. v. Hongkong Bank of Canada)* [1991] 2 W.W.R. 136, 1990 CarswellBC 394 (B.C. C.A.) — referred to
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Richtree Inc., Re (2005), 2005 CarswellOnt 255, 7 C.B.R. (5th) 294 (Ont. S.C.J. [Commercial List]) — referred to
Rizzo & Rizzo Shoes Ltd., Re (1998), 1998 CarswellOnt 1, 1998 CarswellOnt 2, 154 D.L.R. (4th) 193, 36 O.R. (3d) 418 (headnote only), (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 221 N.R. 241, (sub nom. *Adrien v. Ontario Ministry of Labour)* 98 C.L.L.C. 210-006, 50 C.B.R. (3d) 163, (sub nom. *Rizzo & Rizzo Shoes Ltd. (Bankrupt), Re)* 106 O.A.C. 1, [1998] 1 S.C.R. 27, 33 C.C.E.L. (2d) 173 (S.C.C.) — referred to
Royal Oak Mines Inc., Re (1999), 1999 CarswellOnt 792, 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]) — considered
Sammi Atlas Inc., Re (1998), 1998 CarswellOnt 1145, 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]) — referred to
Skeena Cellulose Inc., Re (2003), 43 C.B.R. (4th) 187, 184 B.C.A.C. 54, 302 W.A.C. 54, 2003 BCCA 344, 2003 CarswellBC 1399, 13 B.C.L.R. (4th) 236 (B.C. C.A.) — followed
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Westar Mining Ltd., Re (1992), 70 B.C.L.R. (2d) 6, 14 C.B.R. (3d) 88, [1992] 6 W.W.R. 331, 1992 CarswellBC 508 (B.C. S.C.) — referred to

Statutes considered:

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

s. 2(1) "affairs" — considered

s. 102 — referred to

s. 106(3) — referred to

s. 109(1) — referred to

s. 111 — referred to

s. 122(1) — referred to

s. 122(1)(a) — referred to

s. 122(1)(b) — referred to

s. 145 — referred to

s. 145(2)(b) — referred to

s. 241 — referred to

s. 241(3)(e) — referred to

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

s. 11 — considered

s. 11(1) — considered

s. 11(3) — considered

s. 11(4) — considered

s. 11(6) — considered

s. 20 — considered

APPEAL by potential board members from judgments reported at *Stelco Inc., Re* (2005), 2005 CarswellOnt 742, 7 C.B.R. (5th) 307 (Ont. S.C.J. [Commercial List]) and at *Stelco Inc., Re* (2005), 2005 CarswellOnt 743, 7 C.B.R. (5th) 310 (Ont. S.C.J. [Commercial List]), granting motion by employees for removal of certain directors from board of corporation under protection of *Companies Creditors' Arrangement Act*.

***Blair J.A.*:**

Part I — Introduction

1 Stelco Inc. and four of its wholly owned subsidiaries obtained protection from their creditors under the *Companies' Creditors Arrangement Act* [1] on January 29, 2004. Since that time, the Stelco Group has been engaged in a high profile, and sometimes controversial, process of economic restructuring. Since October 2004, the restructuring has revolved around a court-approved capital raising process which, by February 2005, had generated a number of competitive bids for the Stelco Group.

2 Farley J., an experienced judge of the Superior Court Commercial List in Toronto, has been supervising the CCAA process from the outset.

3 The appellants, Michael Woollcombe and Roland Keiper, are associated with two companies — Clearwater Capital Management Inc., and Equilibrium Capital Management Inc. — which, respectively, hold approximately 20% of the outstanding publicly traded common shares of Stelco. Most of these shares have been acquired while the CCAA process has been ongoing, and Messrs. Woollcombe and Keiper have made it clear publicly that they believe there is good shareholder value in Stelco in spite of the restructuring. The reason they are able to take this position is that there has been a solid turn around in worldwide steel markets, as a result of which Stelco, although remaining in insolvency protection, is earning annual operating profits.

4 The Stelco board of directors ("the Board") has been depleted as a result of resignations, and in January of this year Messrs. Woollcombe and Keiper expressed an interest in being appointed to the Board. They were supported in this request by other shareholders who, together with Clearwater and Equilibrium, represent about 40% of the Stelco common shareholders. On February 18, 2005, the Board appointed the appellants directors. In announcing the appointments publicly, Stelco said in a press release:

> After careful consideration, and given potential recoveries at the end of the company's restructuring process, the Board responded favourably to the requests by making the appointments announced today.

> Richard Drouin, Chairman of Stelco's Board of Directors, said: "I'm pleased to welcome Roland Keiper and Michael Woollcombe to the Board. Their experience and their perspective will assist the Board as it strives to serve the best interests of all our stakeholders. We look forward to their positive contribution."

5 On the same day, the Board began its consideration of the various competing bids that had been received through the capital raising process.

6 The appointments of the appellants to the Board incensed the employee stakeholders of Stelco ("the Employees"), represented by the respondent Retired Salaried Beneficiaries of Stelco and the respondent United Steelworkers of America ("USWA"). Outstanding pension liabilities to current and retired employees are said to be Stelco's largest long-term liability — exceeding several billion dollars. The Employees perceive they do not have the same, or very much, economic leverage in what has sometimes been referred to as 'the bare knuckled arena' of the restructuring process. At the same time, they are amongst the most financially vulnerable stakeholders in the piece. They see the appointments of Messrs. Woollcombe and Keiper to the Board as a threat to their well being in the restructuring process, because the appointments provide the appellants, and the shareholders they represent, with direct access to sensitive information relating to the competing bids to which other stakeholders (including themselves) are not privy.

7 The Employees fear that the participation of the two major shareholder representatives will tilt the bid process in favour of maximizing shareholder value at the expense of bids that might be more favourable to the interests of the Employees. They sought and obtained an order from Farley J. removing Messrs. Woollcombe and Keiper from their short-lived position of directors, essentially on the basis of that apprehension.

8 The Employees argue that there is a reasonable apprehension the appellants would not be able to act in the best interests of the corporation — as opposed to their own best interests as shareholders — in considering the bids. They say this is so because of prior public statements by the appellants about enhancing shareholder value in Stelco, because of the appellants' linkage to such a large shareholder group, because of their earlier failed bid in the restructuring, and because of their opposition to a capital proposal made in the proceeding by Deutsche Bank (known as "the Stalking Horse Bid"). They submit further that the appointments have poisoned the atmosphere of the restructuring process, and that the Board made the appointments under threat of facing a potential shareholders' meeting where the members of the Board would be replaced en masse.

9 On the other hand, Messrs. Woollcombe and Keiper seek to set aside the order of Farley J. on the grounds that (a) he did not have the jurisdiction to make the order under the provisions of the CCAA, (b) even if he did have jurisdiction, the reasonable apprehension of bias test applied by the motion judge has no application to the removal of directors, (c) the motion judge erred in interfering with the exercise by the Board of its business judgment in filling the vacancies on the Board, and (d) the facts do not meet any test that would justify the removal of directors by a court in any event.

10 For the reasons that follow, I would grant leave to appeal, allow the appeal, and order the reinstatement of the applicants to the Board.

Part II — Additional Facts

11 Before the initial CCAA order on January 29, 2004, the shareholders of Stelco had last met at their annual general meeting on April 29, 2003. At that meeting they elected eleven directors to the Board. By the date of the initial order, three of those directors had resigned, and on November 30, 2004, a fourth did as well, leaving the company with only seven directors.

12 Stelco's articles provide for the Board to be made up of a minimum of ten and a maximum of twenty directors. Consequently, after the last resignation, the company's corporate governance committee began to take steps to search for new directors. They had not succeeded in finding any prior to the approach by the appellants in January 2005.

13 Messrs. Woollcombe and Keiper had been accumulating shares in Stelco and had been participating in the CCAA proceedings for some time before their request to be appointed to the Board, through their companies, Clearwater and

Equilibrium. Clearwater and Equilibrium are privately held, Ontario-based, investment management firms. Mr. Keiper is the president of Equilibrium and associated with Clearwater. Mr. Woollcombe is a consultant to Clearwater. The motion judge found that they "come as a package".

14 In October 2004, Stelco sought court approval of its proposed method of raising capital. On October 19, 2004, Farley J. issued what has been referred to as the Initial Capital Process Order. This order set out a process by which Stelco, under the direction of the Board, would solicit bids, discuss the bids with stakeholders, evaluate the bids, and report on the bids to the court.

15 On November 9, 2004, Clearwater and Equilibrium announced they had formed an investor group and had made a capital proposal to Stelco. The proposal involved the raising of $125 million through a rights offering. Mr. Keiper stated at the time that he believed "the value of Stelco's equity would have the opportunity to increase substantially if Stelco emerged from CCAA while minimizing dilution of its shareholders." The Clearwater proposal was not accepted.

16 A few days later, on November 14, 2004, Stelco approved the Stalking Horse Bid. Clearwater and Equilibrium opposed the Deutsche Bank proposal. Mr. Keiper criticized it for not providing sufficient value to existing shareholders. However, on November 29, 2004, Farley J. approved the Stalking Horse Bid and amended the Initial Capital Process Order accordingly. The order set out the various channels of communication between Stelco, the monitor, potential bidders and the stakeholders. It provided that members of the Board were to see the details of the different bids before the Board selected one or more of the offers.

17 Subsequently, over a period of two and a half months, the shareholding position of Clearwater and Equilibrium increased from approximately 5% as at November 19, to 14.9% as at January 25, 2005, and finally to approximately 20% on a fully diluted basis as at January 31, 2005. On January 25, Clearwater and Equilibrium announced that they had reached an understanding jointly to pursue efforts to maximize shareholder value at Stelco. A press release stated:

> Such efforts will include seeking to ensure that the interests of Stelco's equity holders are appropriately protected by its board of directors and, ultimately, that Stelco's equity holders have an appropriate say, by vote or otherwise, in determining the future course of Stelco.

18 On February 1, 2005, Messrs. Keiper and Woollcombe and others representatives of Clearwater and Equilibrium, met with Mr. Drouin and other Board members to discuss their views of Stelco and a fair outcome for all stakeholders in the proceedings. Mr. Keiper made a detailed presentation, as Mr. Drouin testified, "encouraging the Board to examine how Stelco might improve its value through enhanced disclosure and other steps". Mr. Keiper expressed confidence that "there was value to the equity of Stelco", and added that he had backed this view up by investing millions of dollars of his own money in Stelco shares. At that meeting, Clearwater and Equilibrium requested that Messrs. Woollcombe and Keiper be added to the Board and to Stelco's restructuring committee. In this respect, they were supported by other shareholders holding about another 20% of the company's common shares.

19 At paragraphs 17 and 18 of his affidavit, Mr. Drouin, summarized his appraisal of the situation:

> 17. It was my assessment that each of Mr. Keiper and Mr. Woollcombe had personal qualities which would allow them to make a significant contribution to the Board in terms of their backgrounds and their knowledge of the steel industry generally and Stelco in particular. In addition I was aware that their appointment to the Board was supported by approximately 40% of the shareholders. In the event that these shareholders successfully requisitioned a shareholders meeting they were in a position to determine the composition of the entire Board.
>
> 18. I considered it essential that there be continuity of the Board through the CCAA process. I formed the view that the combination of existing Board members and these additional members would provide Stelco with the most appropriate board composition in the circumstances. The other members of the Board also shared my views.

20 In order to ensure that the appellants understood their duties as potential Board members and, particularly that "they would no longer be able to consider only the interests of shareholders alone but would have fiduciary responsibilities as a Board

member to the corporation as a whole", Mr. Drouin and others held several further meetings with Mr. Woollcombe and Mr. Keiper. These discussions "included areas of independence, standards, fiduciary duties, the role of the Board Restructuring Committee and confidentiality matters". Mr. Woollcombe and Mr. Keiper gave their assurances that they fully understood the nature and extent of their prospective duties, and would abide by them. In addition, they agreed and confirmed that:

a) Mr. Woollcombe would no longer be an advisor to Clearwater and Equilibrium with respect to Stelco;

b) Clearwater and Equilibrium would no longer be represented by counsel in the CCAA proceedings; and

c) Clearwater and Equilibrium then had no involvement in, and would have no future involvement, in any bid for Stelco.

21 On the basis of the foregoing — and satisfied "that Messrs. Keiper and Woollcombe would make a positive contribution to the various issues before the Board both in [the] restructuring and the ongoing operation of the business" — the Board made the appointments on February 18, 2005.

22 Seven days later, the motion judge found it "appropriate, just, necessary and reasonable to declare" those appointments "to be of no force and effect" and to remove Messrs. Woollcombe and Keiper from the Board. He did so not on the basis of any actual conduct on the part of the appellants as directors of Stelco but because there was some risk of anticipated conduct in the future. The gist of the motion judge's rationale is found in the following passage from his reasons (at para. 23):

> In these particular circumstances and aside from the Board feeling coerced into the appointments for the sake of continuing stability, I am not of the view that it would be appropriate to wait and see if there was any explicit action on behalf of K and W while conducting themselves as Board members which would demonstrate that they had not lived up to their obligations to be "neutral". They may well conduct themselves beyond reproach. But if they did not, the fallout would be very detrimental to Stelco and its ability to successfully emerge. What would happen to the bids in such a dogfight? I fear that it would be trying to put Humpty Dumpty back together again. The same situation would prevail even if K and W conducted themselves beyond reproach but with the Board continuing to be concerned that they not do anything seemingly offensive to the bloc. The risk to the process and to Stelco in its emergence is simply too great to risk the wait and see approach.

Part III — Leave to Appeal

23 Because of the "real time" dynamic of this restructuring project, Laskin J.A. granted an order on March 4, 2005, expediting the appellants' motion for leave to appeal, directing that it be heard orally and, if leave be granted, directing that the appeal be heard at the same time. The leave motion and the appeal were argued together, by order of the panel, on March 18, 2005.

24 This court has said that it will only sparingly grant leave to appeal in the context of a CCAA proceeding and will only do so where there are "serious and arguable grounds that are of real and significant interest to the parties": *Country Style Food Services Inc., Re* (2002), 158 O.A.C. 30, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), at para. 15. This criterion is determined in accordance with a four-pronged test, namely,

a) whether the point on appeal is of significance to the practice;

b) whether the point is of significance to the action;

c) whether the appeal is *prima facie* meritorious or frivolous;

d) whether the appeal will unduly hinder the progress of the action.

25 Counsel agree that (d) above is not relevant to this proceeding, given the expedited nature of the hearing. In my view, the tests set out in (a) - (c) are met in the circumstances, and as such, leave should be granted. The issue of the court's jurisdiction to intervene in corporate governance issues during a CCAA restructuring, and the scope of its discretion in doing so, are questions

of considerable importance to the practice and on which there is little appellate jurisprudence. While Messrs. Woollcombe and Keiper are pursuing their remedies in their own right, and the company and its directors did not take an active role in the proceedings in this court, the Board and the company did stand by their decision to appoint the new directors at the hearing before the motion judge and in this court, and the question of who is to be involved in the Board's decision making process continues to be of importance to the CCAA proceedings. From the reasons that follow it will be evident that in my view the appeal has merit.

26 Leave to appeal is therefore granted.

Part IV — The Appeal

The Positions of the Parties

27 The appellants submit that,

a) in exercising its discretion under the CCAA, the court is not exercising its "inherent jurisdiction" as a superior court;

b) there is no jurisdiction under the CCAA to remove duly elected or appointed directors, notwithstanding the broad discretion provided by s. 11 of that Act; and that,

c) even if there is jurisdiction, the motion judge erred:

(i) by relying upon the administrative law test for reasonable apprehension of bias in determining that the directors should be removed;

(ii) by rejecting the application of the "business judgment" rule to the unanimous decision of the Board to appoint two new directors; and,

(iii) by concluding that Clearwater and Equilibrium, the shareholders with whom the appellants are associated, were focussed solely on a short-term investment horizon, without any evidence to that effect, and therefore concluding that there was a tangible risk that the appellants would not be neutral and act in the best interests of Stelco and all stakeholders in carrying out their duties as directors.

28 The respondents' arguments are rooted in fairness and process. They say, first, that the appointment of the appellants as directors has poisoned the atmosphere of the CCAA proceedings and, secondly, that it threatens to undermine the even-handedness and integrity of the capital raising process, thus jeopardizing the ability of the court at the end of the day to approve any compromise or arrangement emerging from that process. The respondents contend that Farley J. had jurisdiction to ensure the integrity of the CCAA process, including the capital raising process Stelco had asked him to approve, and that this court should not interfere with his decision that it was necessary to remove Messrs. Woollcombe and Keiper from the Board in order to ensure the integrity of that process. A judge exercising a supervisory function during a CCAA proceeding is owed considerable deference: *Algoma Steel Inc., Re* (2001), 25 C.B.R. (4th) 194 (Ont. C.A.), at para. 8.

29 The crux of the respondents' concern is well-articulated in the following excerpt from paragraph 72 of the factum of the Retired Salaried Beneficiaries:

> The appointments of Keiper and Woollcombe violated every tenet of fairness in the restructuring process that is supposed to lead to a plan of arrangement. One stakeholder group — particular investment funds that have acquired Stelco shares during the CCAA itself — have been provided with privileged access to the capital raising process, and voting seats on the Corporation's Board of Directors and Restructuring Committee. No other stakeholder has been treated in remotely the same way. To the contrary, the salaried retirees have been completely excluded from the capital raising process and have no say whatsoever in the Corporation's decision-making process.

30 The respondents submit that fairness, and the perception of fairness, underpin the CCAA process, and depend upon effective judicial supervision: see *Olympia & York Developments Ltd. v. Royal Trust Co.* (1993), 12 O.R. (3d) 500 (Ont. Gen. Div.); *Ivaco Inc., Re* (2004), 3 C.B.R. (5th) 33 (Ont. S.C.J. [Commercial List]), at para.15-16. The motion judge reasonably decided to remove the appellants as directors in the circumstances, they say, and this court should not interfere.

Jurisdiction

31 The motion judge concluded that he had the power to rescind the appointments of the two directors on the basis of his "inherent jurisdiction" and "the discretion given to the court pursuant to the *CCAA*". He was not asked to, nor did he attempt to rest his jurisdiction on other statutory powers imported into the CCAA.

32 The CCAA is remedial legislation and is to be given a liberal interpretation to facilitate its objectives: *Babcock & Wilcox Canada Ltd., Re*, [2000] O.J. No. 786 (Ont. S.C.J. [Commercial List]), at para. 11. See also, *Hongkong Bank of Canada v. Chef Ready Foods Ltd.* (1990), 4 C.B.R. (3d) 311 (B.C. C.A.), at p. 320; *Lehndorff General Partner Ltd., Re* (1993), 17 C.B.R. (3d) 24 (Ont. Gen. Div. [Commercial List]). Courts have adopted this approach in the past to rely on inherent jurisdiction, or alternatively on the broad jurisdiction under s. 11 of the CCAA, as the source of judicial power in a CCAA proceeding to "fill in the gaps" or to "put flesh on the bones" of that Act: see *Dylex Ltd., Re* (1995), 31 C.B.R. (3d) 106 (Ont. Gen. Div. [Commercial List]), *Royal Oak Mines Inc., Re* (1999), 7 C.B.R. (4th) 293 (Ont. Gen. Div. [Commercial List]); and *Westar Mining Ltd., Re* (1992), 70 B.C.L.R. (2d) 6 (B.C. S.C.).

33 It is not necessary, for purposes of this appeal, to determine whether inherent jurisdiction is excluded for all supervisory purposes under the CCAA, by reason of the existence of the statutory discretionary regime provided in that Act. In my opinion, however, the better view is that in carrying out his or her supervisory functions under the legislation, the judge is not exercising inherent jurisdiction but rather the statutory discretion provided by s. 11 of the CCAA and supplemented by other statutory powers that may be imported into the exercise of the s. 11 discretion from other statutes through s. 20 of the CCAA.

Inherent Jurisdiction

34 Inherent jurisdiction is a power derived "from the very nature of the court as a superior court of law", permitting the court "to maintain its authority and to prevent its process being obstructed and abused". It embodies the authority of the judiciary to control its own process and the lawyers and other officials connected with the court and its process, in order "to uphold, to protect and to fulfill the judicial function of administering justice according to law in a regular, orderly and effective manner". See I.H. Jacob, "The Inherent Jurisdiction of the Court" (1970) 23 Current Legal Problems 27-28. In Halsbury's Laws of England, 4 th ed. (London: Lexis-Nexis UK, 1973 -) vol. 37, at para. 14, the concept is described as follows:

> In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine, and has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particularly to ensure the observation of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.

35 In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the Legislature has acted. As Farley J. noted in *Royal Oak Mines Inc.*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play" (para. 4). See also, *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.* (1975), [1976] 2 S.C.R. 475 (S.C.C.) at 480; *Richtree Inc., Re*, [2005] O.J. No. 251 (Ont. S.C.J. [Commercial List]).

36 In the CCAA context, Parliament has provided a statutory framework to extend protection to a company while it holds its creditors at bay and attempts to negotiate a compromised plan of arrangement that will enable it to emerge and continue as a viable economic entity, thus benefiting society and the company in the long run, along with the company's creditors, shareholders, employees and other stakeholders. The s. 11 discretion is the engine that drives this broad and flexible statutory

scheme, and that for the most part supplants the need to resort to inherent jurisdiction. In that regard, I agree with the comment of Newbury J.A. in *Skeena Cellulose Inc., Re*, [2003] B.C.J. No. 1335, 43 C.B.R. (4th) 187 (B.C. C.A.) at para. 46, that:

> . . . the court is not exercising a power that arises from its nature as a superior court of law, but is exercising the discretion given to it by the CCAA. . . . This is the discretion, given by s. 11, to stay proceedings against the debtor corporation and the discretion, given by s. 6, to approve a plan which appears to be reasonable and fair, to be in accord with the requirements and objects of the statute, and to make possible the continuation of the corporation as a viable entity. It is these considerations the courts have been concerned with in the cases discussed above, [2] rather than the integrity of their own process.

37 As Jacob observes, in his article "The Inherent Jurisdiction of the Court", *supra*, at p. 25:

> The inherent jurisdiction of the court is a concept which must be distinguished from the exercise of judicial discretion. These two concepts resemble each other, particularly in their operation, and they often appear to overlap, and are therefore sometimes confused the one with the other. There is nevertheless a vital juridical distinction between jurisdiction and discretion, which must always be observed.

38 I do not mean to suggest that inherent jurisdiction can never apply in a CCAA context. The court retains the ability to control its own process, should the need arise. There is a distinction, however — difficult as it may be to draw — between the *court's* process with respect to the restructuring, on the one hand, and the course of action involving the negotiations and corporate actions accompanying them, which are the *company's* process, on the other hand. The court simply supervises the latter process through its ability to stay, restrain or prohibit proceedings against the company during the plan negotiation period "on such terms as it may impose". [3] Hence the better view is that a judge is generally exercising the court's statutory discretion under s. 11 of the Act when supervising a CCAA proceeding. The order in this case could not be founded on inherent jurisdiction because it is designed to supervise the company's process, not the court's process.

The Section 11 Discretion

39 This appeal involves the scope of a supervisory judge's discretion under s. 11 of the CCAA, in the context of corporate governance decisions made during the course of the plan negotiating and approval process and, in particular, whether that discretion extends to the removal of directors in that environment. In my view, the s. 11 discretion — in spite of its considerable breadth and flexibility — does not permit the exercise of such a power in and of itself. There may be situations where a judge in a CCAA proceeding would be justified in ordering the removal of directors pursuant to the oppression remedy provisions found in s. 241 of the CBCA, and imported into the exercise of the s. 11 discretion through s. 20 of the CCAA. However, this was not argued in the present case, and the facts before the court would not justify the removal of Messrs. Woollcombe and Keiper on oppression remedy grounds.

40 The pertinent portions of s. 11 of the CCAA provide as follows:

> **Powers of court**
>
> 11. (1) Notwithstanding anything in the *Bankruptcy* and Insolvency Act or the Winding-up Act, where an application is made under this Act in respect of a company, the court, on the application of any person interested in the matter, may, subject to this Act, on notice to any other person or without notice as it may see fit, make an order under this section.
>
> **Initial application court orders**
>
> (3) A court may, on an initial application in respect of a company, make an order on such terms as it may impose, effective for such period as the court deems necessary not exceeding thirty days.
>
> > (a) staying, until otherwise ordered by the court, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Other than initial application court orders

(4) A court may, on an application in respect of a company other than an initial application, make an order on such terms as it may impose.

(a) staying, until otherwise ordered by the court, for such period as the court deems necessary, all proceedings taken or that might be taken in respect of the company under an Act referred to in subsection (1);

(b) restraining, until otherwise ordered by the court, further proceedings in any action, suit or proceeding against the company; and

(c) prohibiting, until otherwise ordered by the court, the commencement of or proceeding with any other action, suit or proceeding against the company.

Burden of proof on application

(6) The court shall not make an order under subsection (3) or (4) unless

(a) the applicant satisfies the court that circumstances exist that make such an order appropriate; and

(b) in the case of an order under subsection (4), the applicant also satisfied the court that the applicant has acted, and is acting, in good faith and with due diligence.

41 The rule of statutory interpretation that has now been accepted by the Supreme Court of Canada, in such cases as *R. v. Sharpe*, [2001] 1 S.C.R. 45 (S.C.C.), at para. 33, and *Rizzo & Rizzo Shoes Ltd., Re*, [1998] 1 S.C.R. 27 (S.C.C.), at para. 21 is articulated in E.A. Driedger, *The Construction of Statutes*, 2nd ed. (Toronto: Butterworths, 1983) as follows:

> Today, there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

See also Ruth Sullivan, *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Toronto: Butterworths, 2002) at page 262.

42 The interpretation of s. 11 advanced above is true to these principles. It is consistent with the purpose and scheme of the CCAA, as articulated in para. 38 above, and with the fact that corporate governance matters are dealt with in other statutes. In addition, it honours the historical reluctance of courts to intervene in such matters, or to second-guess the business decisions made by directors and officers in the course of managing the business and affairs of the corporation.

43 Mr. Leon and Mr. Swan argue that matters relating to the removal of directors do not fall within the court's discretion under s. 11 because they fall outside of the parameters of the court's role in the restructuring process, in contrast to the company's role in the restructuring process. The court's role is defined by the "on such terms as may be imposed" jurisdiction under subparagraphs 11(3)(a)-(c) and 11(4)(a)-(c) of the CCAA to stay, or restrain, or prohibit proceedings against the company during the "breathing space" period for negotiations and a plan. I agree.

44 What the court does under s. 11 is to establish the boundaries of the playing field and act as a referee in the process. The company's role in the restructuring, and that of its stakeholders, is to work out a plan or compromise that a sufficient percentage of creditors will accept and the court will approve and sanction. The corporate activities that take place in the course of the workout are governed by the legislation and legal principles that normally apply to such activities. In the course of acting as referee, the court has great leeway, as Farley J. observed in *Lehndorff General Partner Ltd.*, *supra*, at para 5, "to make order[s] so as to effectively maintain the status quo in respect of an insolvent company while it attempts to gain the approval of its creditors for the proposed compromise or arrangement which will be to the benefit of both the company and its creditors". But the s. 11 discretion is not open-ended and unfettered. Its exercise must be guided by the scheme and object of the Act and by the legal principles that govern corporate law issues. Moreover, the court is not entitled to usurp the role of the directors and management in conducting what are in substance *the company's* restructuring efforts.

45 With these principles in mind, I turn to an analysis of the various factors underlying the interpretation of the s. 11 discretion.

46 I start with the proposition that at common law directors could not be removed from office during the term for which they were elected or appointed: *London Finance Corp. v. Banking Service Corp.* (1922), 23 O.W.N. 138 (Ont. H.C.); *Stephenson v. Vokes* (1896), 27 O.R. 691 (Ont. H.C.). The authority to remove must therefore be found in statute law.

47 In Canada, the CBCA and its provincial equivalents govern the election, appointment and removal of directors, as well as providing for their duties and responsibilities. Shareholders elect directors, but the directors may fill vacancies that occur on the board of directors pending a further shareholders meeting: CBCA, ss. 106(3) and 111. [4] The specific power *to remove* directors is vested in the shareholders by s. 109(1) of the CBCA. However, s. 241 empowers the court — where it finds that oppression as therein defined exists — to "make any interim or final order it thinks fit", including (s. 241(3)(e)) "an order appointing directors in place of or in addition to all or any of the directors then in office". This power has been utilized to remove directors, but in very rare cases, and only in circumstances where there has been actual conduct rising to the level of misconduct required to trigger oppression remedy relief: see, for example, *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, [2004] O.J. No. 4722 (Ont. S.C.J.).

48 There is therefore a statutory scheme under the CBCA (and similar provincial corporate legislation) providing for the election, appointment, *and removal* of directors. Where another applicable statute confers jurisdiction with respect to a matter, a broad and undefined discretion provided in one statute cannot be used to supplant or override the other applicable statute. There is no legislative "gap" to fill. See *Baxter Student Housing Ltd. v. College Housing Co-operative Ltd.*, *supra*, at p. 480; *Royal Oak Mines Inc. (Re)*, *supra*; and *Richtree Inc. (Re)*, *supra*.

49 At paragraph 7 of his reasons, the motion judge said:

> The board is charged with the standard duty of "manage[ing], [*sic*] or supervising the management, of the business and affairs of the corporation": s. 102(1) CBCA. *Ordinarily the Court will not interfere with the composition of the board of directors. However, if there is good and sufficient valid reason to do so, then the Court must not hesitate to do so to correct a problem*. The directors should not be required to constantly look over their shoulders for this would be the sure recipe for board paralysis which would be so detrimental to a restructuring process; thus interested parties should only initiate a motion where it is reasonably obvious that there is a problem, actual or poised to become actual.
>
> [emphasis added]

50 Respectfully, I see no authority in s. 11 of the CCAA for the court to interfere with the composition of a board of directors on such a basis.

51 Court removal of directors is an exceptional remedy, and one that is rarely exercised in corporate law. This reluctance is rooted in the historical unwillingness of courts to interfere with the internal management of corporate affairs and in the court's well-established deference to decisions made by directors and officers in the exercise of their business judgment when managing the business and affairs of the corporation. These factors also bolster the view that where the CCAA is silent on the issue, the

court should not read into the s. 11 discretion an extraordinary power — which the courts are disinclined to exercise in any event — except to the extent that that power may be introduced through the application of other legislation, and on the same principles that apply to the application of the provisions of the other legislation.

The Oppression Remedy Gateway

52 The fact that s. 11 does not itself provide the authority for a CCAA judge to order the removal of directors does not mean that the supervising judge is powerless to make such an order, however. Section 20 of the CCAA offers a gateway to the oppression remedy and other provisions of the CBCA and similar provincial statutes. Section 20 states:

> The provisions of this Act may be applied together with the provisions of any Act of Parliament or of the legislature of any province that authorizes or makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them.

53 The CBCA is legislation that "makes provision for the sanction of compromises or arrangements between a company and its shareholders or any class of them". Accordingly, the powers of a judge under s. 11 of the CCAA may be applied together with the provisions of the CBCA, including the oppression remedy provisions of that statute. I do not read s. 20 as limiting the application of outside legislation to the provisions of such legislation dealing specifically with the sanctioning of compromises and arrangements between the company and its shareholders. The grammatical structure of s. 20 mandates a broader interpretation and the oppression remedy is, therefore, available to a supervising judge in appropriate circumstances.

54 I do not accept the respondents' argument that the motion judge had the authority to order the removal of the appellants by virtue of the power contained in s. 145(2)(b) of the CBCA to make an order "declaring the result of the disputed election or appointment" of directors. In my view, s. 145 relates to the procedures underlying disputed elections or appointments, and not to disputes over the composition of the board of directors itself. Here, it is conceded that the appointment of Messrs. Woollcombe and Keiper as directors complied with all relevant statutory requirements. Farley J. quite properly did not seek to base his jurisdiction on any such authority.

The Level of Conduct Required

55 Colin Campbell J. recently invoked the oppression remedy to remove directors, without appointing anyone in their place, in *Catalyst Fund General Partner I Inc. v. Hollinger Inc.*, *supra* The bar is high. In reviewing the applicable law, C. Campbell J. said (para. 68):

> Director removal is *an extraordinary remedy* and certainly should be *imposed most sparingly*. As a starting point, I accept the basic proposition set out in Peterson, "Shareholder Remedies in Canada" [5] :
>
> > SS. 18.172 *Removing and appointing directors to the board is an extreme form of judicial intervention*. The board of directors is elected by the shareholders, vested with the power to manage the corporation, and appoints the officers of the company who undertake to conduct the day-to-day affairs of the corporation. [Footnote omitted.] It is clear that the board of directors has control over policymaking and management of the corporation. *By tampering with a board, a court directly affects the management of the corporation*. If a reasonable balance between protection of corporate stakeholders and the freedom of management to conduct the affairs of the business in an efficient manner is desired, altering the board of directors should be *a measure of last resort*. The order could be suitable where the continuing presence of the incumbent directors is harmful to both the company and the interests of corporate stakeholders, and where the appointment of a new director or directors would remedy the oppressive conduct without a receiver or receiver-manager.
> >
> > [emphasis added]

56 C. Campbell J. found that the continued involvement of the Ravelston directors in the *Hollinger* situation would "significantly impede" the interests of the public shareholders and that those directors were "motivated by putting their interests

first, not those of the company" (paras. 82-83). The evidence in this case is far from reaching any such benchmark, however, and the record would not support a finding of oppression, even if one had been sought.

57 Everyone accepts that there is no evidence the appellants have conducted themselves, as directors — in which capacity they participated over two days in the bid consideration exercise — in anything but a neutral fashion, having regard to the best interests of Stelco and all of the stakeholders. The motion judge acknowledged that the appellants "may well conduct themselves beyond reproach". However, he simply decided there was a risk — a reasonable apprehension — that Messrs. Woollcombe and Keiper would not live up to their obligations to be neutral in the future.

58 The risk or apprehension appears to have been founded essentially on three things: (1) the earlier public statements made by Mr. Keiper about "maximizing shareholder value"; (2) the conduct of Clearwater and Equilibrium in criticizing and opposing the Stalking Horse Bid; and (3) the motion judge's opinion that Clearwater and Equilibrium — the shareholders represented by the appellants on the Board — had a "vision" that "usually does not encompass any significant concern for the long-term competitiveness and viability of an emerging corporation", as a result of which the appellants would approach their directors' duties looking to liquidate their shares on the basis of a "short-term hold" rather than with the best interests of Stelco in mind. The motion judge transposed these concerns into anticipated predisposed conduct on the part of the appellants as directors, despite their apparent understanding of their duties as directors and their assurances that they would act in the best interests of Stelco. He therefore concluded that "the risk to the process and to Stelco in its emergence [was] simply too great to risk the wait and see approach".

59 Directors have obligations under s. 122(1) of the CBCA (a) to act honestly and in good faith with a view to the best interest of the corporation (the "statutory fiduciary duty" obligation), and (b) to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (the "duty of care" obligation). They are also subject to control under the oppression remedy provisions of s. 241. The general nature of these duties does not change when the company approaches, or finds itself in, insolvency: *People's Department Stores Ltd. (1992) Inc., Re*, [2004] S.C.J. No. 64 (S.C.C.) at paras. 42-49.

60 In *Peoples* the Supreme Court noted that "the interests of the corporation are not to be confused with the interests of the creditors or those of any other stakeholders" (para. 43), but also accepted "as an accurate statement of the law that in determining whether [directors] are acting with a view to the best interests of the corporation it may be legitimate, given all the circumstances of a given case, for the board of directors to consider, *inter alia*, the interests of shareholders, employees, suppliers, creditors, consumers, governments and the environment" (para. 42). Importantly as well — in the context of "the shifting interest and incentives of shareholders and creditors" — the court stated (para. 47):

> In resolving these competing interests, it is incumbent upon the directors to act honestly and in good faith with a view to the best interests of the corporation. In using their skills for the benefit of the corporation when it is in troubled waters financially, the directors must be careful to attempt to act in its best interests by creating a "better" corporation, and not to favour the interests of any one group of stakeholders.

61 In determining whether directors have fallen foul of those obligations, however, more than some risk of anticipated misconduct is required before the court can impose the extraordinary remedy of removing a director from his or her duly elected or appointed office. Although the motion judge concluded that there was a risk of harm to the Stelco process if Messrs Woollcombe and Keiper remained as directors, he did not assess the level of that risk. The record does not support a finding that there was a sufficient risk of sufficient misconduct to warrant a conclusion of oppression. The motion judge was not asked to make such a finding, and he did not do so.

62 The respondents argue that this court should not interfere with the decision of the motion judge on grounds of deference. They point out that the motion judge has been case-managing the restructuring of Stelco under the CCAA for over fourteen months and is intimately familiar with the circumstances of Stelco as it seeks to restructure itself and emerge from court protection.

63 There is no question that the decisions of judges acting in a supervisory role under the CCAA, and particularly those of experienced commercial list judges, are entitled to great deference: see *Algoma Steel Inc. v. Union Gas Ltd.* (2003), 63 O.R. (3d) 78 (Ont. C.A.) at para. 16. The discretion must be exercised judicially and in accordance with the principles governing its operation. Here, respectfully, the motion judge misconstrued his authority, and made an order that he was not empowered to make in the circumstances.

64 The appellants argued that the motion judge made a number of findings without any evidence to support them. Given my decision with respect to jurisdiction, it is not necessary for me to address that issue.

The Business Judgment Rule

65 The appellants argue as well that the motion judge erred in failing to defer to the unanimous decision of the Stelco directors in deciding to appoint them to the Stelco Board. It is well-established that judges supervising restructuring proceedings — and courts in general — will be very hesitant to second-guess the business decisions of directors and management. As the Supreme Court of Canada said in *Peoples*, *supra*, at para. 67:

> Courts are ill-suited and should be reluctant to second-guess the application of business expertise to the considerations that are involved in corporate decision making . . .

66 In *Brant Investments Ltd. v. KeepRite Inc.* (1991), 3 O.R. (3d) 289 (Ont. C.A.) at 320, this court adopted the following statement by the trial judge, Anderson J.:

> Business decisions, honestly made, should not be subjected to microscopic examination. There should be no interference simply because a decision is unpopular with the minority. [6]

67 McKinlay J.A then went on to say:

> There can be no doubt that on an application under s. 234 [7] the trial judge is required to consider the nature of the impugned acts and the method in which they were carried out. That does not meant that the trial judge should substitute his own business judgment for that of managers, directors, or a committee such as the one involved in assessing this transaction. Indeed, it would generally be impossible for him to do so, regardless of the amount of evidence before him. He is dealing with the matter at a different time and place; it is unlikely that he will have the background knowledge and expertise of the individuals involved; he could have little or no knowledge of the background and skills of the persons who would be carrying out any proposed plan; and it is unlikely that he would have any knowledge of the specialized market in which the corporation operated. In short, he does not know enough to make the business decision required.

68 Although a judge supervising a CCAA proceeding develops a certain "feel" for the corporate dynamics and a certain sense of direction for the restructuring, this caution is worth keeping in mind. See also *Skeena Cellulose Inc., Re*, *supra*, *Sammi Atlas Inc., Re* (1998), 3 C.B.R. (4th) 171 (Ont. Gen. Div. [Commercial List]); *Olympia & York Developments Ltd. (Re)*, *supra*; *Alberta-Pacific Terminals Ltd., Re* (1991), 8 C.B.R. (3d) 99 (B.C. S.C.). The court is not catapulted into the shoes of the board of directors, or into the seat of the chair of the board, when acting in its supervisory role in the restructuring.

69 Here, the motion judge was alive to the "business judgment" dimension in the situation he faced. He distinguished the application of the rule from the circumstances, however, stating at para. 18 of his reasons:

> With respect I do not see the present situation as involving the "management of the business and affairs of the corporation", but rather as a quasi-constitutional aspect of the corporation entrusted albeit to the Board pursuant to s. 111(1) of the CBCA. I agree that where a board is actually engaged in the business of a judgment situation, the board should be given appropriate deference. However, to the contrary in this situation, I do not see it as a situation calling for (as asserted) more deference, but rather considerably less than that. With regard to this decision of the Board having impact upon the capital raising process, as I conclude it would, then similarly deference ought not to be given.

70 I do not see the distinction between the directors' role in "the management of the business and affairs of the corporation" (CBCA, s. 102) — which describes the directors' overall responsibilities — and their role with respect to a "quasi-constitutional aspect of the corporation" (i.e. in filling out the composition of the board of directors in the event of a vacancy). The "affairs" of the corporation are defined in s. 1 of the CBCA as meaning "the relationships among a corporation, it affiliates and the shareholders, directors and officers of such bodies corporate but does not include the business carried on by such bodies corporate". Corporate governance decisions relate directly to such relationships and are at the heart of the Board's business decision-making role regarding the corporation's business *and* affairs. The dynamics of such decisions, and the intricate balancing of competing interests and other corporate-related factors that goes into making them, are no more within the purview of the court's knowledge and expertise than other business decisions, and they deserve the same deferential approach. Respectfully, the motion judge erred in declining to give effect to the business judgment rule in the circumstances of this case.

71 This is not to say that the conduct of the Board in appointing the appellants as directors may never come under review by the supervising judge. The court must ultimately approve and sanction the plan of compromise or arrangement as finally negotiated and accepted by the company and its creditors and stakeholders. The plan must be found to be fair and reasonable before it can be sanctioned. If the Board's decision to appoint the appellants has somehow so tainted the capital raising process that those criteria are not met, any eventual plan that is put forward will fail.

72 The respondents submit that it makes no sense for the court to have jurisdiction to declare the process flawed only after the process has run its course. Such an approach to the restructuring process would be inefficient and a waste of resources. While there is some merit in this argument, the court cannot grant itself jurisdiction where it does not exist. Moreover, there are a plethora of checks and balances in the negotiating process itself that moderate the risk of the process becoming irretrievably tainted in this fashion — not the least of which is the restraining effect of the prospect of such a consequence. I do not think that this argument can prevail. In addition, the court at all times retains its broad and flexible supervisory jurisdiction — a jurisdiction which feeds the creativity that makes the CCAA work so well — in order to address fairness and process concerns along the way. This case relates only to the court's exceptional power to order the removal of directors.

The Reasonable Apprehension of Bias Analogy

73 In exercising what he saw as his discretion to remove the appellants as directors, the motion judge thought it would be useful to "borrow the concept of reasonable apprehension of bias . . .with suitable adjustments for the nature of the decision making involved" (para. 8). He stressed that "there was absolutely no allegation against [Mr. Woollcombe and Mr. Keiper] of any actual 'bias' or its equivalent" (para. 8). He acknowledged that neither was alleged to have done anything wrong since their appointments as directors, and that at the time of their appointments the appellants had confirmed to the Board that they understood and would abide by their duties and responsibilities as directors, including the responsibility to act in the best interests of the corporation and not in their own interests as shareholders. In the end, however, he concluded that because of their prior public statements that they intended to "pursue efforts to maximize shareholder value at Stelco", and because of the nature of their business and the way in which they had been accumulating their shareholding position during the restructuring, and because of their linkage to 40% of the common shareholders, there was a risk that the appellants would not conduct themselves in a neutral fashion in the best interests of the corporation as directors.

74 In my view, the administrative law notion of apprehension of bias is foreign to the principles that govern the election, appointment and removal of directors, and to corporate governance considerations in general. Apprehension of bias is a concept that ordinarily applies to those who preside over judicial or quasi-judicial decision-making bodies, such as courts, administrative tribunals or arbitration boards. Its application is inapposite in the business decision-making context of corporate law. There is nothing in the CBCA or other corporate legislation that envisages the screening of directors in advance for their ability to act neutrally, in the best interests of the corporation, as a prerequisite for appointment.

75 Instead, the conduct of directors is governed by their common law and statutory obligations to act honestly and in good faith with a view to the best interests of the corporation, and to exercise the care, diligence and skill that a reasonably prudent person would exercise in comparable circumstances (CBCA, s. 122(1)(a) and (b)). The directors also have fiduciary obligations

to the corporation, and they are liable to oppression remedy proceedings in appropriate circumstances. These remedies are available to aggrieved complainants — including the respondents in this case — but they depend for their applicability on the director having engaged in conduct justifying the imposition of a remedy.

76 If the respondents are correct, and reasonable apprehension that directors may not act neutrally because they are aligned with a particular group of shareholders or stakeholders is sufficient for removal, all nominee directors in Canadian corporations, and all management directors, would automatically be disqualified from serving. No one suggests this should be the case. Moreover, as Iacobucci J. noted in *Blair v. Consolidated Enfield Corp.*, [1995] 4 S.C.R. 5 (S.C.C.) at para. 35, "persons are assumed to act in good faith unless proven otherwise". With respect, the motion judge approached the circumstances before him from exactly the opposite direction. It is commonplace in corporate/commercial affairs that there are connections between directors and various stakeholders and that conflicts will exist from time to time. Even where there are conflicts of interest, however, directors are not removed from the board of directors; they are simply obliged to disclose the conflict and, in appropriate cases, to abstain from voting. The issue to be determined is not whether there is a connection between a director and other shareholders or stakeholders, but rather whether there has been some conduct on the part of the director that will justify the imposition of a corrective sanction. An apprehension of bias approach does not fit this sort of analysis.

Part V — Disposition

77 For the foregoing reasons, then, I am satisfied that the motion judge erred in declaring the appointment of Messrs. Woollcombe and Keiper as directors of Stelco of no force and effect.

78 I would grant leave to appeal, allow the appeal and set aside the order of Farley J. dated February 25, 2005.

79 Counsel have agreed that there shall be no costs of the appeal.

***Goudge J.A.*:**

I agree.

***Feldman J.A.*:**

I agree.

Appeal allowed.

Footnotes

1 R.S.C. 1985, c. C-36, as amended.

2 The reference is to the decisions in *Dyle, Royal Oak Mines, and Westar*, cited above.

3 See paragraph 43, *infra*, where I elaborate on this distinction.

4 It is the latter authority that the directors of Stelco exercised when appointing the appellants to the Stelco Board.

5 Dennis H. Peterson, Shareholder Remedies in Canada (Markham: LexisNexis — Butterworths — Looseleaf Service, 1989) at 18-47.

6 Or, I would add, unpopular with other stakeholders.

7 Now s. 241.

Tab 8

2007 ONCA 135
Ontario Court of Appeal

Ravelston Corp., Re

2007 CarswellOnt 1115, 2007 ONCA 135, [2007] O.J. No. 749,
155 A.C.W.S. (3d) 577, 29 C.B.R. (5th) 45, 85 O.R. (3d) 175

In the Matter of the Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36, as amended

And In the Matter of a plan of compromise or arrangement of the
Ravelston Corporation Limited and Ravelston Management Inc.

And In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3,
as amended and the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

D.H. Doherty, R.J. Sharpe, R.A. Blair JJ.A.

Heard: February 26, 2007
Judgment: March 1, 2007 *
Docket: CA C46649, C46680, M34773

Proceedings: affirming *Ravelston Corp., Re* (2007), 2007 CarswellOnt 661 (Ont. S.C.J. [Commercial List]); additional reasons at *Ravelston Corp., Re* (2007), 2007 CarswellOnt 2126, 2007 ONCA 272 (Ont. C.A.)

Counsel: Earl A. Cherniak, Q.C. for Appellant, Conrad Black
Peter Howard, Danielle Royal for Appellant, Conrad Black Capital Corporation
Matthew Gottlieb, Elyse Korman for Respondent, Hollinger Inc.
Alexander MacFarlane, Daniel MacDonald, Max Mendelsohn for Respondent, RSM Richter Inc.
Robyn M. Ryan Bell for Respondent, Sun-Times Media
David R. Wingfield, Paul D. Guy for Appellants, Peter G. White, Peter G. White Management Limited
David Moore for Respondent, Catalyst Fund
No one for Respondent, Argus Corporation

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XIX Companies' Creditors Arrangement Act
XIX.3 Arrangements
XIX.3.a Approval by court
Headnote
Bankruptcy and insolvency --- Proposal — Companies' Creditors Arrangement Act — Arrangements — Approval by court — "Fair and reasonable"
Respondent company was court-appointed receiver of R Ltd. — Receiver recommended that R Ltd. enter plea of guilty on charge of mail fraud in United States District Court — Receiver brought motion for approval — Motion judge gave detailed and well-considered reasons for finding that receiver's recommendation to enter plea agreement was "well within the bounds of reasonableness" and granted receiver's approval motion — Order permitting R Ltd. to plead guilty was appealed — Respondents brought motion to quash appeal on ground that leave was required pursuant to Bankruptcy and Insolvency Act or Companies Creditors Arrangement Act, and appellants brought cross-motion for leave to appeal if necessary — Appeal dismissed — Appellate court owes substantial deference to discretion of commercial court judge charged with responsibility of supervising

insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere — There was no reason to interfere with decision of motion judge — Receiver and motion judge did not err by basing decision on assessment of risk of conviction — Risk of conviction was first factor to consider — Motion judge did not err by rejecting appellants' submission that cost of defence in criminal proceedings could have been avoided without pleading guilty by adopting "coat-tail" defence with other defendants — This suggestion ignored separate identity and interests of R Ltd. that both receiver and motion judge were required to consider — It was open to motion judge to conclude that plea agreement benefited R Ltd. by reducing its monetary exposure — Receiver's assessment that plea agreement significantly reduced R Ltd.'s risk of exposure to civil liability did not exceed bounds of reasonableness — Motion judge was open to accept receiver's assessment that guilty plea to one count and acquittal on all other counts under this plea agreement carried less risk of exposure to civil liability than conviction on all counts.

Table of Authorities

Cases considered:

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 193(e) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

s. 13 — referred to

APPEAL from judgment reported at *Ravelston Corp., Re* (2007), 2007 CarswellOnt 661, 29 C.B.R. (5th) 1 (Ont. S.C.J. [Commercial List]), granting receiver's approval motion.

***Per curiam*:**

1 This appeal concerns the recommendation of the respondent, RSM Richter Inc., ("Richter") the court-appointed receiver of The Ravelston Corporation Limited ("Ravelston"), that, pursuant to a plea agreement it negotiated with the United States Attorney's Office, Ravelston enter a plea of guilty on a charge of mail fraud in a United States District Court. The motion judge gave detailed and well-considered reasons finding, at para. 154, that the receiver's recommendation to enter the plea agreement was "well within the bounds of reasonableness" and granted the receiver's approval motion. The appellants, Conrad Black and his holding company that formerly controlled Ravelston, Conrad Black Capital Corporation, and Peter G. White Management Ltd. And Peter White, a former director of Ravelston, seek to appeal the order permitting Ravelston to plead guilty.

Motion to Quash

2 The respondents move to quash this appeal on the ground that leave is required pursuant to the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, s. 193(e), or the *Companies Creditors Arrangement Act*, R.S.C. 1985, c. C-36, s. 13. The appellants brought a cross motion for leave to appeal if necessary. In the circumstances, without deciding the motion to quash, we heard argument on the question of leave and the merits and these reasons should not be read as deciding the question of whether the appellants are entitled to an appeal as of right.

Standard of Review

3 The motion judge applied the appropriate standard when considering Richter's recommendation: see *Ravelston Corp., Re* (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)at para. 40: "If the receiver's decision is within the broad bounds of reasonableness, and if it proceeds fairly, having considered the interests of all stakeholders, the court will support the receiver's decision." It is well established that an appellate court owes substantial deference to the discretion of a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings and that absent demonstrable error, it will not interfere.

Merits

4 The appellants submit that the motion judge clearly erred by considering the risk of conviction and by failing to consider the possibility of the "acquittal contingency" in which all individual defendants are exonerated. The appellants further submit

that the terms of the plea agreement fail to provide Ravelston with sufficient benefit to justify surrendering the possibility of an acquittal on all counts. For the following reasons we reject these submissions.

(a) Risk of conviction and possibility of acquittal

5 The submission that the receiver and the motion judge erred by basing their decision on an assessment of the risk of conviction is entirely without merit. As a matter of logic, professional responsibility and judgment, the risk of conviction was the first factor to consider. Nor do we agree with the suggestion that the receiver failed to take adequate steps to obtain the necessary information to assess the risk of conviction. The receiver was entitled to enter plea negotiations with the prosecutor and this almost inevitably interfered with the commonality of interest Ravelston had shared with the other defendants. As for the "acquittal contingency", the appellants put forth nothing but conjecture and their faith in their ability to destroy Radler's credibility on cross-examination to challenge the receiver's assessment that Ravelston faces a substantial risk of conviction. Without knowing the theory of the defence of the individual defendants, we cannot accept the submission that acquittal of the individual defendants would make Ravelston's acquittal "inevitable" in the face of the guilty plea and the evidence of Radler, its President and Chief Operating Officer.

(b) Benefit of the plea agreement

(i) Cost of defence

6 One of the principal benefits of the plea agreement is that Ravelston would avoid the costs of a defence in the criminal proceedings. We see no merit in the submission that the motion judge erred by rejecting the appellants' submission that the cost of a defence in the criminal proceedings could have been avoided without pleading guilty by adopting a "coat-tail" defence with the other defendants. This suggestion essentially ignores the separate identity and interests of Ravelston that both the receiver and the motion judge were required to consider.

(ii) Fine and restitution order

7 It was clearly open to the motion judge to conclude that the plea agreement benefited Ravelston by essentially capping the fine and reducing its risk of exposure to a large restitution order, particularly in relation to the $26 million in potential liability arising out of the Can-West transaction. By pleading guilty to one count only and agreeing to the fine to be imposed, Ravelston substantially reduced its monetary exposure. With respect to the restitution order, while Ravelston remains legally exposed to a significant order, a guilty plea would potentially assist Ravelston when the sentencing judge exercises his or her discretion in fixing the quantum of the restitution order. The terms of the plea agreement explicitly preserve Ravelston's rights to argue that any fine and restitution order are not enforceable in Ontario.

(iii) Impact on civil proceedings

8 While there may be some ambiguity in the terms of the plea agreement as to what facts Ravelston admits, we cannot say that the receiver's assessment that it significantly reduced Ravelston's risk of exposure to civil liability exceeded the bounds of reasonableness. This argument must be considered in the light of the receiver's assessment that Ravelston faced a substantial risk of conviction on all counts. In that scenario, Ravelston's position in the outstanding civil proceedings would be severely prejudiced. Even on the least favourable interpretation of the plea agreement, the guilty plea could not provide the basis for issue estoppel with respect to the Can-West transaction. Moreover, the appellants provided no evidence as to foreign law to support their contention that, for the purposes of issue estoppel, the plea agreement would be read more broadly than suggested by the receiver. In our view, it was clearly open to the motion judge to accept the receiver's assessment that a guilty plea to one count and an acquittal on all other counts under this plea agreement carried less risk of exposure to civil liability that a conviction on all counts.

9 Assuming without deciding that the Richter was bound to consider White's personal exposure to liability as a director, the degree of his exposure is at most no more than that of Ravelston. We agree with the submission that the issue for the motion

judge was whether it was better to plead guilty under *this* plea agreement or proceed to trial, not whether some better plea agreement could be imagined.

Conclusion

10 We see no reason to interfere with the thorough and balanced decision of the motion judge. Accordingly, assuming that leave to appeal is required, we would grant leave to appeal but dismiss the appeal. The parties are at liberty to make brief written submissions as to the costs of the appeal, the respondents to file their submissions within ten days of the release of these reasons, and the appellants to file theirs within ten days thereafter.

Appeal dismissed.

Footnotes

* A corrigendum issued by the court on March 5, 2007 has been incorporated herein.

Tab 9

Most Negative Treatment: Check subsequent history and related treatments.

2013 ONCA 282
Ontario Court of Appeal [In Chambers]

Business Development Bank of Canada v. Pine Tree Resorts Inc.

2013 CarswellOnt 5026, 2013 ONCA 282, [2013] O.J. No. 1918, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 227 A.C.W.S. (3d) 611, 307 O.A.C. 1

Business Development Bank of Canada Applicant (Respondent) and Pine Tree Resorts Inc. and 1212360 Ontario Limited Respondents (Appellants)

R.A. Blair J.A., In Chambers

Heard: April 22, 2013
Judgment: April 29, 2013
Docket: CA M42401, M42383, M42395 (C56856)

Proceedings: refused leave to appeal *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (2013), 2013 CarswellOnt 12749 ((Ont. S.C.J. [Commercial List]))

Counsel: Milton A. Davis for Appellants, Pine Tree Resorts Inc., 1212360 Ontario Limited
David Preger for Appellant, Romspen Investment Corporation
Harvey Chaiton for Respondent, Business Development Bank of Canada

Subject: Civil Practice and Procedure; Insolvency; Corporate and Commercial; Property

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.i Availability

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Respondent P Inc. owned and operated hotel — Business development bank (applicant) was owed approx. $2.6 million by P Inc., and held first security for that indebtedness by way of mortgage on hotel lands and general security agreements over land and chattels — Second mortgage was also in default, and second mortgagee was owed approx. $4.2 million — Applicant brought successful application for appointment of receiver over assets of respondents — P Inc. and second mortgagee brought motion for leave, if required, to appeal — Motion dismissed — There was no automatic right to appeal from order appointing receiver, and leave was required — Neither s. 193(a) nor (c) of Bankruptcy and Insolvency Act applied in circumstances — This was not appropriate case in which to grant leave — P Inc. and second mortgagee raised number of grounds relating to exercise of application judge's discretion which were entitled to deference and were purely factual and case specific and not of general significance — There were serious reservations about likelihood of success on appeal with respect to legal issue raised — Success on appeal would require creative interpretation of s. 22 of Mortgages Act, one that would potentially create element of uncertainty in field of mortgage enforcement — Serious reservations about merits, together with need for timely sale process, led to conclusion that leave ought not be granted — As such, receivership order was not to be stayed.

Table of Authorities

Cases considered by *R.A. Blair J.A., In Chambers*:

Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of) (1997), 48 C.B.R. (3d) 171, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re)* 206 A.R. 295, 1997 CarswellAlta 737, (sub nom. *Edo (Canada) Ltd. (Bankrupt), Re)* 156 W.A.C. 295 (Alta. C.A. [In Chambers]) — referred to

Baker, Re (1995), 1995 CarswellOnt 58, 31 C.B.R. (3d) 184, (sub nom. *Baker (Bankrupt), Re)* 83 O.A.C. 351, 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]) — considered

Blue Range Resource Corp., Re (1999), 244 A.R. 103, 209 W.A.C. 103, 1999 CarswellAlta 809, 12 C.B.R. (4th) 186, 1999 ABCA 255 (Alta. C.A.) — referred to

Country Style Food Services Inc., Re (2002), 158 O.A.C. 30, 2002 CarswellOnt 1038 (Ont. C.A. [In Chambers]) — referred to

Ditchburn Boats & Aircraft (1936) Ltd., Re (1938), [1938] O.W.N. 241, 1938 CarswellOnt 74, 19 C.B.R. 240, [1938] 3 D.L.R. 751 (Ont. C.A.) — referred to

Dominion Foundry Co., Re (1965), 1965 CarswellMan 7, 8 C.B.R. (N.S.) 74, 51 W.W.R. 679, 52 D.L.R. (2d) 79 (Man. C.A.) — considered

Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201, 198 O.A.C. 27 (Ont. C.A. [In Chambers]) — considered

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2003), 2003 CarswellOnt 6652 (Ont. C.A. [In Chambers]) — considered

Leard, Re (1994), 25 C.B.R. (3d) 210, 114 D.L.R. (4th) 135, (sub nom. *Leard (Bankrupt), Re)* 71 O.A.C. 56, 1994 CarswellOnt 274 (Ont. C.A.) — referred to

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — followed

R.J. Nicol Homes Ltd. (Trustee of) v. Nicol (1995), 30 C.B.R. (3d) 90, 77 O.A.C. 395, 1995 CarswellOnt 42 (Ont. C.A.) — followed

Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — referred to

Theodore Daniels Ltd. v. Income Trust Co. (1982), 135 D.L.R. (3d) 76, 25 R.P.R. 97, 1982 CarswellOnt 659, 37 O.R. (2d) 316 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(c) — considered

s. 193(e) — considered

Companies' Creditors Arrangement Act, R.S.C. 1985, c. C-36

Generally — referred to

Mortgages Act, R.S.O. 1990, c. M.40

s. 22 — considered

s. 22(1) — considered

Words and phrases considered:

future rights

The portions of s. 193 of the BIA [*Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3] relied upon by [the second mortgagee and one of the respondents] are the following:

Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

. . .

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

. . .

(e) in any other case by leave of a judge of the Court of Appeal.

. . . . .

"Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.), at para. 17. See also *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]).

Proceeding: Motion/Application for Leave to Appeal.

MOTION for leave to appeal from granting of receivership order.

***R.A. Blair J.A., In Chambers*:**

Overview

1 On April 2, 2013, Justice Mesbur granted the application of Business Development Bank of Canada ("BDC") for the appointment of a receiver over the assets of the respondents, Pine Tree Resorts Inc. and 1212360 Ontario Limited (together, "Pine Tree"). Pine Tree owns and operates the Delawana Inn in Honey Harbour, Ontario.

2 Pine Tree and the second mortgagee, Romspen Investment Corporation ("Romspen"), seek to appeal from Mesbur J.'s order. At the heart of this motion is whether the order should be stayed pending the appeal if there is an appeal. Collateral issues include whether the appeal is as of right under s. 193 of the *Bankruptcy Act*, R.S.C. 1985, c. B-3 ("BIA"). If the answer to that question is yes, should the automatic stay be lifted? If leave to appeal is required, should it be granted and, if so, should the order be stayed pending the disposition of the appeal?

3 For the reasons that follow, I conclude that the appeal is not as of right, that leave to appeal is required and that in the circumstances here leave ought not to be granted. It is therefore unnecessary to deal with the specific question of whether a stay should be ordered pending appeal.

Background and Facts

4 BDC is owed approximately $2.6 million by Pine Tree and holds first security for that indebtedness by way of a mortgage on the Delawana Inn lands and, additionally, by way of general security agreements covering both land and chattels. Romspen is the second mortgagee. Its mortgage, too, is in default. Romspen is owed approximately $4.3 million.

5 The Inn has been in financial difficulties for several years and finally, after a number of negotiated extensions and forbearances, BDC demanded payment under both the mortgage and the general security agreements.

6 Under its security documents, BDC is contractually entitled to the appointment of a receiver. Instead of appointing a private receiver, however, BDC chose to apply for a court-appointed receiver. Romspen chose to initiate power of sale proceedings but, at the time the order was made, was not in a position to proceed with the sale because three days remained under the period prescribed in the Notice of Power of Sale for redemption.

7 Pine Tree and Romspen opposed BDC's application. That said, all parties agree the property must be sold immediately. Pine Tree does not have the financial ability to keep the Inn operating. In essence, the dispute is over which secured creditor will have control over the sale of the property and which plan for sale will be implemented.

8 Pine Tree supports Romspen's plan because it involves re-opening the Inn for the upcoming summer season and attempting to sell the property on a going concern basis. BDC rejects this option as unrealistic because it views the Inn's operations as being an irretrievably losing proposition.

9 Romspen argued before the application judge — and argues here as well — that it was entitled to exercise its rights as a subsequent mortgagee under s. 22 of the *Mortgages Act*, R.S.O. 1990, c. M.40, to put BDC's mortgage in good standing and take over the sale of the property. It proposes to put the mortgage in good standing by paying all arrears of principal and interest, together with all of BDC's costs, expenses, and outstanding realty taxes. However, it does not propose to repay approximately $250,000 in HST arrears. Those arrears constitute a default under the BDC security documents.

10 In seeking to appeal the order, Romspen and Pine Tree assert a number of grounds relating to the exercise of the application judge's discretion in granting the receivership order, but the centre piece of their legal argument on appeal concerns the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*. They submit that the arrears of HST do not jeopardize BDC's security in any way because they are a subsequent encumbrance, and therefore it is not necessary for them to comply with that covenant in order to be able to take advantage of a subsequent mortgagee's rights under s. 22. Whether that view is correct is the question of law they wish to have determined on appeal.

11 On behalf of BDC, Mr. Chaiton submits that there is nothing in s. 22 that permits a subsequent mortgagee to exercise its s. 22 rights unless it brings the prior mortgage into good standing, which involves both paying the amount due under the mortgage and — where there are unperformed covenants — performing those covenants as well.

Is Leave to Appeal Necessary?

12 In my view, there is no automatic right to appeal from an order appointing a receiver: see *Century Services Inc. v. Brooklin Concrete Products Inc.* (11 March 2005), Court File No. M32275 (Ont. C.A., in Chambers), Catzman J.A.; *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)* (1997), 206 A.R. 295 (Alta. C.A. [In Chambers]).

13 The portions of s. 193 of the BIA relied upon by Romspen and Pine Tree are the following:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> . . .
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> . . .
>
> (e) in any other case by leave of a judge of the Court of Appeal.

14 Neither (a) nor (c) applies in these circumstances, in my view. I will address whether leave to appeal should be granted later in these reasons.

15 "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal. They do not include rights that presently exist but that may be exercised in the future: see *Ravelston Corp., Re*, [2005] O.J. No. 5351 (Ont. C.A.), at para. 17. See also *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.); *Dominion Foundry Co., Re* (1965), 52 D.L.R. (2d) 79 (Man. C.A.); and *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]).

16 Here, Romspen's legal rights are its right to exercise its power of sale remedy and its right to put the first mortgage in good standing under s. 22 of the *Mortgages Act*. The first crystallized on the default under the Romspen mortgage, the second on the default under the BDC mortgage. Both rights were therefore triggered before the order of Mesbur J. They were at best rights presently existing but exercisable in the future.

17 Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(c). As noted by the Manitoba Court of Appeal in *Dominion Foundry Co., Re*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.

18 In my view, leave to appeal is required in the circumstances of this case.

Should Leave to Appeal Be Granted?

The Test

19 In *Fiber Connections Inc.*, Armstrong J.A. (in Chambers) reviewed extensively the jurisprudence surrounding the test to be applied for granting leave to appeal under s. 193(e). As he noted at para. 15, there is some confusion as to what that test is. Two articulations of the test have emerged, and each has its support in the case law.

20 One formulation is that set out by McLachlin J.A. (as she then was) in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.). It asks the following questions:

> (i) Is the point appealed of significance to the practice as a whole?
>
> (ii) Is the point raised of significance in the action itself?
>
> (iii) Is the appeal prima facie meritorious?
>
> (iv) Will the appeal unduly hinder the progress of the action?

21 These are the criteria generally applied when considering whether to grant leave to appeal from orders made in restructuring proceedings under the *Companies' Creditors Arrangement Act* R.S.C. 1985, c. C-36 ("CCAA"), although their application has not been confined to those types of cases.

22 A second approach to the test was adopted by Goodman J.A. in *R.J. Nicol Homes Ltd. (Trustee of) v. Nicol*, [1995] O.J. No. 48 (Ont. C.A.), at para. 6. Through this lens, the court is to determine whether the decision from which leave to appeal is sought (a) appears to be contrary to law; (b) amounts to an abuse of judicial power; or (c) involves an obvious error, causing prejudice for which there is no remedy.

23 Ontario decisions have traditionally leaned toward the *R.J. Nicol* factors when determining whether to grant leave to appeal under s. 193(e) of the BIA: see, in addition to *R.J. Nicol Homes Ltd. (Trustee of)*, for example, *Leard, Re* (1994), 114 D.L.R. (4th) 135 (Ont. C.A.); and *Century Services Inc.*

24 This view has evolved in recent years, however, and three decisions in particular have added nuances to the *R.J. Nicol Homes Ltd. (Trustee of)* approach by considering such factors as whether there is an arguable case for appeal and whether the issues sought to be raised are significant to the bankruptcy practice in general and ought to be addressed by this Court: see *Fiber Connections Inc.*, at paras. 16-20; *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]); and *Baker, Re* (1995), 22 O.R. (3d) 376 (Ont. C.A. [In Chambers]). These factors echo the criteria set out in *Power Consolidated (China) Pulp Inc.*.

25 In *Baker, Re*, Osborne J.A. acknowledged the two alternative approaches to determining whether leave to appeal should be granted. He concluded at p. 381 that the *R.J. Nicol Homes Ltd. (Trustee of)* criteria were "generally relevant" but observed that all factors need not be given equal weight in every case. For that particular case, he emphasized the factor that the issue sought to be appealed was "a matter of considerable general importance in bankruptcy practice". In *TCT Logistics Inc.*, at para. 9, Feldman J.A. listed all of the *R.J. Nicol Homes Ltd. (Trustee of)* *and* the *Power Consolidated (China) Pulp Inc.* criteria — without apparently distinguishing between them — as matters to be taken into account. She granted leave holding that the issues in that case were significant to the commercial practice regulating bankruptcy and receivership and ought to be considered by this court.

26 Finally, in *Fiber Connections Inc.*, Armstrong J.A. reviewed all of the foregoing authorities and, at para. 20, granted leave to appeal because he was satisfied in that case that there were arguable grounds of appeal (although it was not necessary for him to determine whether the appeal would succeed) and because the issues raised were significant to bankruptcy practice and ought to be considered by this Court.

27 I take from this brief review of the jurisprudence that, while judges of this Court have tended to favour the *R.J. Nicol Homes Ltd. (Trustee of)* test in the past, there has been a movement towards a more expansive and flexible approach more recently — one that incorporates the *Power Consolidated (China) Pulp Inc.* notions of overall importance to the practice area in question or the administration of justice as well as some consideration of the merits.

28 That being the case, it is perhaps time to attempt to clarify the "confusion" that arises from the co-existence of the two streams of criteria in the jurisprudence. I would adopt the following approach.

29 Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and
>
> c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

30 It is apparent these considerations bear close resemblance to the *Power Consolidated (China) Pulp Inc.* factors. One is missing: the question whether the point raised is of significance to the action itself. I would not rule out the application of that consideration altogether. It may be, for example, that in some circumstances the parties will need to have an issue determined on appeal as a step toward dealing with other aspects of the bankruptcy/insolvency proceeding. However, it seems to me that this particular consideration is likely to be of lesser assistance in the leave to appeal context because most proposed appeals to this Court raise issues that are important to the action itself, or at least to one of the parties in the action, and if that consideration were to prevail there would be an appeal in almost every case.

31 I have not referred specifically to the three *R.J. Nicol Homes Ltd. (Trustee of)* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power, or

(c) involves an obvious error causing prejudice for which there is no remedy, will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated (China) Pulp Inc.* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker, Re* and by Armstrong J.A. in *Fiber Connections Inc.*. In my view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol Homes Ltd. (Trustee of)* factors into the test.

32 As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.

33 The *Power Consolidated (China) Pulp Inc.* criteria are the criteria applied by this Court in determining whether leave to appeal should be granted in restructuring cases under the CCAA: see *Country Style Food Services Inc., Re*, [2002] O.J. No. 1377 (Ont. C.A. [In Chambers]), Feldman J.A., at para 15; and *Blue Range Resource Corp., Re* (1999), 244 A.R. 103 (Alta. C.A.). The criteria I propose are quite similar. There is something to be said for having similar tests for leave to appeal in both CCAA and BIA insolvency proceedings. Proposed appeals in each area often arise from discretionary decisions made by judges attuned to the particular dynamics of the proceeding. Those decisions are entitled to considerable deference. In addition, both types of appeal often involve circumstances where delays inherent in appellate review can have an adverse effect on those proceedings.

Application of the Test in the Circumstances

34 I am not prepared to grant leave to appeal on the basis of the foregoing criteria in the circumstances of this case.

35 First, Romspen and Pine Tree raise a number of grounds relating to the exercise of the application judge's discretion. These include her consideration and treatment of: the relative expenses involved in BDC's and Romspen's plans for the sale of the property; the impact of shutting down the Inn on employees and others and upon the potential sale prospects of the property; and her concern for "the usual unsecured creditors". These discretionary considerations are all entitled to great deference and, in any event, are purely factual and case specific, and do not give rise to any matters of general significance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole.

36 I would not grant leave to appeal on those grounds.

37 The legal issue raised by Romspen is this: did the application judge err by relying on a covenant default that could not prejudice BDC or erode its firstranking security as the basis for her conclusion that Romspen had not complied with the requirements for the exercise of a subsequent mortgagee's rights under s. 22 of the *Mortgages Act*? The basis for that submission is the argument that the outstanding HST arrears — although a default in the observance of a covenant under the BDC mortgage — could not in any circumstances constitute a claim that would have priority over BDC's security, and therefore Romspen, as a subsequent mortgagee, is not required to cure the default by performing that covenant in order to be able to exercise its s. 22 rights.

38 I have serious reservations about the likelihood of success of this submission on appeal.

39 Romspen relies upon the jurisprudence of this Court establishing that a mortgagor — and therefore, a subsequent mortgagee — is entitled as of right, upon tendering the arrears or performing the covenant in default, to be relieved of the consequence of default: see *Theodore Daniels Ltd. v. Income Trust Co.* (1982), 37 O.R. (2d) 316 (Ont. C.A.). The problem is that Romspen has not offered to put the BDC mortgage in good standing, but has only offered to do so partially. It proposes to leave unperformed a $250,000 covenant — payment of the outstanding HST arrears.

40 For Romspen to succeed on appeal would require a very creative interpretation of s. 22 of the *Mortgages Act* [1], and one that would potentially create an undesirable element of uncertainty in the field of mortgage enforcement, because no one would know which covenants could be left unperformed and which could not, without litigating the issue in each case.

41 I am not persuaded that the s. 22 point crosses the *prima facie* meritorious threshold. In any event, given my serious reservations about the merits, that factor together with the need for a timely sale process leads me to conclude that leave to appeal ought not to be granted.

42 Interfering with the timeliness of that process could potentially impact on the success of the sale. All parties agree the property must be sold. They only differ over who will conduct the sale and how it will be done. The application judge considered the alternative plans at length, and her decision to accept the BDC plan was not dependent on her rejection of Romspen's s. 22 argument.

43 There is some need for the sale to proceed expeditiously. The experienced application judge chose between BDC's and Romspen's two proposals and favoured that of BDC. Any further delay resulting from an appeal could well impact the potential sale, since the Inn is a seasonal business that only operates in the warm months of the year and those warm months are fast approaching.

44 For the foregoing reasons, I decline to grant leave to appeal.

Disposition

45 There is no appeal as of right from the receivership order granted by Mesbur J. under s. 193 of the BIA. Leave to appeal is required, but Romspen and Pine Tree have not met the test for leave to be granted in these circumstances. The motions of Romspen and Pine Tree are therefore dismissed. It follows that the receivership order is not stayed and that BDC's motion, to the extent it is necessary to deal with it, is successful.

46 No order as to costs is required, since I am advised that BDC is entitled to add the costs of this proceeding to its debt under the mortgage.

Motion dismissed.

Footnotes

1 Section 22(1) provides:

> Despite any agreement to the contrary, *where default has occurred* in making any payment of principal or interest due under a mortgage or *in the observance of any covenant in a mortgage* and under the terms of the mortgage, by reason of such default, the whole principal and interest secured thereby has become due and payable,
> (a) at any time before sale under the mortgage: or
>
> (b) before the commencement of an action for the enforcement of the rights of the mortgagee or of any person claiming through or under the mortgagee,
>
> *the mortgagor may perform such covenant* or pay the amount due under the mortgage, exclusive of the money not payable by reason merely of lapse of time, and pay any expenses necessarily incurred by the mortgagee, and thereupon the mortgagor is relieved from the consequences of such default.
>
> [Emphasis added]
> It is not disputed that a subsequent mortgagee is a "mortgagor" for purposes of this provision.

Tab 10

2011 ONCA 713
Ontario Court of Appeal [In Chambers]

Kaiser, Re

2011 CarswellOnt 12822, 2011 ONCA 713, [2011] O.J. No. 6223,
209 A.C.W.S. (3d) 223, 285 O.A.C. 275, 84 C.B.R. (5th) 269

In the Matter of the Bankruptcy of Morris Kaiser of the City of Toronto in the Province of Ontario

Morris Kaiser, a Bankrupt (Applicant) and Soberman Inc., Trustee in Bankruptcy of the Estate of Morris Kaiser (Respondent)

E.A. Cronk J.A.

Heard: October 18, 2011
Judgment: November 14, 2011
Docket: CA M40462

Proceedings: refusing leave to appeal *Kaiser, Re* (2011), 2011 ONSC 4877, 2011 CarswellOnt 8304 (Ont. S.C.J. [Commercial List])

Counsel: Melvyn L. Solmon, Cameron J. Wetmore for Applicant
Neil Rabinovitch, Milton A. Davis for Respondent

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.3 Discovery and examinations
XVII.3.c Evidentiary issues
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.6 Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous
Bankrupt was assigned into bankruptcy — Lawyer for trustee had been involved in proceedings against bankrupt for several years, and was currently representing creditor L in action against others who had acted for bankrupt in litigation — In course of proceedings trustee signed document purporting to waive privilege of bankrupt — Bankrupt brought motion to remove counsel for trustee and to nullify waiver of privilege — Motion for removal of counsel dismissed, motion regarding waiver allowed — Bankrupt brought application for leave to appeal — Application dismissed — Bankrupt had not satisfy test for leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act — Trustee had sworn that there was no conflict, that counsel had not preferred L's interests over those of trustee, and that bankrupt's largest creditors, together with trustee, wished counsel to continue as counsel to trustee.
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Table of Authorities

Cases considered by *E.A. Cronk J.A.*:

Colville-Reeves v. Canadian Home Publishers Inc. (2002), 2002 CarswellOnt 546, [2002] O.T.C. 124 (Ont. S.C.J. [Commercial List]) — referred to

Dugas, Re (2003), 2003 NBQB 197, 2003 CarswellNB 203, (sub nom. *Dugas (Bankrupt), Re)* 261 N.B.R. (2d) 315, 685 A.P.R. 315, 41 C.B.R. (4th) 168, 32 C.P.C. (5th) 69 (N.B. Q.B.) — referred to

Engels v. Richard Killen & Associates Ltd. (2002), 2002 CarswellOnt 2435, 60 O.R. (3d) 572, 35 C.B.R. (4th) 77 (Ont. S.C.J.) — considered

Engels v. Richard Killen & Associates Ltd. (2004), 2004 CarswellOnt 62, 48 C.B.R. (4th) 68, 69 O.R. (3d) 183, 181 O.A.C. 94 (Ont. C.A.) — referred to

Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) — followed

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2003), 2003 CarswellOnt 6652 (Ont. C.A. [In Chambers]) — followed

Lautec Properties Inc. v. Barzel Windsor (1984) Inc. (2002), 2002 CarswellOnt 3049, 26 C.P.C. (5th) 131 (Ont. S.C.J. [Commercial List]) — considered

MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, (sub nom. *Martin v. Gray)* [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384, 285 W.A.C. 241, 1990 CarswellMan 233 (S.C.C.) — referred to

Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd. (2011), 79 C.B.R. (5th) 229, 2011 CarswellOnt 5613, 2011 ONSC 3945 (Ont. S.C.J. [Commercial List]) — considered

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

Turbo Logistics Canada Inc. v. HSBC Bank Canada (2009), 81 C.B.R. (5th) 169, 2009 CarswellOnt 5929 (Ont. S.C.J. [Commercial List]) — considered

Zawadzki v. Matthews Group Ltd. (1998), 1998 CarswellOnt 197, 18 C.P.C. (4th) 373, 50 O.T.C. 392 (Ont. Gen. Div.) — referred to

Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd. (1992), 18 B.C.A.C. 221, 31 W.A.C. 221, 84 B.C.L.R. (2d) 283, 22 C.B.R. (3d) 291, 1992 CarswellBC 541 (B.C. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 163 — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(c) — considered

s. 193(e) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

Proceeding: Motion/Application for Leave to Appeal.

APPLICATION by bankrupt for leave to appeal from judgment reported at *Kaiser, Re* (2011), 2011 ONSC 4877, 2011 CarswellOnt 8304 (Ont. S.C.J. [Commercial List]), which refused to order removal of law firm as counsel of record for trustee in bankruptcy.

***E.A. Cronk J.A.*:**

1 This is a motion for leave to appeal to this court from the order of Newbould J. of the Superior Court of Justice, In Bankruptcy, dated August 16, 2011, refusing to order the removal of a law firm as counsel of record for a trustee in bankruptcy.

I. Background

2 The applicant, Morris Kaiser ("Kaiser"), was adjudged bankrupt on October 17, 2009. The respondent, Soberman Inc. (the "Trustee"), was appointed trustee of the bankrupt estate.

3 For more than a decade, Milton Davis ("Davis"), a partner in the law firm of Davis Moldaver LLP, has acted as counsel in various legal proceedings against or involving Kaiser. Specifically, since the spring of 1999, Davis has acted as counsel for approximately 20 individual or corporate litigants in more than 14 actions against Kaiser or his interests. By reason of these professional engagements, Davis has gained considerable knowledge of Kaiser as a litigant.

4 Davis, through Davis Moldaver LLP, also acts for the Trustee in the Kaiser bankruptcy.

5 As set out in an affidavit sworn by Kenneth Tessis ("Tessis") of the Trustee's offices on July 14, 2010, as a result of Davis' extensive experience with Kaiser, the Trustee regards Davis Moldaver LLP as "the best suited law firm to be acting on behalf of the Trustee" in the Kaiser bankruptcy.

6 Representatives of three of Kaiser's largest creditors — Bernie Ghert, Lautec Properties Inc. ("Lautec") and the Canada Revenue Agency — serve as inspectors in Kaiser's bankruptcy. It is undisputed that each of these creditors has "unequivocally" advised the Trustee of their desire to have Davis Moldaver LLP continue to act for the Trustee in the Kaiser bankruptcy.

7 It is against this general background that this leave to appeal motion must be understood.

(1) Removal Motion

8 In the summer of 2011, Kaiser moved for an order removing Davis Moldaver LLP as counsel of record for the Trustee (the "Removal Motion"). As relevant to this leave motion, Kaiser alleged on the Removal Motion that Davis Moldaver LLP was in a conflict position because: (1) while acting for the Trustee, Davis was also acting for Lautec; and (2) in breach of obligations that Kaiser claimed are owed to him by Davis and the Trustee (in particular, the alleged duty to protect Kaiser's right to solicitor-client privilege), Davis advised and permitted the Trustee to take steps that preferred Lautec's interests over those of the Trustee and the Kaiser estate.

9 By order dated August 16, 2011, the motion judge dismissed the Removal Motion and awarded costs to the Trustee.

(2) Leave to Appeal Motion

10 Kaiser seeks leave to appeal from the motion judge's order dismissing his request for a removal order. If leave be granted, he also seeks an order expediting the appeal.

11 Section 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") provides for an appeal as of right to the Court of Appeal from any order or decision of a judge in bankruptcy in limited circumstances as set out in ss. 193(a) to (d). Under s. 193(e), leave of a judge of the Court of Appeal is required to appeal to this court "in any other case".

12 Thus, the preliminary issue on this motion is whether leave to appeal the motion judge's decision to this court is required.

13 In his notice of motion, Kaiser seeks leave to appeal, "if leave is required", pursuant to s. 193(e) of the BIA. Kaiser previously filed a Notice of Appeal and Amended Notice of Appeal in which he invoked ss. 193(a) and (c) and, "if necessary", s. 193(e) of the BIA as the jurisdictional basis for appealing the motion judge's decision to this court.

14 In both his leave motion materials and his oral submissions, Kaiser took the position that leave to appeal under s. 193(e) is not required. At the same time, he also expressly sought leave to appeal under s. 193(e) of the BIA. He advanced no argument regarding an appeal as of right under any of ss. 193(a) to (d) of the BIA. Leave to appeal was the only relief sought on the motion, apart from an expedited appeal date.

15 Argument of the leave motion proceeded on the basis that s. 193(e) of the BIA applies in the circumstances. It is the Trustee's position that s. 193(e) is engaged, that leave to appeal to this court is required, and that leave should be denied given the history of this matter, as outlined below.

16 I am not persuaded that Kaiser's proposed appeal from the motion judge's decision falls within any of the appeal as of right categories set out in s. 193 of the BIA. [1] Nor, as I have said, did Kaiser urge a contrary conclusion. I therefore proceed on the basis that leave to appeal to this court is required under s. 193(e) of the BIA.

II. Governing Legal Principles

17 The jurisprudence of this court indicates that a flexible approach should be applied to the factors to be considered on a motion for leave under s. 193(e) of the BIA. As Armstrong J.A. of this court explained in *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) (in chambers), at para. 19, "There is a variety of factors to consider depending upon the circumstances presented to the court." These factors include: (1) whether the judgment at issue appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy; (2) whether the point of the appeal is of significance to the practice or to the action itself; (3) whether the appeal is *prima facie* meritorious or frivolous; and (4) whether the appeal will unduly prejudice the progress of the action: see *Fiber Connections Inc.*, *per* Armstrong J.A., at para. 15; *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]) (in chambers), *per* Feldman J.A., at para. 9. The relevant factors to consider will vary according to the circumstances of each case.

18 One factor that is considered in all cases where leave to appeal under s. 193(e) of the BIA is sought is whether the proposed appeal is *prima facie* meritorious. In assessing the merits of a leave to appeal motion under this provision, the court's inquiry is informed by the principle of deference owed to a commercial court judge. Absent demonstrable error, an appeal court will not interfere. See *Ravelston Corp., Re*, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]), (in chambers), *per* Borins J.A., at paras. 11-12; *Fiber Connections Inc.* , *per* Armstrong J.A., at paras. 15-19; *GMAC Commercial Credit*, *per* Feldman J.A., at para. 9.

19 In addition, where the order sought to be appealed from is discretionary, as in this case, this court has recognized that leave will not be granted unless the matter is of importance either to the administration of justice generally or to the respective rights of the parties to the litigation: *Fiber Connections Inc.* , *per* Armstrong J.A., at para. 15; *GMAC Commercial Credit*, *per* Feldman J.A., at paras. 9 and 14; *Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd.* (1992), 22 C.B.R. (3d) 291 (B.C. C.A.) (in chambers), *per* Southin J.A., at para. 21.

20 Given the nature of the order sought to be appealed, Kaiser's leave motion is also informed by those principles that govern the court-ordered removal of a litigant's counsel of record. These principles were relevant to the motion judge's discretionary

decision to deny the relief sought by Kaiser. They are also a relevant consideration in assessing the merits of Kaiser's proposed appeal.

21 As the motion judge properly noted, "A litigant should not be deprived of counsel of its choice without good cause. See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.)." For this reason, Canadian courts exercise the highest level of restraint before interfering with a party's choice of counsel. Where such discretionary, equitable relief is invoked, there must be a possibility of real mischief should a removal order be refused. The test is whether a fair-minded and reasonably informed member of the public would conclude that counsel's removal is necessary for the proper administration of justice: see for example, *MacDonald Estate*; *Zawadzki v. Matthews Group Ltd.* (1998), 18 C.P.C. (4th) 373 (Ont. Gen. Div.); *Colville-Reeves v. Canadian Home Publishers Inc.* (2002), 111 A.C.W.S. (3d) 1202 (Ont. S.C.J. [Commercial List]) [*Colville-Reeves v. Canadian Home Publishers Inc.* (2002), 2002 CarswellOnt 546 (Ont. S.C.J. [Commercial List])]; *Lautec Properties Inc. v. Barzel Windsor (1984) Inc.* (2002), 26 C.P.C. (5th) 131 (Ont. S.C.J. [Commercial List]).

III. Discussion

22 In my opinion, it cannot be said that Kaiser's appeal is *prima facie* meritorious. Far from it.

23 Kaiser sought discretionary, equitable relief of a type that is granted only sparingly and with great caution — the involuntary removal of counsel chosen by a client in the face of the client's opposition to the removal. That relief was denied by the motion judge for clear and cogent reasons. On the motion judge's findings, the requested relief was sought for improper and tactical, rather than legitimate, reasons. This factor alone tells strongly against granting equitable relief. Further, in all the circumstances, I do not regard any of the issues sought to be raised on appeal as important either to the administration of justice generally or to the rights of the parties.

24 I therefore conclude that Kaiser has failed to satisfy the test for leave under s. 193(e) of the BIA. I note, in particular, the following.

25 First, the record suggests that Kaiser has a demonstrated history of initiating proceedings, including removal motions, for purely strategic reasons. His motive for bringing the Removal Motion, which was a central issue before the motion judge, bears directly on the merits of his proposed appeal.

26 The motion judge declined to exercise his discretion in favour of granting the requested removal order in part because he concluded that the Removal Motion had been brought "for tactical purposes to try to delay actions by the [T]rustee [to recover Kaiser's assets for the estate]". In his view, the Removal Motion was "completely miscast". These conclusions are firmly grounded in the evidentiary record.

27 The record reveals that the Removal Motion was not Kaiser's first attempt to secure Davis' removal as counsel of record in proceedings against Kaiser or his interests. In 2002, Kaiser moved for an order removing Davis as counsel of record in 14 related actions. In dismissing that motion, Epstein J., then of the Superior Court of Justice, concluded that: (1) the motion was brought for an improper, tactical purpose; (2) the moving parties knew that such an order would cause delay and inconvenience; and (3) the evidence before her did not support the allegations of misconduct advanced against Davis: *Lautec Properties Inc.*, at paras. 42-45. These were serious findings of impropriety by Kaiser. Justice Epstein put it this way, at para. 46: "[T]he case made out in support of the relief sought ... was like a blanket heavily patterned with strong animus toward Mr. Davis and woven together with speculation and conjecture."

28 Further, Kaiser had attempted in the past, without success, to secure a removal order against Davis' predecessor — also a senior member of the litigation bar in Toronto — as counsel of record for parties opposite in interest to Kaiser. On that removal motion as well, Kaiser alleged serious professional wrongdoings by the involved counsel, allegations that were later found to be wholly groundless.

29 Moreover, it is uncontested that Kaiser previously sued Davis for conspiracy, but adduced no evidence to support this serious claim when the matter proceeded to arbitration. The experienced arbitrator, a former judge of the Superior Court of

Justice, held that there was no evidentiary basis for any criticism of Davis and that the allegations against him were "unfounded and persistent". He awarded costs to Davis and others on a substantial indemnity scale.

30 This troublesome history of improperly-motivated litigation strongly supports the motion judge's conclusion in this case that removal motions "appear to be part of Mr. Kaiser's *modus operandi*" and that Kaiser holds a clear *animus* towards Davis. Kaiser's pattern of advancing serious unfounded allegations of professional improprieties against counsel opposite and of initiating ill-founded removal motions, raises a sharp red flag, necessitating close scrutiny of the merits of any proposed appeal from the motion judge's ruling on the Removal Motion.

31 Second, the record also indicates that Kaiser, in numerous ways, has declined to co-operate with the Trustee and has sought to frustrate the disclosure of his financial resources and assets and the efficient administration of his bankrupt estate by the Trustee.

32 The motion judge held that Kaiser, "who has an obligation to the trustee to assist in locating assets belonging to the bankrupt estate", was "taking every opportunity to refuse to provide information that could assist the trustee". This finding was not challenged during argument of the leave motion. Nor is it attacked by Kaiser in his Notice of Appeal or Amended Notice of Appeal as a factual finding tainted by palpable and overriding error.

33 Again, there was considerable evidence before the motion judge to support this finding. Consider the following:

> (1) the Trustee provided evidence on the Removal Motion that although Kaiser claimed to be impecunious at the time of his bankruptcy, he engaged in a lifestyle, both *before and after* the date of his bankruptcy, that belied this claim. This included evidence of frequent gambling trips to the United States, the loss of significant funds at gambling tables during these trips and numerous cash withdrawals on credit cards belonging to or controlled by a third party (who is suspected by the Trustee to be complicit in Kaiser's efforts to conceal his assets) at or near various casinos;
>
> (2) it was also the Trustee's uncontradicted evidence on the Removal Motion that the Trustee has not been able "to determine much regarding Kaiser's affairs", that a motion is pending to determine the source of funds being used by Kaiser to finance this litigation, that Kaiser appears to have structured his affairs "in such a way as to have [a third party act] as a 'straw man' — thereby shielding his funds from the Trustee and his creditors" and, further, that Kaiser appears to have "access to funds, which he did not have before, the source of which is unknown to the Trustee, to pay for his various family, living and day-to-day expenses";
>
> (3) on his examination conducted under s. 163 of the BIA, Kaiser or his counsel objected to approximately one-half of the questions asked on the ground of privilege. Yet, in the opinion of the motion judge following a review of the relevant questions, most, if not all, the refusals related to factual matters in respect of which a privilege claim could not be advanced; and
>
> (4) on June 30, 2011, Kaiser was cross-examined in respect of the pending Removal Motion. The motion judge noted that every question asked of Kaiser regarding his affairs was objected to, as being irrelevant to the Removal Motion.

34 In part on the basis of these facts, Tessis indicated in his affidavit sworn on behalf of the Trustee in response to the Removal Motion that, in the Trustee's opinion, the Removal Motion was brought "to deflect attention from the fact that [Kaiser] seems to have access to significant sums of money which he has not disclosed to the Trustee".

35 The foregoing circumstances militate in favour of the conclusion that the Removal Motion and, arguably, this associated leave motion, are merely the latest steps taken by Kaiser to delay and impede the expeditious and efficient administration of his bankrupt estate. At the very least, they provide a solid foundation for the motion judge's decision to deny discretionary equitable relief of the type sought by Kaiser. They also undercut Kaiser's contention that his proposed appeal from that decision is meritorious or of significance either to the parties or to commercial bankruptcy practice in general.

36 Finally, a word about the merits of the specific proposed grounds of appeal identified by Kaiser. To be blunt, I consider the merits of the identified grounds to be highly dubious.

37 Kaiser raised numerous grounds of appeal in his Amended Notice of Appeal. However, during oral argument of this motion, these grounds became more focused.

38 Kaiser's principal complaint is that Davis, while acting as counsel for the Trustee, also acted for Lautec, one of Kaiser's major creditors. Kaiser seeks to renew his argument on appeal, advanced before the motion judge, that Davis' dual engagement as counsel placed him and Davis Moldaver LLP in a conflict position, that Davis allegedly abused his role as counsel to the Trustee and breached alleged duties to Kaiser by advising the Trustee to take steps that favoured Lautec's interests over those of the Trustee and Kaiser, and that, by so doing, Davis exposed Davis Moldaver LLP "to an influence that impaired its professional judgment in respect of the Kaiser bankruptcy".

39 At the heart of this complaint is a written waiver document dated February 10, 2010, prepared by Davis and executed by the Trustee (the "Waiver"), pursuant to which the Trustee purported to waive Kaiser's solicitor-client privilege and authorized certain solicitors to disclose information that might otherwise have been subject to that privilege.

40 In the main, Kaiser contends that Davis, as counsel for the Trustee, owed a duty to Kaiser to protect his solicitor-client privilege. Kaiser invokes the professional standards set out in the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (the "Rules"), in support of his claim that Davis breached this duty by drafting and arranging for the execution and subsequent use of the Waiver for the benefit of Lautec in breach of Kaiser's right to solicitor-client privilege. Kaiser describes the Waiver as an "unlawful, misleading and prejudicial document", the preparation and use of which was "a misuse of the process and powers of the BIA".

41 These arguments were raised before the motion judge and fully addressed by him in his reasons on the Removal Motion. He rejected Kaiser's claims of any impropriety by the Trustee, Davis or Davis Moldaver LLP generally and, in particular, in respect of the Waiver. I see no reviewable error in this ruling.

42 Kaiser argued before the motion judge, and seeks to re-argue on appeal, that duties are owed directly by a trustee in bankruptcy's counsel to the bankrupt. In support of this proposition, he relies on *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572 (Ont. S.C.J.), aff'd (2004), 69 O.R. (3d) 183 (Ont. C.A.) and *Dugas, Re*, 2003 NBQB 197, 41 C.B.R. (4th) 168 (N.B. Q.B.), and various of the Rules.

43 The Rules do not appear to have been raised before the motion judge. The motion judge considered the above-mentioned cases cited by Kaiser and declined to follow them, preferring instead to adopt his own prior reasoning on this issue in *Turbo Logistics Canada Inc. v. HSBC Bank Canada* [2009 CarswellOnt 5929 (Ont. S.C.J. [Commercial List])], 2009 CanLII 55292. *Turbo* involved yet another solicitor-removal motion brought by counsel who act for Kaiser on this motion, albeit against another law firm in an unrelated proceeding. In *Turbo*, after considering the decisions in *Engels* and *Dugas*, the motion judge said, at para. 16:

> I cannot agree with the notion that counsel for a trustee in bankruptcy, or for a court-appointed receiver, normally owes any duty to the creditors of the bankrupt or debtor under a court-appointed receiver. The obligation of a solicitor is to his or her client. The fact that the solicitor is an officer of the court does not change that. It is the trustee in bankruptcy or the court-appointed receiver that owes a fiduciary duty to the creditors or other stakeholders. To suggest that the lawyer advising the trustee in bankruptcy or the court-appointed receiver owes a duty to those creditors or other stakeholders would, amongst other things, lay the solicitor open to actions at the hands of the creditors of the trustee in bankruptcy or court-appointed receiver for failure to properly carry out the lawyer's obligations to those creditors or stakeholders. This is not the law and would make no sense. A solicitor giving advice to a client, whether the client is a trustee in bankruptcy or court-appointed receiver or otherwise, is responsible to the client to give proper advice to the client. It is the client, and not the solicitor, that owes duties to creditors and other stakeholders in the case of a trustee in bankruptcy or courtappointed receiver.

See also *Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.*, 2011 ONSC 3945, 79 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

44 I see no error in the motion judge's reasoning on this issue or in the proposition that it is the trustee in bankruptcy, as principal, rather than his or her solicitor, as agent, who owes direct legal duties to the creditors of a bankrupt or the bankrupt. Nor do I read the Rules now cited by Kaiser as undermining this conclusion.

45 I reject Kaiser's contention that his proposed appeal raises "an important question of law for which there are conflicting authorities in Ontario", namely, whether a trustee's counsel owes direct legal duties to a bankrupt and, if so, the scope of those duties.

46 *Engels* is the only Ontario decision cited by Kaiser that is said to be contrary to the motion judge's ruling on this issue. *Engels* was concerned primarily with whether the bankrupt in that case was bound by a common law non-solicitation restriction following the sale by a trustee in bankruptcy of a book of business to a third party. It was in this context that the trial judge in *Engels* commented on the duties of trustees in bankruptcy and the obligation of the trustee and its counsel to act fairly and neutrally in the conduct of the administration of a bankrupt estate.

47 In any event, it is not in every instance in which potentially conflicting decisions exist that leave to appeal to this court is warranted. The issue has now been addressed squarely in two recent Superior Court decisions — *Turbo* and *Manufacturers Life*. In both cases, the notion of duties of counsel of the type urged by Kaiser was rejected.

48 Perhaps more importantly, on the motion judge's findings, neither Davis nor Davis Moldaver LLP breached any obligations to Kaiser.

49 The motion judge considered, and rejected, Kaiser's contention that the drafting, execution and use of the Waiver required the removal of Davis Moldaver LLP as the Trustee's counsel. In my view, this conclusion is overwhelmingly supported by the record.

50 First, the Waiver was prepared following the numerous privilege-based refusals by Kaiser on his BIA s. 163 examination, described above. Although Davis sent the Waiver to Kaiser's previous solicitors, he did not, in fact, request the disclosure of privileged information by those solicitors. In addition, it is uncontroverted that no privileged information was obtained as a result of the Waiver. Thus, regardless of the propriety of the Waiver, no prejudice was occasioned to Kaiser by its creation, execution or use.

51 Second, the motion judge granted a declaration, without opposition from the Trustee, that the Waiver was "null, void and of no effect".

52 Third, the motion judge accepted the Trustee's argument that the issue of the Waiver, and the attempt to invoke it as a basis for the removal of Davis Moldaver LLP as counsel for the Trustee, was part of a continuing effort to protect Kaiser from having to provide information to the Trustee.

53 Fourth, and importantly, the record indicates that Kaiser instructed his counsel to object to Davis' representation of the Trustee about one month *before* the Waiver was signed. Thus, Kaiser's reliance on the Waiver to support the Removal Motion was an 'after-the-fact' stratagem.

54 Fifth, the motion judge, as he was entitled to do, accepted the Trustee's evidence that the Waiver was used in an effort to trace funds that the Trustee has grounds to believe either emanated from Kaiser or from persons who hold money at his behest. He also accepted that at least part of the funds at issue may have been applied to reduce the debt owed to Lautec, one of Kaiser's largest creditors. The reduction of this debt, if it occurred, could only have decreased the amount of Lautec's claim in the bankruptcy and, consequently, increased the funds potentially available for recovery by Kaiser's other creditors. In these circumstances, the Trustee had a legitimate interest in attempting to trace the funds in question.

IV. Disposition

55 I end where I began. It bears repeating that none of the Trustee or Kaiser's major creditors and estate inspectors has voiced any objection to the representation of the Trustee by Davis and his law firm. Nor have they voiced any concern about Davis' conduct or a conflict of interest arising from the fact that Davis acts for both Lautec and the Trustee.

56 To the contrary, the Trustee has sworn that there is no conflict, that Davis has not preferred Lautec's interests over those of the Trustee, and that Kaiser's largest creditors, together with the Trustee, wish Davis to continue as counsel to the Trustee. The Trustee's position was succinctly stated in Tessis' affidavit on the Removal Motion:

> [I]t would be a disservice to the creditors and bankruptcy estate and ultimately a large and expensive impediment to the smooth administration of this bankruptcy if [Davis Moldaver LLP] was to be removed as solicitor of record.

57 Accordingly, for the reasons given, I conclude that Kaiser has not satisfied the test for leave to appeal under s. 193(e) of the BIA. The leave motion is dismissed.

V. Costs

58 The Trustee is entitled to its costs of this motion. I have now received and reviewed the parties' written submissions concerning costs. The Trustee seeks its costs of the leave motion on a full indemnity basis, in the sum of $21,521.48. The Trustee argues that this motion, like the Removal Motion, was tactical in nature and designed to further delay the proper administration of Kaiser's bankrupt estate. Consequently, the Trustee says that the dismissal of the leave motion should attract a costs award on the full indemnity scale.

59 Kaiser submits that his leave motion was reasonable and justified. He argues that, based on the decisions in *Engels* and *Dugas*, he had a legitimate legal foundation on which to object to Davis Moldaver LLP's continuing representation of the Trustee. He argues that the costs of the leave motion should be fixed in the amount of $5,000.

60 The Trustee emphasizes that the motion judge awarded costs to the Trustee in the amount of $50,000 — almost the entire amount of the Trustee's full indemnity costs ($53,758.76). In large part, that award was based on the motion judge's conclusion that the Removal Motion was misconceived and tactical in nature. He viewed the Removal Motion as merely one more effort by Kaiser to "stone wall" the Trustee's efforts to ascertain and realize on Kaiser's assets for the benefit of his bankrupt estate.

61 I have strong suspicions that, like the Removal Motion, Kaiser's leave motion was brought for tactical reasons. That said, the record before me does not clearly establish an improper purpose in the decision to seek leave to appeal.

62 I therefore conclude that the Trustee is entitled to its partial indemnity costs of the leave motion. Contrary to Kaiser's submission, I regard the amount of $14,200, inclusive of disbursements and all applicable taxes, as an appropriate award of partial indemnity costs in this case and I so order. I decline to grant any other relief in respect of the Trustee's costs of this motion.

Application dismissed.

Footnotes

1 For example, s. 193(a) of the BIA provides for an appeal as of right "if the point at issue involves future rights". The proposed appeal concerns the motion judge's discretionary ruling refusing to order the removal of Davis Moldaver LLP as ongoing counsel of record for the Trustee. Kaiser has no existing, let alone future, right to dictate the Trustee's choice of counsel. I do not regard the Trustee's selection of counsel as implicating Kaiser's "future rights". Similarly, it is difficult to see how s. 193(c) of the BIA is engaged in this case. That provision applies "if the property involved in the appeal" exceeds $10,000 in value.

Tab 11

Most Negative Treatment: Distinguished
Most Recent Distinguished: Da Silva v. River Run Vistas Corp. | 2016 ABQB 433, 2016 CarswellAlta 1586, 39 C.B.R. (6th) 109, [2016] A.W.L.D. 3853, 270 A.C.W.S. (3d) 475, [2016] A.J. No. 858 | (Alta. Q.B., Jul 8, 2016)

2014 ABCA 422
Alberta Court of Appeal

Echino v. Munro

2014 CarswellAlta 2223, 2014 ABCA 422, [2015] A.W.L.D. 2, 247 A.C.W.S. (3d) 746, 588 A.R. 211, 626 W.A.C. 211

Dan Echino and Corlac Resources Ltd., Applicants (Appellants) and Barry Thomas Munro and Soojandra Sally Munro, Respondents (Respondents)

Myra Bielby J.A.

Heard: December 2, 2014
Judgment: December 11, 2014
Docket: Edmonton Appeal 1403-0272-AC

Proceedings: refused leave to appeal *Echino v. Munro* (2014), 2014 CarswellAlta 1894, 2014 ABQB 636, (sub nom. Munro (Bankrupt), Re) 598 A.R. 60, 17 C.B.R. (6th) 200, [2014] A.W.L.D. 4638, 246 A.C.W.S. (3d) 509 ((Alta. Q.B.))

Counsel: A.L. Murray, for Applicants / Appellants
M.J. McCabe, Q.C., for Respondents / Respondents

Subject: Civil Practice and Procedure; Insolvency; Property
Related Abridgment Classifications
Bankruptcy and insolvency
XVI Effect of bankruptcy on other proceedings
XVI.1 Proceedings against bankrupt
XVI.1.a Before discharge of trustee
Headnote
Bankruptcy and insolvency --- Effect of bankruptcy on other proceedings — Proceedings against bankrupt — Before discharge of trustee — Granting of leave
Applicants had advanced funds to bankrupts for condominium project — Applicants sought to bring action against bankrupts to found claim against real estated fraud prevention fund — Judge concluded that stay did not prejudice applicants because they did not establish that their claim would survive bankruptcy or meet prerequisites for successful claim from fund — Applicants sought declaration that leave to appeal not required, or alternatively for leave to appeal — Application dismissed — Right of action was not future right so leave required — Applicants had not established that their appeal prima facie meritorious or raised arguable case — No evidence led to found claim of civil fraud or misrepresentation — Inference could not be drawn that applicants advanced monies only in expectation of receiving promissory note — More than allegations required to pierce bankruptcy shield.
Table of Authorities
Cases considered by *Myra Bielby J.A.*:
Combined Air Mechanical Services Inc. v. Flesch (2014), 2014 CarswellOnt 640, 2014 CarswellOnt 641, 2014 SCC 7, 95 E.T.R. (3d) 1, *(*sub nom. *Hryniak v. Mauldin)* [2014] 1 S.C.R. 87, 27 C.L.R. (4th) 1, 37 R.P.R. (5th) 1, 46 C.P.C. (7th) 217, 2014 CSC 7, *(*sub nom. *Hryniak v. Mauldin)* 314 O.A.C. 1, *(*sub nom. *Hryniak v. Mauldin)* 453 N.R. 51, 12 C.C.E.L. (4th) 1, *(*sub nom. *Hryniak v. Mauldin)* 366 D.L.R. (4th) 641, 21 B.L.R. (5th) 248 (S.C.C.) — followed

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 461 N.R. 335, 25 B.L.R. (5th) 1, 373 D.L.R. (4th) 393, [2014] 9 W.W.R. 427, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 59 B.C.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1 (S.C.C.) — followed

Decker Estate (Trustee of) v. Alberta (Superintendent of Bankruptcy) (2009), 2009 ABCA 287, 2009 CarswellAlta 1334, 59 C.B.R. (5th) 221, (sub nom. *Decker (Bankrupt), Re)* 464 A.R. 40, (sub nom. *Decker (Bankrupt), Re)* 467 W.A.C. 40 (Alta. C.A.) — referred to

Durocher Simpson v. Memento Granite Memorials Ltd. (Trustee of) (2003), 45 M.V.R. (4th) 199, 45 C.B.R. (4th) 199, 2003 ABCA 237, 2003 CarswellAlta 1095 (Alta. C.A.) — referred to

Echino v. Munro (2014), 2014 CarswellAlta 1894, 2014 ABQB 636, 17 C.B.R. (6th) 200 (Alta. Q.B.) — referred to

Fantasy Construction Ltd., Re (2007), 2007 ABCA 335, 2007 CarswellAlta 1849, [2008] 5 W.W.R. 475, (sub nom. *Fantasy Construction Ltd. (Bankrupt), Re)* 410 W.A.C. 255, (sub nom. *Fantasy Construction Ltd. (Bankrupt), Re)* 417 A.R. 255, 40 C.B.R. (5th) 212, 89 Alta. L.R. (4th) 93 (Alta. C.A.) — referred to

Gaastra v. Tri-Link Consultants Inc. (2012), 2012 CarswellAlta 1523, 2012 ABCA 262 (Alta. C.A.) — considered

Lechcier-Kimel, Re (2011), 2011 ONCA 590, 2011 CarswellOnt 10144, 84 C.B.R. (5th) 65 (Ont. C.A. [In Chambers]) — referred to

Ma, Re (2001), 143 O.A.C. 52, 2001 CarswellOnt 1019, 24 C.B.R. (4th) 68 (Ont. C.A.) — referred to

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — referred to

Simonelli v. Mackin (2003), 39 C.B.R. (4th) 297, (sub nom. *Simonelli (Bankrupt), Re)* 320 A.R. 330, (sub nom. *Simonelli (Bankrupt), Re)* 288 W.A.C. 330, 2003 CarswellAlta 176, 2003 ABCA 47 (Alta. C.A. [In Chambers]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 69-69.31 — referred to

s. 69(1)(a) — considered

s. 69.4 [en. 1992, c. 27, s. 36(1)] — considered

s. 178(1) — considered

s. 193(a) — considered

s. 193(e) — considered

Real Estate Act, R.S.A. 2000, c. R-5

s. 60(1) — considered

s. 61 — considered

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 6.7 — considered

Words and phrases considered:

future rights

The applicants first apply for a declaration that leave is not required for this appeal, pursuant to s 193(a) of the [Bankruptcy and Insolvency Act (BIA)], because "the point at issue involves future rights". They submit their claim involves future rights because, due to the s 69(1)(a) stay, they cannot pursue their claim until a future time, either when the stay is lifted by order, or, if truly based in fraud, upon the

respondents' discharge from bankruptcy; see BIA, s 178(1).

However, in their written submission the applicants state that a "future right" is inchoate in that it does not exist now, but may arise in the future, and that "future" does not apply to rights that currently exist. This is a concession which defeats their broader argument. Whatever rights the applicants have arising from their claim against the respondents have already vested. Those rights currently exist, but are simply stayed pending the outcome of the bankruptcy.

The precise wording of s 69.4 of the BIA supports this interpretation: it provides that "A creditor who is affected by the operation of sections 69 to 69.31...may apply to the court for a declaration that those sections no longer apply..." This suggests that ss 69 to 69.31 of the BIA do not extinguish creditors' rights, but merely stay or suspend them, given that nothing more than a declaration that they no longer operate will permit the creditor to pursue those rights.

As a result, the applicants must obtain leave to appeal the decision of the Chambers Judge under s 193(e) of the BIA.

Proceeding: Motion/Application for Leave to Appeal.

APPLICATION for declaration leave to appeal not required, or alternatively for leave to appeal.

***Myra Bielby J.A.*:**

1 The applicants apply for a declaration that leave to appeal is not required for them to appeal from a decision granted by Veit J on October 17, 2014 [2014 CarswellAlta 1894 (Alta. Q.B.)] in which she declined to lift the stay of proceedings imposed by s 69(1)(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 ("*BIA*"), resulting from the respondents becoming bankrupt. In the alternative they apply for leave to pursue an appeal from that decision.

2 The applicants hope to commence an action against the respondents for some $300,000 with the goal of obtaining a judgment which could then be used to found an application for compensation from the Real Estate Fraud Prevention Fund ("the Fund"), established by s 60(1) of the *Real Estate Act*, RSA 2000, c R-5. For them to recover from this source, such a judgment would have to be based on a finding of fraud or breach of trust in respect of a transaction in the business of an industry member, defined as a person who holds an authorization as a real estate broker, a real estate appraiser or a mortgage broker. The respondents allegedly meet this definition.

3 If the applicant's claims arise from fraud, they will not be extinguished by the respondents' bankruptcies and may be pursued, without leave, once they are discharged from bankruptcy; see *BIA* s 178(1). However they wish to proceed with their action immediately and thus applied for an order pursuant to s 69.4 of the *BIA*, which gives the Court jurisdiction to lift the stay imposed by s. 69(1)(a) of the *BIA* and order that an action against a party still in bankruptcy may continue, subject to the meeting of certain prerequisites which include a finding that the creditor is likely to be materially prejudiced by the continued operation of the stay or that it is equitable on other grounds to lift the stay.

4 The applicants argue that they are prejudiced by the delay created by the stay, suggesting if they can satisfy any eventual judgment by payment from the Fund, they would have no call on the recovery made by the respondents' bankruptcy trustee, with the result that there would be a larger recovery to share out among the other creditors. This argument ignores the effect of s 61 of the *Real Estate Act* which creates a right of subrogation on account of any monies paid from the Fund, a claim which could conceivably be advanced against any recovery in the hands of the bankruptcy trustee.

5 In the order which is the subject of this appeal, Justice Veit concluded that the continued operation of the stay did not materially prejudice the applicants because they did not establish that their claim would survive the bankruptcy or meet the prerequisites for a successful claim from the Fund. They proffered no written or independent evidence that supported the conclusion that their claim arose from fraud or misrepresentation, rather than simply from a failed investment. She went on to observe that the Court would undermine the statutory objectives of the *BIA* stay if it lifted the stay based on a mere suspicion.

6 The applicants first apply for a declaration that leave is not required for this appeal, pursuant to s 193(a) of the *BIA*, because "the point at issue involves future rights". They submit their claim involves future rights because, due to the s 69(1)(a) stay,

they cannot pursue their claim until a future time, either when the stay is lifted by order, or, if truly based in fraud, upon the respondents' discharge from bankruptcy; see *BIA*, s 178(1).

7 However, in their written submission the applicants state that a "future right" is inchoate in that it does not exist now, but may arise in the future, and that "future" does not apply to rights that currently exist. This is a concession which defeats their broader argument. Whatever rights the applicants have arising from their claim against the respondents have already vested. Those rights currently exist, but are simply stayed pending the outcome of the bankruptcy.

8 The precise wording of s 69.4 of the *BIA* supports this interpretation: it provides that "A creditor who is affected by the operation of sections 69 to 69.31...may apply to the court for a declaration that those sections no longer apply..." This suggests that ss 69 to 69.31 of the *BIA* do not extinguish creditors' rights, but merely stay or suspend them, given that nothing more than a declaration that they no longer operate will permit the creditor to pursue those rights.

9 As a result, the applicants must obtain leave to appeal the decision of the Chambers Judge under s 193(e) of the *BIA*.

10 In *Simonelli v. Mackin*, 2003 ABCA 47 (Alta. C.A. [In Chambers]) at para 28, (2003), 320 A.R. 330 (Alta. C.A. [In Chambers]), Wittmann J.A. (as he then was) adopted the following factors for the Court to consider when determining whether to grant leave to appeal under s 193(e) of the *BIA*. All of the factors must be present:

(a) Whether the point of appeal is of significance to the bankruptcy practice;

(b) Whether the point raised is of significance to the action itself;

(c) Whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous;

(d) Whether the appeal will unduly hinder the progress of the action; and

(e) Leave should only be granted if the judgment appears to be contrary to law, amounts to an abuse of judicial power, or involves an obvious error, causing prejudice for which there is no remedy.

See also *Durocher Simpson v. Memento Granite Memorials Ltd. (Trustee of)*, 2003 ABCA 237 (Alta. C.A.) at para 7, 2003 CarswellAlta 1095 (Alta. C.A.).

11 Whether the appeal is *prima facie* meritorious is the starting point for the application of s 193(e) (see *Ravelston Corp., Re*, 2007 ONCA 268 (Ont. C.A. [In Chambers]) at para 12, 2007 CarswellOnt 2114 (Ont. C.A. [In Chambers])). If the appeal has *prima facie* merit, only then will this Court consider the other elements of the test. When considering this factor, the Court of Appeal does not decide the ultimate merits of the proposed appeal, but rather considers whether the appeal raises an arguable case (see *Lechcier-Kimel, Re*, 2011 ONCA 590 (Ont. C.A. [In Chambers]) at para 9, 2011 CarswellOnt 10144 (Ont. C.A. [In Chambers]); *Decker Estate (Trustee of) v. Alberta (Superintendent of Bankruptcy)*, 2009 ABCA 287 (Alta. C.A.) at para 9, (2009), 464 A.R. 40 (Alta. C.A.); *Fantasy Construction Ltd., Re*, 2007 ABCA 335 (Alta. C.A.) at para 17, (2007), 417 A.R. 255 (Alta. C.A.)). Rothstein J recently explained the arguable case standard in *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53 (S.C.C.) at para 73, (2014), 461 N.R. 335 (S.C.C.) stating, "In my view, the common thread among the various expressions used to describe arguable merit is that the issue raised by the applicant cannot be dismissed through a preliminary examination of the question of law."

12 The applicants in this case have not established that their appeal is *prima facie* meritorious or raises an arguable case. The Chambers Judge applied the appropriate principles and the correct legal standard, namely whether there were "sound reasons" to lift the stay (see *Ma, Re*, [2001] O.J. No. 1189, 2001 CarswellOnt 1019 (Ont. C.A.)). She noted that the applicants must produce some evidence to demonstrate that there was some substance to the allegations of fraud (see *Gaastra v. Tri-Link Consultants Inc.*, 2012 ABCA 262 (Alta. C.A.) at para 2, 2012 CarswellAlta 1523 (Alta. C.A.)). She held that although there is no requirement for them to have established a *prima facie* case of fraud, she was obliged to make some inquiry into the merits of the claim to determine whether there were sound reasons to lift the stay (see *Ma, Re*, *supra* at 3).

13 Justice Karakatsanis recently described the prerequisites for establishing the tort of civil fraud as (1) a false representation by the defendant; (2) some level of knowledge of the falsehood of the representation on the part of the defendant (whether knowledge or recklessness); (3) the false representation caused the plaintiff to act; and (4) the plaintiff's action resulted in a loss; see *Combined Air Mechanical Services Inc. v. Flesch*, 2014 SCC 7 (S.C.C.) at para 87, [2014] 1 S.C.R. 87 (S.C.C.) [hereinafter Hryniak v Mauldin]. The applicants would be required to provide "some evidence" of the existence of each of these elements in order to give the Chambers Judge sound reasons to lift the stay.

14 They did not do so. They tendered no evidence whatsoever in support of this application for leave. There is no evidence before me in which they even allege that misrepresentations were made by the Munros that led them to invest the money in question. While they attempted to rely on the allegations contained in their unfiled proposed Statement of Claim they offered no affidavit deposing those allegations were true.

15 Veit J found that the applicants did not lead any evidence before her supporting a claim in civil fraud. They did not provide her any written or independent evidence suggesting that the Munros made a false representation to the applicants that caused the applicants to pay $300,000 to the Munros.

16 The evidence before her was simply that Dan Echino was a friend of the Munros. Prior to 2005, he had dealt with Sally Munro in a commercial real estate transaction. In May 2005, Ms. Munro approached him about a proposed 51-unit luxury condominium project to be built in Kelowna, BC. Mr. Echino and Ms. Munro discussed the project. On May 18, 2005, Ms. Munro sent Mr. Echino an e-mail, in which she referred to a promissory note personally signed by her husband Barry Munro, and herself, to secure an investment. She observed that it entitled him to be paid out or to convert it as part of the investment group on closing. She promised to bring preliminary plans for the building with her to Calgary the following day. She stated, "I just want you to see what you're investing in..." When Mr. Echino replied to this email, he did not challenge the statement that he was advancing monies for an investment.

17 The applicants made a payment of $150,000 in late May 2005 and a second payment of $150,000 in January 2006. The corporate applicant, a company totally owned by Mr. Echino, made both payments to 749540 Alberta Ltd, a company owned and controlled by the Munros.

18 The Kelowna project was never completed. As Justice Veit noted "no soil was ever turned to start construction on the project". The Munros went bankrupt in February 2013. They remain undischarged from bankruptcy. The applicants did not commence any action against them to recover any funds prior to their bankruptcy.

19 The applicants asked that I also consider the following allegations made in their proposed Statement of Claim, although unsworn:

> 1. Mr. Echino thought that the Munros owned the land upon which the condos were to be built at the time he advanced the funds (whereas in fact they held only an option to purchase, later exercised);
>
> 2. Mr. Echino thought that Sally Munro had told him that all permits were in place before he advanced funds (whereas the Munros allegedly did not obtain the right to develop the property until May 2010);
>
> 3. Mr. Echino never received the promised, or any, promissory note;
>
> 4. The Munros represented that they had preliminary plans and drawings for the project (the applicants do not know if that was true or not);
>
> 5. The Munros mixed the $300,000 with their personal funds in one account (however, there is no evidence that $300,000 of those mixed funds were not spent on the project; to the contrary, Sally Munro testified during an examination conducted under Rule 6.7 that $300,000 from those mixed funds went into the project); and
>
> 6. The Munros represented that they would act in the best interest of the applicants.

20 From this, the applicants ask that I infer that they would not have provided the $300,000 or any portion of it if they had known that the Munros held only an option to purchase at the time they advanced the funds. Justice Veit declined to draw this inference, noting that advancing money to invest in land that the developers have only an option to purchase is a common risk in the venture capital market. In any event, there is nothing, not even an allegation or argument, to suggest that the project failed because the Munros did not actually acquire title to the land until May 2007, or the right to develop it until 2010.

21 While no promissory note was forthcoming from the Munros, the applicants advanced all the monies without first having received it, or even requested its receipt in writing. Indeed, they paid the second installment of $150,000 some eight months after Ms. Munro promised that promissory note. Therefore, I cannot draw an inference that the applicants advanced the monies only in the expectation of receiving the note.

22 There is no evidence to suggest that the Munros did not act in the applicants best interests. As Justice Veit noted, the economic downturn in 2006 affected the viability of recreational real estate in British Columbia. The applicants' $300,000 may well have been lost simply because the project failed due to its timing, rather than from any misconduct by the Munros.

23 Justice Veit found that the Munros were not fiduciaries of the applicants and that they did not commit a defalcation, nor were they guilty of moral turpitude. The applicants' counsel in support of the application before Veit J examined both Mr. and Ms. Munro and no such evidence was forthcoming from those examinations or otherwise.

24 Justice Veit refused to lift the stay because the applicants had done no more than make allegations against the respondents. While the threshold required to pierce the bankruptcy shield was low, she relied on this Court's decision in *Gaastra*, *supra* for the proposition that the creditor must do more than merely make allegations. She found they were unable to point to any evidence that suggested that they had some chance of winning their cause of action. There is no basis to interfere with these findings.

25 It is thus not necessary to address whether the other prerequisites to granting leave to appeal from *Simonelli v. Mackin* exist. As all must be present, the failure to establish one of them, that the appeal *prima facie* has merit, leads to my refusal to give leave to appeal. It is thus not necessary to address the arguments that Justice Veit somehow erred by considering the "fresh start" principle, or in applying the principles from *Hryniak v. Mauldin*, *supra* to the bankruptcy regime. Even absent these considerations, this lack of evidence doomed the application before Justice Veit, as it dooms this application for leave to appeal from her resulting decision.

26 The application is therefore dismissed.

Application dismissed.

Tab 12

2011 ONCA 590
Ontario Court of Appeal [In Chambers]

Lechcier-Kimel, Re

2011 CarswellOnt 10144, 2011 ONCA 590, 207 A.C.W.S. (3d) 199, 84 C.B.R. (5th) 65

In the Matter of the Bankruptcy of Jack Lechcier-Kimel, of the City of Toronto, in the Province of Ontario

Karen M. Weiler J.A.

Heard: August 24, 2011
Judgment: September 13, 2011
Docket: CA M40253, C53831

Proceedings: refusing leave to appeal *Lechcier-Kimel, Re* (2011), 75 C.B.R. (5th) 204, 2011 ONSC 1859, 2011 CarswellOnt 1853 (Ont. S.C.J. [Commercial List])

Counsel: Jonathan H. Wigley for Moving party / Responding party by way of cross-motion, HSBC Bank Canada
Cameron Wetmore for Responding party / Moving party by way of cross-motion, Jack Lechcier-Kimel

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.i Availability
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Future rights
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Bankruptcy application was brought with respect to bankrupt and his spouse — By consent order, two proceedings were separated — Bank brought successful motion to be added as creditor in bankrupt's bankruptcy — Motions judge found that applicant creditor, trust company, was not prosecuting proceedings with due diligence — Motions judge did not exercise his discretion to decide whether bankruptcy proceedings were nullity, and left that question to hearing of bankruptcy application — Bankrupt filed notice of appeal — Bank brought motion for order that bankrupt required leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act — Bankrupt brought cross-motion for leave to appeal — Motion granted; cross-motion dismissed — Leave to appeal refused — Appeal from order adding applicant creditor requires leave — Section 193 specifically states that leave can be granted by "a judge" of Court of Appeal — Single judge of Court of Appeal could grant leave — On application for leave to appeal under s. 193(e), one factor considered in all cases is whether appeal is prima facie meritorious — Applicant must establish that appeal raises arguable points that create realistic possibility of success on appeal — Neither ground of appeal raised by bankrupt met test.
Table of Authorities
Cases considered by *Karen M. Weiler J.A.*:
Elias v. Hutchison (1981), 37 C.B.R. (N.S.) 149, 27 A.R. 1, *(*sub nom. *Catalina Exploration & Development Ltd., Re)* 121 D.L.R. (3d) 95, 1981 CarswellAlta 183, 14 Alta. L.R. (2d) 268 (Alta. C.A.) — considered
Ravelston Corp., Re (2005), 24 C.B.R. (5th) 256, 2005 CarswellOnt 9058 (Ont. C.A.) — considered

Ravelston Corp., Re (2007), 2007 CarswellOnt 2114, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]) — considered

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 43(13) — referred to

s. 193 — referred to

s. 193(a) — considered

s. 193(e) — considered

Proceeding: Motion/Application for Leave to Appeal.

MOTION by creditor bank for order that bankrupt requires leave to appeal; CROSS-MOTION by bankrupt for leave to appeal from judgment reported at *Lechcier-Kimel, Re* (2011), 75 C.B.R. (5th) 204, 2011 ONSC 1859, 2011 CarswellOnt 1853 (Ont. S.C.J. [Commercial List]).

***Karen M. Weiler J.A.*, (in chambers):**

1 HSBC Canada Bank (HSBC) brought a motion to be added as a creditor in the bankruptcy application of Jack Lechcier-Kimel (JLK). HSBC's motion was granted. JLK filed a notice of appeal from that decision. HSBC brought a motion for an order that JLK requires leave of this court to pursue an appeal pursuant to s. 193(e) of the *Bankruptcy and Insolvency Act,* R.S.C. 1985, c. B-3, as amended (*BIA*). In the event that leave is required, HSBC submits that I should refuse to grant leave on the basis that JLK's appeal has no merit. Finally, and in the alternative, if leave is granted, HSBC seeks an order expediting the appeal and security for costs.

2 JLK argues that leave is not required but, if leave is required, JLK has now brought a cross-motion requesting leave. JLK also submits that, if leave is required, a panel of three judges should decide the leave application as opposed to a single judge sitting in chambers. JLK further submits that it has a good, arguable appeal and would agree to an order expediting the hearing of the appeal.

3 I must first deal with the question of whether leave is required and whether a single judge can grant leave.

4 The relevant portions of s. 193 of the *BIA* provide as follows:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> . . . . .
>
> (e) in any other case by leave of a judge of the Court of Appeal.

5 The original bankruptcy application was brought with respect to both JLK and his spouse, Mahavash Lechcier-Kimel (MLK). By consent order, there are now two separate proceedings. In the proceeding involving MLK, on the question of whether an appeal from an order adding an applicant creditor requires leave, Gillese J.A. held that leave is necessary and that adding a party does not raise a point involving future rights. I agree with her. In *Elias v. Hutchison* (1981), 121 D.L.R. (3d) 95 (Alta. C.A.), the court dealt with whether leave was required to appeal an order dismissing an application to sue the trustee. The court held that there was no appeal as of right. The appeal did not involve future rights since future rights are those rights that are not asserted at the present time but that will come into existence at a future time. The issue was whether a present right to sue the trustee existed. The definition of future rights in *Elias* was approved by this court in *Ravelston Corp., Re*[2005 CarswellOnt 9058 (Ont. C.A.)], 2005 CanLII 63802 (ON CA), at para. 19. As in *Elias,* the case before me does not involve future rights since the issue is HSBC's present right to be added as a creditor.

6 Since the decision of Gillese J.A., counsel for MLK has brought a further motion before Armstrong J.A. to set aside her order on the basis that the notice of motion did not clearly indicate that a motion for leave to appeal was to be heard and for that reason responding counsel did not appear. Armstrong J.A. has dismissed that motion.

7 The issue of leave and whether leave should be granted was fully argued before me.

8 On the question of whether a single judge can grant leave or whether the decision ought to be made by a panel, I note that s. 193 specifically states that leave can be granted by "a judge" of the Court of Appeal. Thus, leave is required and a single judge of this court can grant leave.

9 I now turn to the question of whether leave should be granted. On an application for leave to appeal under s. 193(e) of the *BIA*, one factor that is considered in all cases is whether the appeal is *prima facie* meritorious. In this regard, while not assessing or deciding on the ultimate merits of the proposed appeal, the applicant must convince the court that the appeal raises arguable points that create "a realistic possibility of success on the appeal": see *Ravelston Corp., Re*, 2007 ONCA 268 (Ont. C.A. [In Chambers]), at paras. 11-12.

10 Before me, JLK advances two primary grounds of appeal. The first is that the motions judge erred in finding that the applicant creditor, Community Trust Company (CTC), was not prosecuting the proceedings with due diligence and effect as required by s. 43(13) of the *BIA*. At para. 21 of his reasons, the motions judge observed that, during the cross-examination of Tara Rolston on her affidavit, counsel for CTC stated that CTC was not seeking to pursue *either* of the applications for bankruptcy at that point (which was over a year from the bankruptcy application). The motions judge held, at para. 22, "Mr. Reininger, as counsel for a party, made a clear statement binding on the applicant, CTC, which is admissible as evidence of CTC's intentions regarding these applications." JLK submits that counsel's statement cannot be relied upon and treated as evidence as the statement is unsworn and was not specifically adopted by the affiant being cross-examined.

11 This first ground of appeal does not meet the test. The statement by CTC's counsel was an admission by counsel on behalf of his client. Counsel for JLK has provided no authority to suggest that the motions judge made a palpable and overriding error in relying on this admission.

12 Moreover, this ground of appeal advanced by JLK is the same ground advanced in the MLK proceedings. In MLK, Gillese J.A. held that she would refuse to grant leave as the purported appeal from the decision adding a party "is without merit and the issue it raised is not of significance to the practice or the MLK bankruptcy application, as paragraph 2 of the order of 24 March 2011 specifically preserves all of Ms. Lechcier-Kimel's rights and defences on the MLK bankruptcy application." Those comments are equally applicable here.

13 The second ground of appeal is that the motions judge erred in not exercising his discretion to decide a question of law and in leaving that question to the hearing of the bankruptcy application. The question of law is whether the entire bankruptcy proceedings are a nullity. Inasmuch as the original application for bankruptcy was brought with respect to both JLK and MLK, as opposed to a separate application against each of them, JLK submits that the entire proceedings are a nullity and not a defect that can be cured under the *BIA*. JLK submits that the motion judge's deferral of the question of law offends the principle that proceedings should be conducted in the least expensive manner and that the motions judge erred in principle in adjourning the question to the trial of the bankruptcy, which was scheduled for a month later.

14 This ground of appeal also does not meet the test. No authority has been provided to me to support the submission that it is an error in principle for a judge to adjourn a question of law to the trial of the bankruptcy. Indeed, important issues of law are often decided based on a full factual record. While the parties would often like to know the outcome of an important legal issue to assist them in preparing for trial - thus potentially saving time and money - that goal alone does not trump the judge's exercise of discretion and force him or her to decide the question of law before the trial of the bankruptcy application.

15 Accordingly, I would refuse leave to appeal. In view of my decision, it is unnecessary for me to deal with the alternative relief requested.

16 Costs of this motion are to HSBC and, on consent, are fixed in the amount of $5,000, inclusive of disbursements and all applicable taxes.

Motion granted; cross-motion dismissed.

Tab 13

2022 NSCA 8
Nova Scotia Court of Appeal

Can*Sport Incorporated v. HarbourEdge Mortgage Investment Corporation

2022 CarswellNS 43, 2022 NSCA 8, 340 A.C.W.S. (3d) 374, 95 C.B.R. (6th) 169

Can*Sport Incorporated and Lee Adamski (Applicants) v. HarbourEdge Mortgage Investment Corporation (Respondent)

Bourgeois J.A., In Chambers

Heard: January 13, 2022
Judgment: January 20, 2022
Docket: C.A. 509960

Counsel: Christopher I. Robinson, for Applicants
Robert G. MacKeigan, Q.C., Sara L. Scott, for Respondent
Stephen Kingston, Colin Boyd, for Receiver, MNP Ltd.

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.i Availability
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.b Miscellaneous

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge

Respondent commercial lender entered into agreement, for funding of rink development by applicants — Agreement broke down, leading to litigation between parties — Lender moved to have receiver appointed, for assets of corporate applicant — Motion was granted — Applicants applied for leave to appeal from this judgment — Application for leave dismissed — Appointment of receiver was discretionary decision, with highly deferential standard of review — In light of this standard, appeal lacked merit on prima facie basis — Applicants had not demonstrated error of law, or injustice that would meet threshold for appeal — Reasons given by judge were sufficient — Insufficiency of reasons was not pled ground of appeal — There was no issue of general importance raised, outside of subject legislation.

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous

Respondent commercial lender entered into agreement, for funding of rink development by applicants — Agreement broke down, leading to litigation between parties — Lender moved to have receiver appointed, for assets of corporate applicant — Motion was granted — Applicants applied for leave to appeal from this judgment — Application for leave dismissed — Costs were awarded to respondent in amount of $1,500, payable jointly and severally by applicants — Costs were awarded to receiver, in amount of $500 payable by individual applicant personally.

Table of Authorities

Cases considered by *Bourgeois J.A., In Chambers*:

Bank of Montreal v. Linden Leas Limited (2018), 2018 NSSC 82, 2018 CarswellNS 497, 61 C.B.R. (6th) 322 (N.S. S.C.) — considered

Buduchnist Credit Union Limited v. 2321197 Ontario Inc. (2019), 2019 ONCA 588, 2019 CarswellOnt 11103, 72 C.B.R. (6th) 245 (Ont. C.A.) — referred to

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — referred to

Carleton Road Industries Assn. v. Sanford (2015), 2015 NSCA 95, 2015 CarswellNS 835, 27 C.C.E.L. (4th) 35, *(*sub nom. *Sanford v. Carleton Road Industries Association)* 1154 A.P.R. 104, *(*sub nom. *Sanford v. Carleton Road Industries Association)* 366 N.S.R. (2d) 104 (N.S. C.A.) — referred to

Ellph.com Solutions Inc. v. Aliant Inc. (2012), 2012 NSCA 89, 2012 CarswellNS 602, 24 C.P.C. (7th) 36, 1014 A.P.R. 244, 320 N.S.R. (2d) 244 (N.S. C.A.) — referred to

Enroute Imports Inc., Re (2016), 2016 ONCA 247, 2016 CarswellOnt 5045, 35 C.B.R. (6th) 1 (Ont. C.A.) — referred to

Leyte v. Leyte (2019), 2019 NSCA 41, 2019 CarswellNS 351 (N.S. C.A.) — referred to

McAleer v. Farnell (2009), 2009 NSCA 14, 2009 CarswellNS 63, 63 R.F.L. (6th) 6, 274 N.S.R. (2d) 348, 874 A.P.R. 348 (N.S. C.A.) — referred to

National Bank Financial Ltd. v. Barthe Estate (2015), 2015 NSCA 47, 2015 CarswellNS 413, *(*sub nom. *Barthe v. National Bank Financial Ltd.)* 1133 A.P.R. 258, *(*sub nom. *Barthe v. National Bank Financial Ltd.)* 359 N.S.R. (2d) 258 (N.S. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 193 — referred to

s. 193(e) — referred to

s. 243 — referred to

s. 243(1) — referred to

Judicature Act, R.S.N.S. 1989, c. 240

Generally — referred to

s. 43(9) — referred to

APPLICATION by company and individual, for leave to appeal judgment appointing receiver for company on motion by respondent lender.

***Bourgeois J.A., In Chambers*:**

1 The respondent HarbourEdge Mortgage Investment Corporation ("HarbourEdge") is a commercial lender. In 2014, it extended funding to Can*Sport Incorporated ("Can*Sport") for the construction of a multi-sport, multi-pad ice surface development in Bedford, Nova Scotia. Can*Sport's obligations were personally guaranteed by the applicant Lee Adamski.

2 Although the parties disagree as to why, the lending relationship soured. Litigation ensued and is ongoing. On June 17, 2021, HarbourEdge filed a Notice of Motion seeking the appointment of a Receiver and Manager of the assets, collateral and undertakings of Can*Sport. The motion was brought pursuant to s. 243 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "*BIA*") and s.43(9) of the Judicature Act, R.S.N.S. 1989, c. 240.

3 The motion was heard by Justice John P. Bodurtha. In an oral decision delivered October 13, 2021, he gave reasons for granting the motion. An issued order followed the next day.

4 The applicants filed a Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory) on October 25, 2021. Although applications for leave to appeal are routinely heard by a panel of this Court, as I will note below, the *BIA* contemplates the issue of leave being resolved by a judge in chambers.

5 The application for leave was heard on January 13, 2022. After reviewing all of the material before me, and considering the submissions advanced by the parties and the Receiver, I would dismiss the motion. My reasons for doing so follow.

The motion judge's decision

6 The motion judge's decision is unreported. To address the arguments advanced before me, it is necessary to set out certain aspects of the reasons. The motion judge started his decision with a factual review:

> Can*Sport is indebted to HarbourEdge in the amount of four million two hundred and eight thousand seven hundred and thirty-eight dollars and thirty-six cents ($4,208,738.36) as of March 31, 2021 with interest accruing. It has property tax arrears in excess of three hundred twenty thousand dollars ($320,000). And has been unable to secure alternate financing to date. HarbourEdge brings this motion arguing it is just and convenient for this Court to appoint MNP as receiver of the assets, collateral and undertakings of Can*Sport to address the outstanding property tax issues and to ensure the security held by HarbourEdge is addressed in a timely, fair and transparent manner.
>
> Facts: By way of a commitment letter accepted on November 25, 2014 HarbourEdge extended funding to Can*Sport. We'll call this the credit facilities. The credit facilities were extended to Can*Sport in relation to the construction of a multi-sport, multi-pad ice surface development. The development is located at Verdi Drive in Bedford, Nova Scotia.
>
> As of March 31, 2021 Can*Sport was indebted to HarbourEdge in the amount previously mentioned. And as of March 29, 2021 the amount of property tax arrears was three hundred and twenty-nine thousand nine hundred and seventy dollars and ninety-six cents ($329,970.96). On March 7, 2017 HarbourEdge sent letters to Can*Sport and Lee Adamski demanding repayment of the credit facilities and the related guarantee (the "demand letters"), and issued a Notice of Intention to Enforce Security under section 244 of the *BIA*.
>
> Since the spring of 2020, Can*Sport has not provided HarbourEdge with any plan as to how it intends to meet its financial obligations, nor any update on the status of its potential re-financing. MNP has agreed to act as receiver of the assets, collateral and undertakings of Can*Sport.

7 The motion judge then turned to consider the applicable legal principles. He noted s. 243(1) of the BIA, which permits the appointment of a receiver and proceeded to consider the applicable test as established in the case authorities. In particular, he articulated the factors relevant to the appointment of a receiver, quoting from *Bank of Montreal v. Linden Leas Limited*, 2018 NSSC 82. In *Linden Leas*, Justice Rosinski wrote:

> [20] The bank relies particularly on the following two cases: *Enterprise Cape Breton Corp. v. Crown Jewel Resort Ranch Inc.*, 2014 NSSC 128; and the decision of Justice Morawetz, in *Bank of Montréal v. Sherco Properties Inc.*, 2013 ONSC 7023, which is cited with approval in the *Crown Jewel* decision, at paras. 27-28.
>
> [21] Significantly, Justice Edwards in *Crown Jewel*, also cited with approval:
>
> > 26 In *The 2013-2014 Annotated Bankruptcy and Insolvency Act*, Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra (Carswell:Toronto, Ontario 2013-2014) the authors set out at p. 1018 the factors I consider in determining whether it is appropriate to appoint a receiver. These are:
> >
> > (a) Whether irreparable harm might be caused if no order were made, although it is not essential for a creditor to establish irreparable harm if a receiver is not appointed;

(b) The risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of the assets while litigation takes place;

(c) The nature of the property;

(d) The apprehended or actual waste of the debtor's assets;

(e) The preservation and protection of the property pending judicial resolution;

(f) The balance of convenience to the parties;

(g) The fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan;

(h) The enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others;

(i) The principle that the appointment of a receiver is extraordinary relief that should be granted cautiously and sparingly;

(j) The consideration of whether a court appointment is necessary to enable the receiver to carry out its duties more efficiently;

(k) The effect of the order on the parties;

(l) The conduct of the parties;

(m) The length of time that a receiver may be in place;

(n) The cost to the parties;

(o) The likelihood of maximizing return to the parties; and

(p) The goal of facilitating the duties of the receiver.

27 The authors further note that a court can, when it is appropriate to do so, place considerable weight on the fact that the creditor has the right to instrument - appoint a receiver. In *Bank of Montreal v. Sherco Properties Inc.*, 2013 ONSC 7023 (S.C.J.) the court granted the application of the Bank of Montreal for the court-appointment of a receiver over the assets of Sherco Properties Inc., finding at paragraph 42 that:

[42] **Where the security instrument governing the relationship between the debtor and the secured creditor provides for a right to appoint a receiver upon default, this has the effect of relaxing the burden on the applicant seeking to have the receiver appointed. While the appointment of a receiver is generally regarded as an extraordinary equitable remedy, courts do not regard the nature of the remedy as extraordinary or equitable where the relevant security document permits the appointment of a receiver.** This is because the applicant is merely seeking to enforce a term of an agreement that was assented to by both parties. (citations removed)

(Emphasis added)

8 The motion judge further said:

Can*Sport argues that the fact that the mortgage documents provide for a right to appoint a receiver upon default is an important consideration but not the only consideration. I agree with this assessment and so does counsel for HarbourEdge.

> Where they disagree is whether the status quo should remain. Can*Sport argues that the appointment of a Court appointed receiver is unnecessary and the status quo should remain.
>
> I find that the amount of weight to be placed on any one factor will be determined by the facts of the specific case. Some factors may have no application while others will be determinative. What is necessary is to apply the relevant factors in the specific case to determine whether it is just and convenient to appoint a receiver.

9 In considering Can*Sport's argument that the status quo ought to be maintained and the request for a court-appointed receiver be rejected, the motion judge noted:

> Can*Sport argues that HarbourEdge has not expeditiously prosecuted the lawsuit and therefore its remedy is to proceed quickly with the lawsuit. That is how HarbourEdge protects itself, not appointing a receiver but by maintaining the status quo and expediting the litigation.
>
> However, the status quo has not been fine. I am persuaded by counsel for HarbourEdge that Can*Sport has not been forthcoming with its financials. This is not surprising given Can*Sport's position that HarbourEdge is not entitled to them. What choice does HarbourEdge have in this situation?
>
> There is evidence that Can*Sport has received revenue yet there is no clarity around what the revenue was from and how the revenue is being applied. There is no doubt that Can*Sport is not making any payments to HarbourEdge, one of their secured creditors. In addition, there is evidence that Can*Sport is not paying HRM [its] full amount of property taxes.

And further:

> I see value in having a Court-appointed receiver because of the fiduciary duty of the receiver to all interested parties. The work of the receiver would be performed under the guidance and direction of the Court where appropriate.
>
> Can*Sport can still obtain re-financing or work with the receiver to pursue its alternative plan regarding a potential condominium build. There's nothing before the Court to suggest that the only option a Court-appointed receiver would choose in these circumstances is to sell the property. I concur with the comments of the court in *Romspen* at paragraph 19 previously mentioned.
>
> To date Can*Sport has been unable to obtain financing. They essentially want HarbourEdge to continue to wait on its security while at the same time providing no information to HarbourEdge about its revenues. This is untenable to HarbourEdge and they argued correctly that a receiver does not prevent Can*Sport from continuing to try to obtain financing or complete current negotiations regarding financing. HarbourEdge should not be required to wait indefinitely before exercising its available remedies. It demanded payment in 2017 and has not received one payment.

10 In support of the motion, HarbourEdge argued the lack of financial transparency regarding Can*Sport's revenue and expenses was detrimental to their security interest in the property. The motion judge observed:

> Clearly the facility has earned revenue and not an insignificant amount when not shut down due to Covid. But there is no transparency as to where the revenue is going, what expenses are being paid, how much, and why. There is no information forthcoming.
>
> For instance, HarbourEdge did not know about the tax arrears of Can*Sport until reviewing the information appended as an exhibit to Mr. Adamski's affidavit for this hearing. This is not an insignificant oversight given that the tax arrears go back as far as 2015 and under the *Municipal Government Act* there could be no right of redemption regarding a tax sale of the property under section 152.
>
> The evidence before me is that Can*Sport has reached an agreement regarding partial payment of the arrears, but that does not detract from HarbourEdge's point that this is another example of HarbourEdge being unaware of Can*Sport's financial situation and support's HarbourEdge's request for a Court-appointed receiver under the "just or convenient" test.

11 After reviewing the relevant provision of the *Judicature Act*, the motion judge concluded:

> Section 243 of the *BIA* and section 43(9) of the *Judicature Act* both allow the court to appoint a receiver if it's considered by the Court to be just or convenient.
>
> The factors I considered in determining whether it is appropriate to appoint a receiver are the balance of convenience to the parties, the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan, the enforcement of rights under a security instrument where the security holder encounters or expects to encounter difficulty with the debtor and others, the consideration of whether a Court appointment is necessary to enable the receiver to carry out its duties more efficiently, the effect of the order on the parties, the conduct of the parties, the likelihood of maximizing return to the parties and the goal of facilitating the duties of the receiver.
>
> And the facts supporting the appointment of a receiver are HarbourEdge holds first priority security over the property. There has been a failure by Can*Sport to fulfill the terms of its loan pursuant to the credit facilities. The credit facilities provide for the appointment of a receiver. HarbourEdge has made demand for the payment on Can*Sport and issued Notice of Intention to Enforce the Security pursuant to the *BIA*. Both the demand letters and the Notice of Intention to Enforce the Security have expired without payment being made. HarbourEdge is in a position to enforce the security against Can*Sport. There have been no firm offers received despite Can*Sport having ample opportunity to complete the transaction. The inability of Can*Sport to address the significant real property tax arrears has put the security held by HarbourEdge in issue.
>
> I've also taken into consideration the balance of the convenience to the parties and the fact that the creditor has the right to appoint a receiver under the documentation provided for in the loan.
>
> Conclusion: Can*Sport is in default under the credit facilities and security agreements and has failed to secure alternate financing or sell assets sufficient to retire its outstanding debts. Due to accruing expenses, property taxes and interest, Can*Sport's property continues to erode.

12 The motion judge found it was just and convenient to appoint a receiver. The applicants now seek leave to appeal that determination.

Legal Principles

13 The parties are in agreement regarding the legal principles governing this motion. Section 193 of the BIA contemplates appeals to this Court. It provides:

> 193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars;
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
>
> (e) **in any other case by leave of a judge of the Court of Appeal.**
>
> (Emphasis added)

14 In their written and oral submissions, the applicants submit only s. 193(e) applies in the present instance and, as such, leave to appeal is required. All parties are of the view the above provision clearly places the responsibility for assessing leave with a single judge of this Court. I agree.

15 The *BIA* does not provide a statutory test for assessing whether leave should be granted. All parties, however, cite a decision of the Ontario Court of Appeal as setting out the relevant considerations. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, Justice Blair said:

> [29] Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,
>
> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and
>
> c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.
>
> . . .
>
> [31] I have not referred specifically to the three *R.J. Nicol* criteria in the factors mentioned above. That is because those factors are caught by the "*prima facie* meritorious" criterion in one way or another. A proposed appeal in which the judgment or order under attack (a) appears to be contrary to law, (b) amounts to an abuse of judicial power, or (c) involves an obvious error causing prejudice for which there is no remedy, will be a proposed appeal that is *prima facie* meritorious. I recognize that the *Power Consolidated* "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to by Osborne J.A. in *Baker* and by Armstrong J.A. in *Fiber Connections*. **In my view, however, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the incorporation of the *R.J. Nicol* factors into the test.**
>
> [32] As I have explained above, however, the jurisprudence has evolved to a point where the test for leave to appeal is not simply merit-based. It requires a consideration of all of the factors outlined above.
>
> (Emphasis added)

See also *Buduchnist Credit Union Limited v. 2321197 Ontario Inc.*, 2019 ONCA 588.

Analysis

Is the appeal prima facie meritorious?

16 The bulk of the parties' submissions are focused on this element. As such, I will address it first. Before considering the arguments advanced on the motion, there are three preliminary points relevant to the determination of whether a proposed appeal is *prima facie* meritorious.

17 First, I am in agreement with Blair J.A. in Pine Tree, supra, that a consideration of the *prima facie* merit of the appeal involves a higher standard than demonstrating grounds that are merely arguable or not frivolous. An applicant should demonstrate its appeal has a real chance of success based upon not only the motion judge's reasons, but contextually on the entirety of the motion record.

18 Second, the Court should not undertake a meandering assessment of whether the motion judge possibly erred. Rather, the question of whether the applicant has raised a meritorious assertion of error is anchored in the grounds of appeal pled. In

their Notice of Application for Leave to Appeal and Notice of Appeal (Interlocutory), the applicants allege the motion judge erred in the following specific ways:

> 1. The Learned Judge erred in law as regards the application of the test for the appointment of a receiver and the appropriate weight that ought to have been given to the factors which comprise the balance of convenience, and the determination the appointment was just.
>
> 2. The Learned Judge ignored, misapprehended or gave insufficient weight to the evidence of the appellants as it related to the following factors when determining whether the appointment of a receiver was just and convenient:
>
> a. Whether irreparable harm might be caused if no order was made;
>
> b. The risk to the security holder taking into consideration the size of the debtor's equity in the assets;
>
> c. The nature of the property;
>
> d. The apprehended or actual waste of the debtor's assets; the preservation and protection of the property pending judicial resolution;
>
> e. The effect of the order on the parties; and
>
> f. The conduct of the parties.

19 Lastly, in assessing whether the applicants have demonstrated the appeal is *prima facie* meritorious, one should consider in addition to the grounds pled, the standard of review under which this Court would assess the motion judge's decision.

20 The parties have all acknowledged the appointment of a receiver is a discretionary decision. The standard of review this Court applies in reviewing discretionary decisions on appeal is not controversial. In *Aliant Inc. v. Ellph.com Solutions Inc.*, 2012 NSCA 89, Justice Saunders noted:

> [27] The standard of review in matters such as this is well settled. **We will only intervene if we are persuaded that wrong principles of law have been applied, or that failing to intervene would produce an obvious injustice. The threshold for overturning a discretionary order is considerable and is not easily displaced**. As this Court said in *A.B. v. Bragg Communications*, 2011 NSCA 26:
>
> > [31] ... Clear error of law or a substantial injustice must be established.
> >
> > . . .
> >
> > [33] ... appellate courts are restrained in choosing to intervene. Absent an error in law or a manifest injustice we will decline to do so. The threshold for seeking reversal is high. It is not a soft or casual target. Any party seeking to set aside an interlocutory discretionary order has a heavy onus. Litigants should be reminded that it is not a burden which will be satisfied easily. ...
>
> [28] Thus, in the absence of a clear error of law or a substantial injustice we will refuse to intervene. Appeals from interlocutory matters create delay, run up costs for the parties, and tie up the court's own resources while other proceedings in the system wait to be tried. A judge hearing motions in Chambers develops a well-honed proficiency in the exercise of discretion, especially in cases where he or she has heard the witnesses being examined first hand. These are some of the reasons why the standard of review is strictly applied where any party attempts to set aside a discretionary, interlocutory order.
>
> (Emphasis added)

See also *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47 and *Leyte v. Leyte*, 2019 NSCA 41.

21 Although my role in assessing leave is not to ultimately determine the merits of the proposed appeal, I must, in applying the above, consider the strength of the grounds advanced in light of the highly deferential standard of review.

22 With the above points in mind, I turn now to the applicants' arguments that the proposed appeal is *prima facie* meritorious. In support of the motion, the applicants filed written submissions on November 9, 2021 and December 13, 2021, supplemented by oral argument at the hearing.

23 In their November 9 submissions, the applicants assert the motion judge erred by not considering and balancing all of the 16 factors enumerated in *Linden Leas*. They say the motion judge placed undue reliance on the fact that the loan instrument gave HarbourEdge the contractual right to appoint a receiver:

> 12. The list above includes 16 different factors, all of which must be individually considered and balanced. ...
>
> 13. In brief, when a parties' security instrument contains a right to appoint a receiver, this has the effect of relaxing the burden on the applicant by removing the "extraordinary" label from the relief, and by allowing the court to place considerable weight on this one factor.
>
> . . .
>
> 15. In brief, while the "right to appoint" factor is important, **the rest of the 16 factors are still required to be considered and weighed** in order to properly determine the balance of convenience.
>
> 16. In their grounds for appeal, the appellants assert that the Learned Judge gave inordinate - almost exclusive - weight to the "right to appoint" factor, and either ignored or gave insufficient weight to the balance of the factors. ...
>
> (Underlining in Original; bolding added)

24 In their subsequent submissions, the applicants appear to have changed their view with respect to the above assertions. Notably, they argue the motion judge was not obligated to consider and weigh all the factors, but only those that were relevant to the matter at hand. Instead, the applicants now assert the motion judge fell into error based upon misapprehending the evidence and by failing to provide sufficient reasons to permit appellate review. I note sufficiency of reasons was not a ground of appeal raised in the pleadings.

25 The applicants allege the motion judge's conclusion that the status quo was untenable was based upon two separate misapprehensions of evidence. First, the applicants say the motion judge erred in concluding they were intentionally withholding financial records from HarbourEdge. They say there was no evidence to support that finding. Second, they assert the motion judge was in error when he said "HarbourEdge did not know about the tax arrears of Can*Sport until reviewing the information appended as an exhibit to Mr. Adamski's affidavit for this hearing".

26 In assessing whether the applicants' assertions of misapprehension of evidence give rise to a *prima facie* meritorious appeal, it is necessary to look not only to the decision itself, but to the entirety of the motion record. In my view, neither of these concerns gives rise to a *prima facie* case for appellate intervention, especially in light of the deference afforded to the motion judge's discretionary decision.

27 When one looks to the arguments advanced and the evidence before him, the motion judge was entitled to draw the conclusion HarbourEdge was not receiving adequate financial information from the applicants. Further, based on the evidentiary record and arguments of counsel, an inference could be drawn that the information was being purposefully withheld. These are findings of fact available on the record. To interfere with the motion judge's determination on appeal, the applicants are required to show a clear error of law or a substantial injustice. Their arguments in this regard are not *prima facie* meritorious.

28 I reach the same conclusion regarding the motion judge's error relating to when HarbourEdge became aware of the applicants' tax arrears. HarbourEdge acknowledges it was aware of the accrual of tax arrears on the property prior to receiving

Mr. Adamski's affidavit. This is outlined in the affidavit of its CEO Larry Dunn. What Mr. Dunn's affidavit asserts is that HarbourEdge was unaware of the payment arrangement the applicants had made with the Halifax Regional Municipality until it had received Mr. Adamski's affidavit filed in opposition of the appointment motion. There is no doubt the motion judge misspoke when giving his oral reasons on this factual point.

29 To assess the impact of this misstatement of fact, one must again look at its significance contextually and in light of the deferential standard of review. Although the factual error appears clear, in my view the applicants have not shown it likely contributed to the outcome. The evidence and arguments before the motion judge focused on the existence of significant tax arrears (which eroded HarbourEdge's security position) accruing over the past five years, not when they were disclosed. This was in addition to other concerns regarding the lack of clarity relating to the revenues being earned and expenses being paid. In my view, the applicants have not demonstrated the motion judge's misstatement of fact on this point gives rise to a likely error of law, or a manifest injustice. As such, it does not meet the threshold of a *prima facie* meritorious ground of appeal.

30 Finally, the applicants argue the motion judge's reasons are so deficient that it is unclear how or why he concluded the appointment of a receiver was "just and convenient" in the circumstances. In oral argument, Mr. Robinson likened the reasons to a math test he had taken in high school. He recounted he provided correct answers to the questions, but despite that, was scored poorly. This was because the teacher expected to see the process of how he had reached his conclusions. Similarly, Mr. Robinson says the motion judge was obligated to set out a "full analysis" of every factor he said he considered. In their written submissions of December 13, 2021, the applicants further explain:

> 31. However, there is no indication in the Decision what evidence was weighed, what facts were found, how those facts were applied to the various factors, and then how the balance of convenience was determined in a just manner, as is required. In short, the Decision certainly lists the factors, but there is no indication whatsoever as to how the factors were actually considered and with what evidence; the Decision says they were considered, but silent as to how.

31 In considering whether this argument gives rise to a *prima facie* meritorious ground of appeal, it is helpful to look at what this Court considers when insufficiency of reasons is alleged as a reason for appellate intervention. In *McAleer v. Farnell*, 2009 NSCA 14, Chief Justice MacDonald wrote:

> [12] I begin with the recent decision of the Supreme Court of Canada in *R.E.M.*, 2008 SCC 51. Although decided in a criminal law context, I nonetheless find that it offers good guidance in this appeal. There, the Chief Justice explained how a trial judge's reasons fulfill five basic purposes: 1) to inform the parties why the decision was made; 2) to provide public accountability for the judicial decision; 3) to permit effective appellate review; 4) to help ensure fair and accurate decision making, and 5) to provide guidance to future courts in accordance with the principle of *stare decisis*.
>
> [13] These basic goals, the Chief Justice explains, are effectively fulfilled if the decision informs the reader as to what was decided and why:
>
> > ¶ 17 These purposes are fulfilled if the reasons, read in context, show why the judge decided as he or she did. **The object is not to show how the judge arrived at his or her conclusion, in a "watch me think" fashion. It is rather to show why the judge made that decision**. The decision of the Ontario Court of Appeal in *Morrissey* predates the decision of this Court establishing a duty to give reasons in *Sheppard*. But the description in *Morrissey* of the object of a trial judge's reasons is apt. Doherty J.A. in *Morrissey*, at p. 525, puts it this way: "In giving reasons for judgment, the trial judge is attempting to tell the parties what he or she has decided and why he or she made that decision" (emphasis added). What is required is a logical connection between the "what" - the verdict - and the "why" - the basis for the verdict. **The foundations of the judge's decision must be discernable, when looked at in the context of the evidence, the submissions of counsel and the history of how the trial unfolded**.
> >
> > . . .
> >
> > ¶ 25 The functional approach advocated in *Sheppard* suggests that what is required are reasons sufficient to perform the functions reasons serve - **to inform the parties** of the basis of the verdict, to provide public accountability and

> to permit meaningful appeal. The functional approach does not require more than will accomplish these objectives. Rather, reasons will be inadequate only where their objectives are not attained; otherwise, an appeal does not lie on the ground of insufficiency of reasons. This principle from *Sheppard* was reiterated thus in *R. v. Braich*, [2002] 1 S.C.R. 903, 2002 SCC 27, at para. 31: ... [Emphasis in original.]

[14] Furthermore, the amount of detail required to meet these basic functions very much depends on the context of each case:

> ¶ 44 The degree of detail required may vary with the circumstances. Less detailed reasons may be required in cases where the basis of the trial judge's decision is apparent from the record, even without being articulated. More detail may be required where the trial judge is called upon "to address troublesome principles of unsettled law, or to resolve confused and contradictory evidence on a key issue ...": *Sheppard*, at para. 55.

[15] For this reason, our role on appeal is not to criticize the level of detail or expression. Instead it is to determine if the functions noted above have been fulfilled to the point where a meaningful appeal is available:

> ¶ 53 However, the Court in *Sheppard* also stated: "The appellate court is not given the power to intervene simply because it thinks the trial court did a poor job of expressing itself" (para. 26). **To justify appellate intervention, the Court makes clear, there must be a functional failing in the reasons. More precisely, the reasons, read in the context of the evidentiary record and the live issues on which the trial focussed, must fail to disclose an intelligible basis for the verdict, capable of permitting meaningful appellate review.**
>
> (Emphasis added)

See also *Carleton Road Industries Association v. Sanford*, 2015 NSCA 95.

32 Although Mr. Robinson may have been expected to demonstrate the process he used to solve his math equations, judges' reasons are not required to take a "watch me think" approach. He is wrong in suggesting the two exercises are comparable. The legal principles above clearly demonstrate the motion judge was not required by law to perform an exacting analysis of each factor upon which he relied. All that was required was for his reasons, read in context of the evidence and submissions before him, to adequately explain why he made the determination he did.

33 I am unable to conclude the applicants have met the threshold of establishing the alleged insufficiency of reasons is a *prima facie* meritorious ground of appeal for two reasons. First, and as noted earlier, it is not a pled ground of appeal. The applicants have not indicated there would be a sought amendment. It is difficult to grant leave on the basis of a ground of appeal that has not been pled.

34 Secondly, on its face, the motion judge's reasons explain what law he applied, what the factual context was and the factors that led to his conclusion the appointment of a receiver was appropriate. A review of the motion record only serves to enhance what is already apparent in the decision. Other than the applicants' misguided comparison to a high school math test, they have not presented any legally sound argument that the motion judge's reasons would likely warrant appellate intervention.

35 I am satisfied the applicants have not established the appeal is *prima facie* meritorious. I would dismiss the application for leave on this basis alone.

An issue of general importance

36 The applicants are not claiming the motion judge identified incorrect legal principles. At the heart of their complaint is their assertion he failed to view the evidence in the manner they sought and to weigh the *Linden Leas* factors in their favour. The proposed grounds of appeal are entirely related to a dispute between this creditor and this debtor.

37 In my view, there is nothing in this fact-specific dispute that gives rise to an issue of general importance to the practice of bankruptcy/insolvency matters or to the administration of justice as a whole. See Buduchnist Credit Union, supra, at para. 18 and *Enroute Imports Inc. (Re)*, , 2016 ONCA 247 at paras. 7-8.

38 The applicants have not met this criterion, and I would dismiss the application on this basis as well.

Undue hindrance of the proceedings

39 The final Pine Tree, supra, criterion is whether the proposed appeal would unduly hinder the progress of the bankruptcy/insolvency proceedings. The applicants' argument on this point is brief and based upon propositions I have already rejected. In their December 13 written submissions, they assert:

> 46. The key word in the element of the test is "unduly". The Appellants submit that the *prima facie* meritorious nature of the appealable errors, which engage the administration of justice as these do, cannot be seen as "undue" ... rather, any resulting delay must instead be seen as necessary.
>
> (Emphasis in original)

40 HarbourEdge submits granting leave to appeal, which would serve to stay the appointment of the receiver, would be problematic. It has not received payment from the applicants in relation to the loan advanced for several years. There is significant municipal tax arrears owing in relation to the property, accruing since 2015. The municipality has given notice of its intention to proceed to a tax sale of the property. There is a further lien and judgment registered against the property. The applicants have not provided a plan as to how they intend to deal with these issues.

41 HarbourEdge says it has no information regarding how the applicants are managing the revenue and expenses of the property and are fearful its security interest in the property may be further eroded. Granting leave to appeal would delay the court-appointed receiver in attempting to ascertain the financial reality and taking appropriate steps, with court oversight if necessary.

42 A review of the motion judge's factual conclusions and the record satisfies me HarbourEdge's concerns regarding delay should leave be granted are warranted.

Conclusion

43 For the reasons above, the applicants' application for leave to appeal is dismissed.

44 With respect to costs, the applicants advised during the hearing that if successful, they sought costs against both HarbourEdge and the receiver, MNP. HarbourEdge, if successful, sought costs jointly and severally against the applicants. MNP advised if the motion were dismissed, it would seek costs only against Mr. Adamski.

45 HarbourEdge is entitled to costs of $1,500.00 on the motion, payable by the applicants on a joint and several basis. MNP is entitled to costs in the amount of $500.00, payable by Lee Adamski personally.

Application dismissed.

Tab 14

Most Negative Treatment: Check subsequent history and related treatments.

2015 BCCA 236
British Columbia Court of Appeal

Farm Credit Canada v. Gidda

2015 CarswellBC 1414, 2015 BCCA 236, [2015] B.C.W.L.D. 4587, 255 A.C.W.S. (3d) 27, 372 B.C.A.C. 285, 640 W.A.C. 285

In the Matter of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Farm Credit Canada, Respondent (Plaintiff) and Nirmal Singh Gidda, Jaspreet Jaur Gidda, Kaldep Singh Gidda, also known as Kaldeep Singh Gidda, Neelam Rani Gidda, Gidda Brothers Orchards Ltd., Mt. Boucherie Vineyards & Cellars Inc., Kan-A-Farms Corporation Ltd., 0837582 B.C. Ltd., Sunrise Vineyards Ltd., West-Kana Farms Ltd., O.K. Motel & Mobile Home Park Ltd., and O.K. Labour Company Ltd., Appellants (Defendants)

Goepel J.A., In Chambers

Heard: April 27, 2015
Judgment: May 27, 2015
Docket: Vancouver CA42243

Counsel: K.S. Gidda, Appellant, for himself
K.E. Siddall, for Respondent

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.i Availability
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Applicants were part owners of companies, and plaintiff held security in companies' property (secured property) — Plaintiff successfully applied for order under Bankruptcy and Insolvency Act and Law and Equity Act appointing receiver and authorizing receiver to immediately list and sell secured property — At hearing of plaintiff's application, chambers judge declined to allow cross-examination of plaintiff's accounts manager, M, with respect to her affidavit evidence valuing secured property — Applicants brought application for leave to appeal order — Application dismissed — Proposed grounds of appeal were without clear merit and, moreover, there was no point of significance raised in regard to bankruptcy and insolvency practice warranting attention of Court of Appeal — First ground of appeal, that chambers judge weighed evidence improperly, was attempt to relitigate chambers hearing and concerned purely factual and case-specific issues — Second ground of appeal, concerning cross-examination of M on her affidavit, was also without clear merit — It was within chambers judge's discretion, pursuant to R. 14(2) of Bankruptcy and Insolvency General Rules, to decline to order that M be cross-examined on her affidavit — This was because valuation of secured property was not critical to question of whether receiver ought to be appointed — With respect to third ground of appeal, it might be arguable that chambers judge erred in ordering immediate sale of secured property — However, given time that had now passed, any error in shortening length of redemption period did not warrant granting of leave — With respect to fourth ground of appeal, facetious comment by chambers judge that applicants might require family counsellor did not give rise to reasonable apprehension of bias — Application at bar was heard despite fact that it was filed

late — Given that merits of applicants' appeal were focus of application at bar, it was appropriate to grant extension of time and resolve application on merits.

Table of Authorities

Cases considered by *Goepel J.A., In Chambers*:

British Columbia (Attorney General) v. Malik (2009), 2009 CarswellBC 1194, 79 R.P.R. (4th) 1, 53 C.B.R. (5th) 25, 91 B.C.L.R. (4th) 87, [2009] 7 W.W.R. 85, 2009 BCCA 202, 454 W.A.C. 199, 270 B.C.A.C. 199 (B.C. C.A.) — referred to

Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 307 O.A.C. 1, 2013 CarswellOnt 5026, 2013 ONCA 282, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617 (Ont. C.A.) — followed

Committee for Justice & Liberty v. Canada (National Energy Board) (1976), [1978] 1 S.C.R. 369, 68 D.L.R. (3d) 716, 9 N.R. 115, 1976 CarswellNat 434, 1976 CarswellNat 434F (S.C.C.) — followed

Farm Credit Canada v. West-Kana Farms Ltd. (2014), 68 B.C.L.R. (5th) 333, 2014 BCCA 501, 2014 CarswellBC 3863 (B.C. C.A.) — referred to

Goldman, Sachs & Co. v. Sessions (2000), 2000 CarswellBC 1068, 2000 BCCA 326 (B.C. C.A. [In Chambers]) — referred to

Mannix Resources Inc., Re (2004), 5 C.B.R. (5th) 255, 2004 BCSC 1315, 2004 CarswellBC 2353 (B.C. S.C. [In Chambers]) — referred to

Manor, Re (2009), 2009 CarswellOnt 4566, 57 C.B.R. (5th) 126 (Ont. S.C.J.) — referred to

Maple Trade Finance Inc. v. CY Oriental Holdings Ltd. (2009), 60 C.B.R. (5th) 142, 2009 BCSC 1527, 2009 CarswellBC 2982 (B.C. S.C. [In Chambers]) — followed

National Shoring Ltd. (Trustee of) v. Dextras Engineering & Construction Ltd. (2009), 53 C.B.R. (5th) 50, 2009 BCCA 236, 2009 CarswellBC 1367, *(*sub nom. *National Shoring Ltd. (Bankrupt) v. Dextras Engineering & Construction Ltd.)* 271 B.C.A.C. 157, *(*sub nom. *National Shoring Ltd. (Bankrupt) v. Dextras Engineering & Construction Ltd.)* 458 W.A.C. 157 (B.C. C.A. [In Chambers]) — followed

Placements Sarr Inc. v. Diplome Construction Inc. (1967), 1967 CarswellQue 18, 10 C.B.R. (N.S.) 250 (C.S. Que.) — referred to

Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp. (1988), 19 C.P.C. (3d) 396, 1988 CarswellBC 615 (B.C. C.A.) — followed

Prue v. Shen (2014), 2014 ABQB 363, 2014 CarswellAlta 949 (Alta. Q.B.) — referred to

Teck Cominco Metals Ltd. v. British Columbia (2009), 2009 BCCA 3, 2009 CarswellBC 12, [2009] 3 C.T.C. 116, 445 W.A.C. 164, 264 B.C.A.C. 164 (B.C. C.A. [In Chambers]) — considered

Wearmouth v. Tallon Energy Corp. (2006), 30 C.B.R. (5th) 98, 2006 ABQB 861, 2006 CarswellAlta 1617 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 183(2) — considered

s. 193(a)-193(d) — referred to

s. 193(e) — considered

s. 243(1) — considered

Law and Equity Act, R.S.B.C. 1996, c. 253

s. 39 — considered

s. 39(1) — considered

Personal Property Security Act, R.S.B.C. 1996, c. 359

s. 63 — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 3 — considered

R. 14 — considered

R. 14(2) — considered

R. 31(1) — considered

Proceeding: Motion/Application for Leave to Appeal.

APPLICATION by part owners of insolvent companies for leave to appeal order appointing receiver and authorizing immediate sale of secured property.

***Goepel J.A., In Chambers*:**

Introduction

1 Farm Credit Canada ("FCC") obtained an order on September 29, 2014 (the "Order"), appointing a receiver under s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 [*BIA*], and s. 39 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 [*LEA*]. The Order authorized the receiver to immediately list and sell the underlying property, with any sale being subject to court approval.

2 The appellants, other than Nirmal Singh Gidda and Jaspreet Jaur Gidda, seek leave to appeal the Order. There was an earlier proceeding in this Court in which Mr. Justice Frankel determined that the Order could only be appealed with leave. His reasons are indexed at 2014 BCCA 501 (B.C. C.A.).

Background

3 Mr. Justice Frankel set out the factual background:

> [4] Kaldep Singh Gidda and Nirmal Singh Gidda are brothers. Together with their wives, they each own a 50% interest in the corporate appellants. The Giddas' primary business is grape growing and wine making. FCC has provided financing to the Giddas and their companies secured by guarantees, mortgages, and general security agreements. There is discord between the brothers and each has commenced litigation against the other.
>
> [5] FCC commenced these proceedings against the Giddas and their companies because it had lost confidence in the brothers' ability to conduct their financial affairs in a manner that would protect and maintain the security provided to it. FCC sought the following orders:
>
> > (a) a declaration that several mortgages were in default and that the amounts secured by those mortgages are due and owing;
> >
> > (b) a declaration that several general security agreements were in default and that the amounts secured by those agreements are due and owing;
> >
> > (c) judgment in the amounts found to be due and owing under the mortgages and general security agreements; and
> >
> > (d) the appointment of a receiver with the immediate power to sell certain lands.
>
> [6] The first three orders were not opposed. However, Kaldep Gidda opposed the appointment of a receiver. In seeking the appointment of a receiver, FCC relied on s. 243(1) of the *BIA*:
>
> > Subject to subsection (1.1), on application by a secured creditor, a court may appoint a receiver to do any or all of the following if it considers it to be just or convenient to do so:

> (a) take possession of all or substantially all of the inventory, accounts receivable or other property of an insolvent person or bankrupt that was acquired for or used in relation to a business carried on by the insolvent person or bankrupt;
>
> (b) exercise any control that the court considers advisable over that property and over the insolvent person's or bankrupt's business; or
>
> (c) take any other action that the court considers advisable.

It also relied on s. 39(1) of the *LEA*, which provides:

> An injunction or an order in the nature of mandamus may be granted or a receiver or receiver manager appointed by an interlocutory order of the court in all cases in which it appears to the court to be just or convenient that the order should be made.

[7] The chambers judge granted the orders sought by FCC on September 29, 2014. The formal order entered to give effect to her decision reads, in part:

> **APPOINTMENT OF RECEIVER**
>
> 16. Pursuant to Section 243(1) of the BIA and Section 39 of the LEA, Wolrige Mahon Limited is hereby appointed Receiver, without security, until further Order of the Court, of the Lands.
>
> **CHARGING ORDER**
>
> 17. Pursuant to s. 63 of the *Personal Property Security Act*, R.S.B.C. 1996, c. 359, the Plaintiff's security, and in particular the [General Security Agreements] defined in Schedule "C" to this Order attaches all bottled and bulk wine owned by the Debtors or any of them (the "*Wine*") and the proceeds from the sale of the Wine are to be paid to the Receiver, along with all documentation supporting the sale of the Wine, including receipts and accounting of sales.
>
> **RECEIVER'S POWERS**
>
> 18. The Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable: ...

The listed powers give the receiver the ability to manage the Giddas' businesses on an ongoing basis. The receiver was also authorized "to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of ordinary course of business with the approval of this Court": sub-para. 18(j).

4 The chambers judge found the evidence before her more than sufficient to justify the appointment of a receiver, following the approach set out in *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd.*, 2009 BCSC 1527 (B.C. S.C. [In Chambers]). She considered various factors, including:

> (a) the existing lawsuits and continuing discords between the brothers which made security on the properties vulnerable;
>
> (b) Mr. Nirmal Gidda did not oppose the appointment of a receiver;
>
> (c) Mr. Kuldep Gidda, although opposing the appointment, agreed that the property would have to be sold to satisfy the outstanding debts;
>
> (d) the defendants had been in default over nine months and the brothers could not agree on a plan of action in response;

(e) the financing agreements contained a term allowing the plaintiff to make application for a receiver upon default.

5 On October 10, 2014, the appellants filed a notice of appeal, which was filed out of time according to R. 31(1) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368. On November 4, 2014, the appellants filed an amended notice of appeal together with an application to extend time for filing their notice of appeal. FCC opposed any extension of time on the basis that the appellants required leave to appeal the Order, as the circumstances of this case were not within the automatic leave to appeal provisions in the *BIA*.

6 The application for an extension of time came on for hearing before Mr. Justice Frankel on December 1, 2014. In reasons for judgment issued on December 22, 2014, he dismissed the appellants' application on the basis that there was no automatic right of appeal from the Order. Specifically, he found that ss. 193(a)-(d) of the *BIA*, which provide for an automatic appeal as of right to this Court, were not triggered. Having decided that leave to appeal was required, Mr. Justice Frankel extended the time within which the appellants could file a notice of application for leave to appeal to January 5, 2015.

7 The appellants filed their notice of application for leave to appeal on December 30, 2014. They did not, however, file their leave to appeal application materials until March 30, 2015. Consequently, on this application, they also seek leave to further extend the time to file their leave to appeal application materials.

Application to Extend Time

8 The criteria for seeking an extension of time for leave to appeal are succinctly set out in *National Shoring Ltd. (Trustee of) v. Dextras Engineering & Construction Ltd.*, 2009 BCCA 236 (B.C. C.A. [In Chambers]) (Prowse J.A.):

(a) whether there is a *bona fide* intention to appeal within the time for bringing the appeal;

(b) when the applicants inform the respondents of their intention to appeal;

(c) whether there would be prejudice to the respondents if an extension were granted;

(d) whether there is merit to the appeal;

(e) whether it is in the interests of justice that an extension be granted.

9 FCC opposes the application to extend time principally on the basis that the proposed appeal has no merit.

10 It is clear that the appellants have always had a *bona fide* intention to appeal within the time for bringing the appeal and that FCC was aware of their intention to appeal throughout. There will be no prejudice to FCC if the extension is granted. In my view, given that the merits of the appeal were the focus of the application, it is appropriate, in the circumstances of this case, to grant the extension of time and then resolve the application on the merits.

Application for Leave to Appeal

Test for Leave to Appeal

11 Section 183(2) of the *BIA* gives this Court the jurisdiction to hear and determine appeals of orders made under the authority of the *BIA*. Section 193(e) of the *BIA* provides that "an appeal lies to the Court of Appeal from an order ... by leave of a judge of the Court of Appeal." In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282 (Ont. C.A.) [*Pine Tree Resorts*], Mr. Justice Blair of the Ontario Court of Appeal articulated the test for granting leave to appeal under s. 193(e):

> 29 Beginning with the overriding proposition that the exercise of granting leave to appeal under s. 193(e) is discretionary and must be exercised in a flexible and contextual way, the following are the prevailing considerations in my view. The court will look to whether the proposed appeal,

> a) raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
>
> b) is *prima facie* meritorious, and
>
> c) would unduly hinder the progress of the bankruptcy/insolvency proceedings.

12 The criteria set out in *Pine Tree Resorts* are functionally identical to the criteria for leave to appeal set out in *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (B.C. C.A.) [*Power Consolidated*]. The *Power Consolidated* criteria include:

> [1] whether the point on appeal is of significance to the practice;
>
> [2] whether the point raised is of significance to the action itself;
>
> [3] whether the appeal is prima facie meritorious or, on the other hand, whether it is frivolous; and
>
> [4] whether the appeal will unduly hinder the progress of the action.

See also *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 (B.C. C.A. [In Chambers]) at para. 10.

Grounds of Appeal

13 The appellants' grounds of appeal can be summarized as follows:

> 1. that the chambers judge improperly weighed the evidence;
>
> 2. that the chambers judge erred by not permitting the defendants to conduct an examination on certain affidavits;
>
> 3. that the chambers judge erred in granting the receiver immediate conduct of sale; and
>
> 4. that comments made by the chambers judge gave rise to a reasonable apprehension of bias.

14 The appellants submit that each of these grounds is *prima facie* meritorious and raises issues that are important to the bankruptcy and insolvency practice. They stress that adjudication of this appeal would not unduly hinder the receivership because, among other things, there is no proven need for the receiver to immediately sell the property to preserve its value.

15 FCC opposes the leave application primarily on the basis that the proposed appeal is without merit. It stresses that the grounds of appeal are factual and case specific, and that they do not bear on any issue in the general practice of bankruptcy and insolvency law. It notes that even if a six-month redemption period should have been granted at the time of the chambers hearing, it would have, by now, expired.

Discussion

16 As noted by Mr. Justice Frankel in *Teck Cominco Metals Ltd. v. British Columbia*, 2009 BCCA 3 (B.C. C.A. [In Chambers]) at para. 27:

> a judge hearing a leave application serves a gatekeeper function; his or her task is to ensure that judicial resources are not expended on matters that do not merit the attention of a division of the Court. One situation in which leave is not warranted is when there is no prospect that the order being challenged will be reversed on appeal.

17 This is such a case. I would not grant leave to appeal as the proposed grounds of appeal are without clear merit. Moreover, there is no point of significance raised in regard to bankruptcy and insolvency practice warranting the attention of a division of this Court.

18 The first ground of appeal, that the judge weighed the evidence improperly, is, in substance, an attempt to relitigate the chambers hearing and concerns purely factual and case-specific issues. The ground challenges the judge's exercise of her discretion to appoint a receiver under s. 243(1) of the *BIA* or s. 39 of *LEA*. No issue arises on this ground that would warrant consideration by a division of this Court.

19 The second ground of appeal, concerning the refusal to order the cross-examination of a deponent of an affidavit, is also without clear merit. The point arises from the chambers judge's refusal to allow the cross-examination of Ms. Monoghan, who is a senior accounts manager employed by FCC. She deposed that FCC had internally valued the underlying properties, for liquidation purposes, at approximately $20 million. (I note, parenthetically, that the indebtedness at the time of the underlying application was approximately $17 million.) The appellants, in support of their application to cross-examine Ms. Monoghan, relied on an affidavit of Mr. Kaldep Gidda. Mr. Gidda deposed that Ms. Monoghan, in a conversation on May 20, 2014, had suggested to him that the properties were worth some $26 million (rather than the $20 million set out in her affidavit).

20 The decision to permit an affiant to be cross-examined on their affidavit in a bankruptcy proceeding is a discretionary one. Rule 3 of the *Bankruptcy and Insolvency General Rules* provides, in essence, that, in a matter arising under the *BIA*, the provincial rules of civil procedure are inoperative to the extent that they are inconsistent with the *BIA* or the rules promulgated thereunder. In this case, it is well-established that R. 14 of the *Bankruptcy and Insolvency General Rules* will govern whether examination on an affidavit is allowed: see *Mannix Resources Inc., Re*, 2004 BCSC 1315 (B.C. S.C. [In Chambers]) at para. 16. For reference, I set out Rules 3 and 14 below:

> **GENERAL**
>
> 3. In cases not provided for in the Act or these Rules, the courts shall apply, within their respective jurisdictions, their ordinary procedure to the extent that that procedure is not inconsistent with the Act or these Rules.
>
> **WITNESSES AND DEPOSITIONS**
>
> 14. (1) A party to any court proceedings may, with leave of the court, examine the other party or any other person and require them to produce documents.
>
> (2) A party to any court proceedings may, with leave of the court, require the attendance of any person for examination on an affidavit that the person filed with the court.
>
> (3) An application for leave of the court under subsection (1) or (2) may be made *ex parte*.

21 Leave of the court to examine on an affidavit is typically granted only where it is in the interest of justice to allow the examination to proceed: see *Manor, Re* (2009), 57 C.B.R. (5th) 126 (Ont. S.C.J.); see also *Prue v. Shen*, 2014 ABQB 363 (Alta. Q.B.), *Wearmouth v. Tallon Energy Corp.*, 2006 ABQB 861 (Alta. Q.B.) and *Placements Sarr Inc. v. Diplome Construction Inc.* (1967), 10 C.B.R. (N.S.) 250 (C.S. Que.).

22 In my view, it was within the chambers judge's discretion, arising pursuant to R. 14(2), to decline to order that Ms. Monoghan attend to be cross-examined on her affidavit. This is because the valuation of the underlying properties was not critical to the question of whether a receiver ought to be appointed.

23 At the time of the application, FCC was owed in excess of $17 million. Given the ongoing dispute between the different sides of the family, the appointment of the receiver did not turn on the actual value of the underlying properties. The chambers judge set out her reasons for declining to order that Ms. Monoghan attend for cross-examination at paras. 8-9:

> [8] ... [A]fter reviewing the impugned affidavit and Mr. Kaldep Gidda's application and his supporting material, I am satisfied the court does not need any of that information to have a proper evidentiary basis and sufficient information to proceed with the plaintiff's application.

> [9] Mr. Kaldep Gidda makes allegations against the affiant of false or inaccurate information. He has no independent basis to support these allegations. It is improper, in my view, to accuse a witness of falsification without a basis other than mere suspicion. As to the inaccurate information, that lies squarely in the defendant's lap. As indicated in the separate actions that the brothers are currently involved with, there has been inadequate disclosure and no current financial information exchanged or given to the plaintiff. It is no answer to the claims of inadequate disclosure for Mr. Kaldep Gidda to seek that same information from the plaintiff; that is the purpose of his application for cross-examination.

24 The chambers judge considered, in essence, whether it would be in the interest of justice to permit an examination on the affidavit to go forward. In my view, the chambers judge did not err in principle in the manner in which she considered the application and it was otherwise open to her to decline to order the examination on the facts before her. A division of this Court would not set aside the order appointing the receiver because the chambers judge, in the exercise of her discretion pursuant to R. 14(2), refused to order the cross-examination of Ms. Monoghan on her affidavit.

25 The third proposed ground of appeal concerns the order granting the receiver immediate conduct of sale. This ground also turns on the value of the property. If the property was worth $26 million as suggested by the appellants, as opposed to the $20 million set out in Ms. Monoghan's affidavit, the granting of an immediate order for sale might give rise to an arguable point on appeal. The problem, however, is that the appointment of the receiver took place more than seven months ago. The property is still not sold. While it may be arguable, on the assumption that the property was undervalued, that the chambers judge erred in ordering an immediate sale, given the time that has now passed, any error in shortening the length of the redemption period does not warrant the granting of leave. In this regard, I note that if a six-month redemption period had been ordered, it would by now already have expired. It is most unlikely this Court would vary an order to impose a redemption period where the period that should have been initially granted would already have expired: *British Columbia (Attorney General) v. Malik*, 2009 BCCA 202 (B.C. C.A.) at paras. 53-55.

26 The fourth ground of appeal alleges that comments made by the chambers judge gave rise to a reasonable apprehension of bias. The test for a reasonable apprehension of bias is undisputed and was first articulated by the Supreme Court of Canada in *Committee for Justice & Liberty v. Canada (National Energy Board)* (1976), [1978] 1 S.C.R. 369 (S.C.C.), at p. 394, per de Grandpré J. (dissenting):

> ... what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

27 The allegation in this case is based upon the following exchange between Mr. Kuldep Gidda and the chambers judge:

> KULDEP GIDDA: We already had a receiver in one time, because there are three brothers. Like there's now just me and my middle brother fighting. We, our older brother separated with us —
>
> THE COURT: Maybe I should —
>
> KULDEP GIDDA: — with a receiver.
>
> THE COURT: — get you a family counsellor instead.

28 While the exchange demonstrates the peril of a judge making an obvious facetious comment in the course of an application, it does not give rise to a reasonable apprehension of bias. An informed person, viewing the matter realistically and practically — and having thought the matter through — would not conclude it is more likely than not that the chambers judge, whether consciously or unconsciously, would not decide fairly.

29 For the reasons set out, I would extend the time for bringing the application, but dismiss the application for leave.

Application dismissed.

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Tab 15

2022 ONCA 479
Ontario Court of Appeal

KingSett Mortgage Corporation v. 30 Roe Investments Corp.

2022 CarswellOnt 8597, 2022 ONCA 479, 100 C.B.R. (6th) 218, 2022 A.C.W.S. 1846

KingSett Mortgage Corporation (Applicant / Moving Party / Responding Party) and 30 Roe Investments Corp. (Respondent / Responding Party / Moving Party)

David Brown, L.B. Roberts, Paciocco JJ.A.

Heard: June 13, 2022
Judgment: June 17, 2022
Docket: CA M53449 & M53510 (C70638)

Proceedings: refusing leave to appeal *KingSett Mortgage Corporation v. 30 Roe Investments Corp.* (2022), 2022 ONSC 2777, 2022 CarswellOnt 6465, Cavanagh J. (Ont. S.C.J.)

Counsel: Richard Swan, Sean Zweig, for Moving Party (M53449), Responding Party (M53510) KingSett Mortgage Corporation
Nancy J. Tourgis, Laney Paddock, for Responding Party (M53449), Moving Party (M53510) 30 Roe Investments Corp.
Mark Dunn, for KSV Restructuring Inc. in its capacity as court-appointed receiver
Darren Marr, for Canadian Imperial Bank of Commerce

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.4 Appeals
XVII.4.a To Court of Appeal
XVII.4.a.i Availability
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Leave by judge
Receivership order was previously made, in favour of respondent corporation — Order appointed restructuring company as receiver and manager, over condominium units owned by appellant company — After company appealed order, corporation brought motion to quash appeal — Company opposed motion to quash, and moved for leave to appeal order — Motion to quash granted; motion for leave dismissed — Recent jurisprudence confirmed that no right of appeal existed, from order appointing receiver — As no right of appeal existed, company needed leave to appeal order — There was no issue of general importance, either on insolvency or for general practice — Decision was fact-specific — Appeal lacked prima facie merit — Application judge properly considered all relevant factors — There was no basis for company's claim, that matter had to be adjourned for appointment of new counsel — Appeal would hinder progress of receivership, and prejudice corporation's ability to enforce its second mortgage — Appeal was quashed, with $15,000 in costs payable to company.
Bankruptcy and insolvency --- Receivers — Appointment
Table of Authorities
Cases considered by *David Brown J.A.*:

Buduchnist Credit Union Limited v. 2321197 Ontario Inc. (2019), 2019 ONCA 588, 2019 CarswellOnt 11103, 72 C.B.R. (6th) 245 (Ont. C.A.) — referred to
Business Development Bank of Canada v. Astoria Organic Matters Ltd. (2019), 2019 ONCA 269, 2019 CarswellOnt 5177, 69 C.B.R. (6th) 13 (Ont. C.A.) — referred to
Business Development Bank of Canada v. Pine Tree Resorts Inc. (2013), 2013 ONCA 282, 2013 CarswellOnt 5026, 100 C.B.R. (5th) 91, 115 O.R. (3d) 617, 307 O.A.C. 1 (Ont. C.A.) — referred to
Comfort Capital Inc. v. Yeretsian (2019), 2019 ONCA 1017, 2019 CarswellOnt 21285, 75 C.B.R. (6th) 217 (Ont. C.A.) — referred to
Essar Steel Algoma Inc. (Re) (2017), 2017 ONCA 478, 2017 CarswellOnt 8668, 49 C.B.R. (6th) 259, 65 B.L.R. (5th) 218 (Ont. C.A.) — referred to
Hillmount Capital Inc. v. Pizale (2021), 2021 ONCA 364, 2021 CarswellOnt 8163, 92 C.B.R. (6th) 214, 462 D.L.R. (4th) 228 (Ont. C.A.) — referred to
Royal Bank of Canada v. Bodanis (2020), 2020 ONCA 185, 2020 CarswellOnt 3314, 78 C.B.R. (6th) 165 (Ont. C.A.) — referred to
Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc. (2021), 2021 ONCA 202, 2021 CarswellOnt 4232, 88 C.B.R. (6th) 1 (Ont. C.A.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 193 — referred to

s. 193(a) — referred to

s. 193(c) — referred to

s. 193(e) — referred to

s. 195 — referred to

s. 243 — referred to

s. 243(1) — referred to

s. 244 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194

R. 15.04(6) — referred to

Proceeding: Motion/Application for Leave to Appeal.

MOTION by respondent company, to quash appeal by appellant corporation from judgment reported at *KingSett Mortgage Corporation v. 30 Roe Investments Corp.* (2022), 2022 ONSC 2777, 2022 CarswellOnt 6465, 98 C.B.R. (6th) 311 (Ont. S.C.J.); MOTION by corporation for leave to appeal order.

***David Brown J.A.*:**

I. OVERVIEW

1 The respondent, KingSett Mortgage Corporation ("KingSett"), moves to quash the appeal brought by 30 Roe Investments Corp. ("30 Roe") from the order of Cavanagh J. dated May 9, 2022 (the "Receivership Order"). That order appointed KSV Restructuring Inc. as the receiver and manager of nine residential condominium units owned by 30 Roe in a 397-

unit condominium building located at 30 Roehampton Avenue, Toronto (the nine units are hereafter referred to as the "Real Property").

2 30 Roe opposes the motion to quash, arguing that it enjoys an appeal as of right from the Receivership Order under s. 193(c) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B–3 ("BIA"). [1] As well, it moves for leave to appeal the Receivership Order pursuant to s. 193(e) of the BIA.

3 At the conclusion of the hearing of the motions, the panel granted KingSett's motion to quash and dismissed 30 Roe's motion for leave to appeal with reasons to follow. These are those reasons.

II. BACKGROUND FACTS

4 On April 8, 2019, KingSett advanced a non-revolving demand loan to 30 Roe, which originally was for the principal amount of $1.5 million, but later increased to $1.875 million. The advance was secured, in part, by a second mortgage on the Real Property. The advance is also secured by an April 8, 2019 General Security Agreement and other security.

5 The Canadian Imperial Bank of Commerce ("CIBC") holds a first mortgage on the Real Property.

6 The original loan maturity date was in April 2021. The loan facility was extended several times, with the final maturity date set for December 1, 2021.

7 30 Roe defaulted on the December 1, 2021 interest payment, as it had on some other interest payments, and it did not pay out the loan upon maturity. KingSett served a notice of default. On December 13, 2021, KingSett issued a demand letter and gave notice of intention to enforce security in accordance with s. 244 of the BIA.

8 As of December 31, 2021, the amount due under the loan was $1,895,958.85.

9 KingSett applied on January 7, 2022 for the appointment of a receiver and manager of the Real Property pursuant to s. 243(1) of the BIA and s. 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43 ("CJA"). 30 Roe sought and received three adjournments of the application, including one to enable the hearing of a motion brought by former counsel to get off the record. Cavanagh J. approved a timetable for all pre-hearing steps. Ultimately, KingSett's application was scheduled to be heard on May 6, 2022.

10 On that date, 30 Roe sought a further adjournment. Cavanagh J. refused an adjournment for two reasons: (i) although 30 Roe had obtained an expression of interest to provide refinancing, the letter of intent was not a binding commitment letter and the application judge concluded there was no assurance 30 Roe would secure refinancing to pay out its debt to KingSett if a further adjournment was granted; and (ii) 30 Roe had not acted reasonably or in accordance with prior court endorsements to find new counsel.

11 As of the hearing date, the state of affairs regarding the Real Property was as follows: (i) CIBC took no position in opposition to the application; (ii) all units were rented and rents were being paid; (iii) 30 Roe was paying interest on the second mortgage debt; and (iv) CIBC was willing to defer enforcement steps for 30 days commencing May 6, 2022 to allow 30 Roe an opportunity to put in place refinancing.

12 On May 9, 2022, Cavanagh J. made the Receivership Order.

13 The next day, May 10, 2022, 30 Roe delivered a notice of appeal in which the grounds of appeal are essentially three-fold: (i) the motion judge erred in refusing its fourth adjournment request; (ii) he misapplied the factors applicable to whether it would be just and convenient to appoint a receiver; and (iii) he erred in failing to recognize that KingSett had impliedly extended the loan facility until April 1, 2022, by debiting the amount of an extension fee to 30 Roe's mortgage debt account in January and February 2022. (The application judge accepted KingSett's evidence that the debits were the result of an administrative error, which KingSett had reversed once advised of the mistake.)

14 KingSett moves to quash the appeal on the basis that 30 Roe does not enjoy an appeal of right under BIA s. 193 but requires leave to appeal.

15 30 Roe takes the position that an appeal lies as of right under BIA s. 193(c), as the "the property involved in the appeal exceeds in value ten thousand dollars". 30 Roe has brought a separate motion for leave to appeal the Receivership Order pursuant to BIA s. 193(e).

III. KINGSETT'S MOTION TO QUASH

16 In its jurisprudence regarding the appeals of orders appointing a receiver under BIA s. 243 and CJA s. 101, this court has consistently made two points:

> (i) Where a receivership order is made pursuant to both BIA s. 243 and CJA s. 101, the more restrictive appeal provisions of BIA s. 193 govern the rights of appeal and appeal routes: Business Development Bank of Canada v. Astoria Organic Matters Ltd., 2019 ONCA 269, 69 C.B.R. (6th) 13, at paras. 66 and 67; Buduchnist Credit Union Limited v. 2321197 Ontario Inc., 2019 ONCA 588, 72 C.B.R. (6th) 245, at paras. 10 and 11;
>
> (ii) No appeal as of right exists under BIA ss. 193(a) or (c) from an order appointing a receiver: Hillmount Capital Inc. v. Pizale, 2021 ONCA 364, 462 D.L.R. (4th) 228, at para. 38; Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282, 115 O.R. (3d) 617, at paras. 15–17; and *Buduchnist* , at para. 12.

17 In an effort to avoid the effect of that jurisprudence, 30 Roe fashions two arguments about the availability of a right of appeal under BIA s. 193(c). The first draws upon several decisions of judges of this court sitting in Chambers; the second is based on a sales approval "carve-out" provision in the Receivership Order.

18 First, 30 Roe relies on several Chambers decisions of this court to contend that s. 193(c) authorizes an automatic right of appeal from a receivership order. The first decision is that of the Chambers judge in *Comfort Capital Inc. v. Yeretsian*, 2019 ONCA 1017, 75 C.B.R. (6th) 217. However, that case did not involve an appeal from an order appointing a receiver; the nature of the order in *Comfort Capital* was quite different. There, the order under appeal directed payment of part of the proceeds of the receiver's sale of property to one set of claimants that was otherwise payable to another claimant. The order resulted in a loss to the second claimant and, therefore, the nature of the order fell within BIA s. 193(c). *Comfort Capital* has no application to the order at issue in the present case.

19 The other Chambers decisions are those in *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185, 78 C.B.R. (6th) 165 [2] and *Shaver-Kudell Manufacturing Inc. v. Knight Manufacturing Inc.*, 2021 ONCA 202, 88 C.B.R. (6th) 1. Neither case provides support for 30 Roe's submission that BIA s. 193(c) grants an automatic right of appeal from a receivership order, because neither case involved an attempt to appeal a receivership order. The order at issue in *Bodanis* was a bankruptcy order; that in *Shaver-Kudell* an order declaring that a bankrupt's debts and liabilities would survive his discharge from bankruptcy.

20 Moreover, 30 Roe's submission based on those Chambers decisions ignores the more recent panel decision of this court in *Hillmount Capital Inc. v. Pizale*, 2021 ONCA 364, 462 D.L.R. (4th) 228. In the course of discussing the types of orders that fall outside of s. 193(c), the court in *Hillmount Capital*, stated, at para. 38:

> By its nature the second type of order - one that does not bring into play the value of the debtor's property - would not result in a loss or put property value in jeopardy. For example, it is well-established in the *BIA* s. 193(c) jurisprudence that an order appointing a receiver or interim receiver usually does not bring into play the value of the debtor's property as it simply appoints an officer of the court to preserve and monetize those assets subject to court approval. [Emphasis added.]

21 30 Roe's second argument is based on para. 3(k) of the Receivership Order, which deals with the powers of the receiver and authorizes the receiver to sell any part of the Real Property out of the ordinary course of business "without the approval of this

Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $500,000."

22 Drawing on that provision, 30 Roe argues as follows: (i) in *Pine Tree Resorts* the Chambers judge described the nature of a receivership order as one that does not bring into play the value of the debtor's property but simply appoints an officer of the court to preserve and monetize those assets *subject to court approval*: at para. 17; (ii) in *Pine Tree Resorts* the court relied on that description of the nature of a receivership order to conclude that BIA s. 193(c) does not provide an automatic right of appeal from such an order; (iii) however, para. 3(k) of the Receivership Order identifies a sub-set of 30 Roe's property that the receiver may sell without applying for court approval; so, therefore, (iv) the nature of the Receivership Order containing para. 3(k) differs from that which led the court in *Pine Tree Resorts* to conclude that no appeal as of right existed. It follows, according to 30 Roe, that the presence of the para. 3(k) carve-out in the Receivership Order places that order in the class of orders for which an automatic right of appeal exists under BIA s. 193(c).

23 This submission is not persuasive. First, 30 Roe does not cite any authority involving a receivership order to support its proposition. Second, as KingSett points out, the receivership order made in *Pine Tree Resorts* contained the same carve-out granting the receiver the power to sell assets without court approval in any transaction not exceeding $250,000. The presence of such a carve-out provision did not affect Blair J.A.'s characterization of the *Pine Tree Resorts* receivership order as one that did not bring into play the value of the debtor's property but simply appointed an officer of the court to preserve and monetize those assets subject to court approval: at para. 17. No doubt Blair J.A. reached that conclusion in part because the initial receivership order itself granted court approval for the monetization of assets of less than $250,000. As well, while a sale transaction of less than $250,000 would not require a further approval motion, the court ultimately reviews the receiver's conduct for such transactions as part of its periodic review and approval of receiver's reports. Accordingly, the presence of a "carve-out" provision such as para. 3(k) in the Receivership Order does not alter the essential nature of that order: namely, an order that does not bring into play the value of the debtor's assets for the purpose of a BIA s. 193(c) analysis.

24 In its notice of appeal, 30 Roe also asserts that an appeal to the Court of Appeal is provided under BIA s. 195.[3] With respect, that assertion does not accurately describe the operation of s. 195, which deals with stays of orders pending appeal to an appellate court, not with when rights of appeal lie, or with appeal routes.

25 To summarize, two recent panel decisions of this court, *Buduchnist* and *Hillmount Capital* , confirmed the court's jurisprudence that no appeal as of right exists under BIA s. 193(c) from an order appointing a receiver. The Receivership Order was made under BIA s. 243(1); BIA s. 193 therefore governs the availability of appeals; with the result that 30 Roe does not enjoy an automatic right to appeal the Receivership Order under BIA s. 193(c). Accordingly, 30 Roe must seek leave to appeal pursuant to BIA s. 193(e).

IV. 30 ROE'S MOTION FOR LEAVE TO APPEAL

26 The test for leave to appeal under BIA s. 193(e) is well-established:

- Does the proposed appeal raise an issue of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole and therefore is one that an appellate court should consider and address?
- Is the proposed appeal *prima facie* meritorious and does it involve a point that is of significance to the proceeding?
- Would the proposed appeal unduly hinder the progress of the bankruptcy/insolvency proceedings?

See: Pine Tree Resorts, at para. 29; *Buduchnist* , at para. 17; Essar Steel Algoma Inc. (Re), 2017 ONCA 478, 49 C.B.R. (6th) 259, at para. 19.

Issue of general importance

27 The proposed appeal does not raise an issue of general importance to insolvency practice or to the administration of justice as a whole. The grounds of appeal are rooted in the specifics of the relationship between a mortgagor — 30 Roe — and a mortgagee — KingSett, including the effect on the maturity date of the loan facility by KingSett debiting an extension fee against 30 Roe's mortgage account in January and February 2022. It is also grounded in the fact-specific, discretionary decision of the application judge to refuse a fourth adjournment request by 30 Roe.

Merits of the appeal

28 Nor does the notice of appeal disclose a *prima facie* meritorious appeal. The application judge's reasons disclose that he fairly considered all relevant factors in refusing the fourth adjournment request, especially in circumstances where, by the May 6, 2022 hearing date, it was clear 30 Roe had no ability to make payments of principal, remained in default, and offered no tangible prospect of refinancing. There was nothing premature or disproportionate about the application judge's appointment of a receiver.

29 30 Roe argues that r. 15.04(6) of the Rules of Civil Procedure, R.R.O. 1990, Reg. 194 gave it the right until May 20, 2022 to appoint new counsel, with the consequence that the scheduled May 6 hearing had to be adjourned until after that date. 30 Roe's submission is without any merit. During the course of case managing the matter, the application judge set a timetable that governed the date of the hearing. That timetable took precedence over any time specified in r. 15.04(6). As the application judges stated at para. 15 of his reasons, "I made it clear in my March 8, 2022 endorsement that May 6, 2022 was a firm date". In that circumstance, the language of r. 15.04(6) that a corporation must appoint counsel "within 30 days" after receiving the order removing former counsel from the record has no effect on the hearing date already set by a judge. It should go without saying that where a removal order is made in the face of a hearing date fixed by the judge managing an application, the corporation obviously must appoint new counsel before the hearing date or risk the hearing proceeding without representation.

30 Finally, 30 Roe has not demonstrated any palpable and overriding error or unreasonableness in the application judge's conclusion, at para. 15, that 30 Roe "has not acted reasonably and in accordance with my [prior endorsements] by not seeking to identify counsel who could represent it . . . "

31 As to the ground of appeal that the application judge failed to have regard to the evidence that KingSett debited 30 Roe's mortgage account for extension fees in January and February, 2022, the reasons disclose that the application judge dealt squarely with that issue, accepting KingSett's explanation that the debits were simply administrative errors: at paras. 23-25.

32 That conclusion by the application judge was reasonable in light of the evidence that: (i) 30 Roe acknowledged in the October 25, 2021 fourth amendment letter that "there shall be no further extensions of the Term beyond December 1, 2021"; and, (ii) KingSett sent a December 13, 2021 demand letter and notice of intention to enforce to 30 Roe — acts inconsistent with granting an extension of the maturity date.

33 According to the affidavit of a director of 30 Roe, Raymond Zar, the debtor also takes the position that the maturity date of the second mortgage was extended until April 1, 2022 as he had sent a December 16, 2021 email to KingSett requesting an extension of the maturity date to that time. However, KingSett did not respond to that email, and the record contains no evidence that KingSett granted such an extension. Instead, KingSett moved to enforce its security. In any event, the April 1, 2022 date has come and gone, and there is no evidence that 30 Roe has paid the mortgage debt. It remains in default.

34 Finally, the reasons of the application judge do not disclose that his analysis was based on any error of law. While 30 Roe obviously does not agree with how the application judge weighed the various factors relevant to whether a receiver should be appointed, his decision to appoint a receiver was not unreasonable given 30 Roe's default and inability to cure its default.

35 Accordingly, the proposed appeal is not *prima facie* meritorious.

Effect of an appeal on the progress of the receivership

36 Finally, the proposed appeal would unduly hinder the progress of the administration of the receivership. Granting leave would trigger the automatic stay contained in BIA s. 195, thereby preventing the receiver from exercising its power under the Receivership Order to market and sell the Real Property. No purpose would be served by such a delay. It is apparent from the record that 30 Roe has been unable to secure third party financing to take out the KingSett second mortgage notwithstanding several extensions of the mortgage maturity date and the lapse of almost half a year since KingSett initiated its receivership application.

37 To delay the ability of KingSett to enforce its second mortgage — the validity and enforceability of which are not in dispute — would be unfair to KingSett, especially given 30 Roe's consent, in the third and fourth amendments to the commitment letter, to KingSett's appointment of a receiver, either privately or court-appointed, in the event of a default by 30 Roe going beyond the applicable cure period.

Summary

38 For these reasons, the panel did not grant 30 Roe leave to appeal the Receivership Order.

V. DISPOSITION

39 As stated at the end of the hearing, KingSett's motion to quash 30 Roe's appeal C70638 is granted and 30 Roe's motion for leave to appeal is dismissed.

40 As agreed by the parties, KingSett is entitled to its costs of both motions fixed in the aggregate amount of $15,000, inclusive of disbursements and applicable taxes.

***L.B. Roberts J.A.*:**

I agree.

***Paciocco J.A.*:**

I agree.

Motion granted.

Footnotes

1 BIA s. 193 provides as follows:

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) if the property involved in the appeal exceeds in value ten thousand dollars;

(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) in any other case by leave of a judge of the Court of Appeal.

2 While the court concluded that BIA s. 193(c) provided for the right to appeal a bankruptcy order, the Chambers judge cancelled the automatic stay on appeal under BIA s. 195.

3 BIA s. 195 states:

> Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

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Tab 16

COURT OF APPEAL FOR ONTARIO

CITATION: DEL Equipment Inc. (Re), 2020 ONCA 555
DATE: 20200908
DOCKET: M51568

Lauwers, Brown and Nordheimer JJ.A.

In the Matter of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36, as amended

And In the Matter of a Plan of Compromise or Arrangement of DEL Equipment Inc.

Applicant (Respondent/Responding Party)

Rahul Shastri and David Winer, for the moving party Gin-Cor Industries Inc.

Jason Wadden, Christopher Armstrong and Andrew Harmes, for the responding party DEL Equipment Inc.

Heard: in writing

Motion for leave to appeal from the order of Justice Glenn A. Hainey of the Superior Court of Justice, dated May 7, 2020.

REASONS FOR DECISION

OVERVIEW

[1] Gin-Cor Industries Inc. ("GCI") seeks leave to appeal, pursuant to s. 13 of the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 ("*CCAA*"), from the order of Hainey J. dated May 7, 2020, which required GCI to pay DEL Equipment Inc. ("DEL") the amount of $874,107.08 (the "Funds") then being held in trust pursuant to an earlier court order.

[2] We refuse GCI leave to appeal. In accordance with the practice of this court on motions for leave to appeal under the *CCAA*, these brief reasons explain our refusal.

THE DISPUTE

[3] DEL manufactures special truck bodies and equipment. GCI also manufactures and customizes trucks. In June 2017, DEL and GCI entered into a management agreement under which GCI assumed management control of DEL and ultimately could earn a 100% equity interest in DEL if certain milestones were reached. However, the parties terminated the agreement on July 18, 2019, at which time GCI ceased to manage DEL's business.

[4] In 2018, DEL received two purchase orders from Mack Defense LLC ("Mack Defense") for certain trucks. In May and June 2019, DEL delivered the trucks. In June 2019, DEL issued invoices totaling $874,107.08 to Mack Defense, which made two payments totaling that amount in late August and early September2019.

[5] However, Mack Defense mistakenly sent the payments to GCI, instead of to DEL. It appears the mistake originated when Mack Defense sought to confirm payment instructions for the trucks back in April 2019, when GCI was managing DEL. A GCI representative answered Mack Defense's inquiry and mistakenly provided instructions to direct payment to GCI's account. Although a DEL

representative later provided Mack Defense with the proper payment instructions, Mack Defense ended up mistakenly paying the DEL invoiced amounts to GCI.

[6] In mid-September 2019, DEL followed up with Mack Defense and learned about the mistaken payments. DEL asked GCI to transfer the $874,107.08 to it. Although GCI acknowledged that the payments by Mack Defense were intended to satisfy DEL's invoices, GCI refused to transfer the Funds. GCI took the position that it was entitled to retain the Funds as a set-off against other obligations of DEL to GCI, including those that arose under the management agreement.

[7] Mack Defense viewed the matter as a dispute between DEL and GCI.

[8] On October 22, 2019, DEL was granted protection under the *CCAA*. As of that date, DEL owed GCI and related companies approximately $1.5 million.

[9] The motion judge then granted a preservation order requiring that GCI transfer the Funds to its lawyers pending further order of the court.

[10] Subsequently, DEL and GCI brought competing motions asserting entitlement to the Funds. The motion judge ordered the Funds be paid to DEL and that, pending payment of the Funds to DEL, the Funds are subject to a constructive trust in favour of DEL. GCI now seeks leave to appeal that order.

[11] By order dated June 24, 2020, Thorburn J.A. directed that this motion for leave to appeal be expedited and, if leave was not granted, the Funds be paid out to DEL within two business days of the order refusing leave to appeal.

ANALYSIS

The governing test

[12] This court will only sparingly grant leave to appeal in the context of a *CCAA* proceeding. Leave will be granted only where there are "serious and arguable grounds that are of real and significant interest to the parties", determined by considering whether: (i) the proposed appeal is *prima facie* meritorious or frivolous; (ii) the issue on the proposed appeal is of significance to the practice; (iii) the issue on the proposed appeal is of significance to the proceeding; and (iv) the proposed appeal will unduly hinder the progress of the proceeding: *Stelco Inc., (Re)* (2005), 75 O.R. (3d) 5 (C.A.), at para. 24.

Whether the proposed appeal is *prima facie* meritorious or frivolous

[13] The motion judge concluded that: (i) GCI unjustly enriched itself by retaining the Funds and refusing to pay them to DEL or return them to Mack; and (ii) GCI's retention of the Funds constitutes an improper preference over DEL's other creditors. In dealing with the issue of whether a juristic reason existed for GCI's receipt and retention of the Funds, the motion judge stated:

> I have also concluded that there is no juristic reason for GCI's enrichment of receiving and retaining the Funds because,
>
> > (a) the Funds were never intended for GCI;
> >
> > (b) GCI cannot rely on set off as a juristic reason for its enrichment because the Supreme Court of Canada made this clear at para. 114 of its decision in *Kerr v. Baranow,* 2011 SCC 10, [2011] 1 S.C.R. 269;
> >
> > (c) GCI has acknowledged that it received the Funds by mistake which is not a juristic reason for its enrichment;
> >
> > (d) GCI is not an "innocent" recipient of the Funds because its own employees were at least, in part, the cause of the mistaken payment; and
> >
> > (e) GCI's retention of the Funds constitutes an improper preference over DEL's other creditors.

[14] GCI's primary submission is that the motion judge erred in holding that GCI could not rely on set-off as a juristic reason to defend a claim of unjust enrichment. GCI contends that set-off can constitute a juristic reason in a commercial law context and *CCAA* s. 21 creates a statutory right of set-off available in *CCAA* proceedings.

[15] We are not persuaded that the proposed appeal is *prima facie* meritorious. In our view, GCI has not raised any arguments that provide good reason to doubt the motion judge's decision.

[16] In particular, we are not persuaded GCI's submission on juristic reason is *prima facie* meritorious. *Kerr* remains the leading authority on the elements of a

claim for unjust enrichment. On the issue of juristic reason, *Kerr* drew upon the two-step juristic reason analysis described in the Supreme Court of Canada's earlier decision in *Garland v. Consumers Gas Co.*, 2004 SCC 25, [2004] 1 S.C.R. 629. As the motion judge correctly noted, that two-step analysis is summarized at para. 114 of *Kerr*, where the Supreme Court stated, in part:

> The juristic reason analysis is intended to reveal whether there is a reason for the defendant to retain the enrichment, not to determine its value or whether the enrichment should be set off against reciprocal benefits: *Wilson*, at para. 30. *Garland* established that claimants must show that there is no juristic reason falling within any of the established categories, such as whether the benefit was a gift or pursuant to a legal obligation. If that is established, it is open to the defendant to show that a different juristic reason for the enrichment should be recognized, having regard to the parties' reasonable expectations and public policy considerations. [Emphasis added.]

[17] While the fact that the parties have conferred benefits on each other may be considered at the juristic reasons stage, it can only be considered for the limited purpose of providing evidence of the parties' reasonable expectations that could support the existence of a juristic reason outside the settled categories: *Kerr*, at para. 115.

[18] The motion judge's reasons reveal that he applied *Kerr*'s two-step juristic reason analysis to the specific facts of this case. There was no evidence that GCI's receipt of a benefit of $874,107.08 from Mack Defense was pursuant to a legal obligation. On the contrary, GCI mistakenly received the Funds from Mack

Defense, which should have sent the Funds to DEL to satisfy the invoices for DEL's delivery of trucks to Mack Defense. *CCAA* s. 21[1] recognizes that a creditor may raise the common law defence of set-off when sued by a company under *CCAA* protection. However, this does not alter the fact that, in this case, the Funds were mistakenly paid to and received by GCI.

[19] Further, the fact that DEL was indebted to GCI at the time of Mack Defense's mistaken payments was not, in the circumstances, evidence of any reasonable expectation by DEL and GCI that a juristic reason existed for GCI to retain the mistakenly paid Funds. Indeed, the evidence was to the contrary. As soon as DEL discovered that Mack Defense had mistakenly paid the Funds to GCI, DEL demanded that GCI transfer the Funds to it.

The remaining factors: the significance of the issue to the proceeding; significance to the practice; and the impact on the progress of the *CCAA* proceeding

[20] While the issue of the entitlement to the Funds is of significance to the parties to the proceeding, we are not persuaded that the proposed appeal raises any issues of significance to the practice. The proposed appeal turns on applying well-established principles of law to the unique facts of this case, which include

[1] *CCAA* s. 21 states: "The law of set-off or compensation applies to all claims made against a debtor company and to all actions instituted by it for the recovery of debts due to the company in the same manner and to the same extent as if the company were plaintiff or defendant, as the case may be."

the existence of a management agreement in effect between DEL and GCI at the time Mack Defense sought instructions for the payment of the Funds.

[21] The final factor to consider is whether the proposed appeal will unduly hinder the progress of the proceeding. We regard this factor as neutral. On the one hand, DEL submits that the only remaining task in the *CCAA* proceeding is to distribute funds to unsecured creditors, which cannot occur until the amount available to unsecured creditors is determined. That, in turn, would depend upon the outcome of the proposed appeal. On the other hand, GCI argues that there is no evidence in the record of any prejudice to the *CCAA* proceeding in the event leave were to be granted. As well, GCI submits that the appeal could be expedited, as was the hearing of this motion for leave to appeal.

Conclusion

[22] Leave to appeal is only sparingly granted in *CCAA* proceedings. In our view, the proposed appeal is neither *prima facie* meritorious nor does it raise issues of significance to the practice. Therefore, we are not persuaded that GCI's motion merits granting leave to appeal.

DISPOSITION

[23] For the reasons set out above, the motion is dismissed.

"P. Lauwers J.A."
"David Brown J.A."
"I.V.B. Nordheimer J.A."

Tab 17

2012 ONSC 965
Ontario Superior Court of Justice [Commercial List]

Business Development Bank of Canada v. 2197333 Ontario Inc.

2012 CarswellOnt 2062, 2012 ONSC 965, 212 A.C.W.S. (3d) 401, 94 C.B.R. (5th) 28

Application under Subsection 243(1) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended and Section 101 of the Courts of Justice Act, R.S.O. 1990, c. C.43, as amended

Business Development Bank of Canada, Applicant and 2197333 Ontario Inc., Respondent

Morawetz J.

Heard: January 23, 2012
Judgment: February 15, 2012
Docket: CV-11-9496-00CL

Counsel: Ian A. Aversa for Applicant, Business Development Bank of Canada
R.B. Moldaver, Q.C. for Respondent, 2197333 Ontario Inc.
Rosemary A. Fischer for Proposed Receiver, Fuller Landau Group Inc.

Subject: Insolvency; Corporate and Commercial; Civil Practice and Procedure

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.1 Appointment
Debtors and creditors
VII Receivers
VII.2 Jurisdiction of court to appoint

Headnote

Bankruptcy and insolvency --- Receivers — Appointment

Respondent was real estate holding company with no assets other than property — Mortgage over property provided applicant bank with ability to seek appointment of court-appointed receiver in event of default by respondent — Respondent defaulted — Applicant's security became enforceable — Applicant made demand and gave notice of intention to enforce security pursuant to s. 244(1) of Bankruptcy and Insolvency Act (BIA) — Applicant brought application for appointment of receiver under s. 243(1) of BIA and s. 101 of Courts of Justice Act — Application granted — Appointment of receiver was justified in present case — There had been default — There was contractual remedy provided for in mortgage that contemplated appointment of receiver — As such, relief could not be seen to be extraordinary in nature — Respondent had been in default for considerable period of time — Lack of operating business established that there was no prejudice to debtor that was directly related to appointment.

Debtors and creditors --- Receivers — Jurisdiction of court to appoint

Table of Authorities

Cases considered by *Morawetz J.*:

Bank of Montreal v. Appcon Ltd. (1981), 37 C.B.R. (N.S.) 281, 123 D.L.R. (3d) 394, 1981 CarswellOnt 162, 33 O.R. (2d) 97 (Ont. H.C.) — followed

National Trust Co. v. Yellowvest Holdings Ltd. (1979), 24 O.R. (2d) 11, 98 D.L.R. (3d) 189, 1979 CarswellOnt 1364 (Ont. H.C.) — considered

Ontario v. Shehrazad Non Profit Housing Inc. (2007), 2007 CarswellOnt 2113, 2007 ONCA 267, 46 C.P.C. (6th) 195, 223 O.A.C. 76, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]) — considered

Textron Financial Canada Ltd. v. Chetwynd Motels Ltd. (2010), 67 C.B.R. (5th) 97, 91 C.P.C. (6th) 171, 2010 CarswellBC 855, 2010 BCSC 477 (B.C. S.C. [In Chambers]) — followed

United Savings Credit Union v. F & R Brokers Inc. (2003), 2003 CarswellBC 1084, 2003 BCSC 640, 15 B.C.L.R. (4th) 347, 9 R.P.R. (4th) 279 (B.C. S.C. [In Chambers]) — followed

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 243 — considered

s. 243(1) — pursuant to

s. 244(1) — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43

s. 101 — pursuant to

APPLICATION for appointment of receiver.

***Morawetz J.*:**

1 Business Development Bank of Canada ("BDC") brings this application for the appointment of a receiver under s. 243(1) of the *Bankruptcy and Insolvency Act* ("*BIA*") and s. 101 of the *Courts of Justice Act* ("*CJA*").

2 Counsel to the Respondent submits that a receiver can be appointed by an interlocutory order where it appears to the court to be just or convenient to do so. Counsel referenced *National Trust Co. v. Yellowvest Holdings Ltd.* (1979), 24 O.R. (2d) 11 (Ont. H.C.) for this proposition. Counsel questioned as to whether it was proper to proceed by way of application as this would result in the granting of a final order, which, he submits, is inconsistent with the view expressed by Callaghan J. (as he then was) in *National Trustco*.

3 Counsel to BDC responded by referencing *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267 (Ont. C.A. [In Chambers]), a decision of MacPherson J.A. (In Chambers). In this case, the Ministry commenced its application, including the relief to appoint a receiver and manager pursuant to s. 101 of the *CJA*. The order appointing the receiver was granted and the moving party on appeal, Shehrazad, sought a stay pending appeal. The request for the stay was opposed by the Ministry on two bases: (1) the Court of Appeal had no jurisdiction to hear the motion because the order being appealed was an interlocutory order and, therefore, the appeal would have to be taken to Divisional Court; and (2) on the merits, the moving party could not meet the test for obtaining a stay.

4 With respect to the jurisdictional point, MacPherson J.A. disagreed with the position put forth by the Ministry noting that the Ministry did not bring a motion to appoint a receiver; rather, it made an application.

5 Justice MacPherson stated the following:

> 16. It follows that the decision of this court in *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.), governs the question of which court has jurisdiction to hear the appeal in these proceedings. In *Illidge*, the appellant sought an order setting aside the appointment of the respondent as receiver on the basis of an alleged conflict of interest by reason of the respondent's role as trustee in the bankruptcy for other parties. The respondent argued that the Court of Appeal lacked jurisdiction to hear the appeal because the order appointing the receiver was interlocutory and not final.
>
> 17. The court rejected this argument. Armstrong J.A. stated at paragraph 4:
>
> > At the initial proceeding, Soberman sought the appointment as receiver by way of application rather than on interlocutory motion. As stated by this court in *Hendrickson v. Kallio*, [1932] O.R. 675, ... and in numerous subsequent cases, orders that finally determine the issues raised in an application are final orders.

> In my view, this passage is directly applicable to, and disposes of, the Ministry's objection that the corporation has brought its appeal to the wrong court. It follows that the Corporation's motion for stay should be considered on the merits.

6 The above passage is, in my view, a complete answer to the position put forth by counsel to the Respondent. The Court of Appeal did not take issue with the fact that the proceeding to appoint the receiver was brought by way of application which resulted in a final order.

7 In any event, the provisions of s. 243 of the *BIA* specifically contemplate an application to appoint a receiver.

8 Turning to the merits, the Respondent is a single-purpose real estate holding company. It has no employees and no active business. The Respondent owns a property at 330 Oakdale Road, Toronto (the "Oakdale Premises"). The Respondent's tenant is bankrupt. The Respondent is in default of its obligation to BDC and BDC's security has become enforceable.

9 Demand was made on May 17, 2011. The demand was accompanied by a Notice of Intention to Enforce Security pursuant to s. 244 (1) of the *BIA*.

10 The Respondent is indebted to BDC in the amount of approximately $2.5 million.

11 The mortgage agreement provides that following an event of default, BDC is entitled to apply to court to seek the appointment of a receiver.

12 BDC also raised issues concerning the ability of the Respondent to make payments for heat, hydro and security. However, subsequent to the issuance of the application, it appears that the Respondent made adequate arrangements with respect to these items.

13 A representative of the Respondent, Mr. Santaguida, raised a number of allegations that there are environmental issues affecting the Oakdale Premises. Counsel to the Respondent takes the position that, in the event that the Oakdale Premises have any environmental issues, Mr. Santaguida will be causing the Respondent and the other borrowers to commence proceedings against BDC.

14 Section 101 of the *CJA* and s. 243 of the *BIA* provide that the court may appoint a receiver if it considers it to be just or convenient to do so.

15 Counsel to BDC submits that a receiver should be appointed for the following reasons:

> (a) the credit agreement is in default;
>
> (b) the indebtedness is not in dispute;
>
> (c) there has been a loss of confidence in management and the debtor has shown a flagrant disregard for the secured position of BDC in view of the continued accrual of interest; and
>
> (d) the Respondent is merely a holding company and has no other assets, lines of business or any reasonable prospects for future solvency.

16 Counsel to BDC also takes the position that the court should not interfere with the rights derived by private contract and, in this case, the mortgage provides BDC with the ability to seek the appointment of a court-appointed receiver. Counsel contends that, as the Respondent's default has not been cured, it is unjust to deny BDC the remedy of a court administration (See *Bank of Montreal v. Appcon Ltd.* (1981), 37 C.B.R. (N.S.) 281 (Ont. H.C.), at 286; and *United Savings Credit Union v. F & R Brokers Inc.*, 2003 BCSC 640 (B.C. S.C. [In Chambers]).)

17 In addition, counsel referenced *Textron Financial Canada Ltd. v. Chetwynd Motels Ltd.*, 2010 BCSC 477 (B.C. S.C. [In Chambers]) at para. 75 where it is stated:

> The parties in this case stipulated in their contracts that the plaintiff would be entitled to appoint a receiver or to apply for a court-appointed receiver in the event of default. The relief sought by the plaintiff is not, therefore, extraordinary.

18 Finally, counsel submits that the appointment of a receiver is justified in order to protect to stakeholders and that it is the optimal enforcement mechanism in this case.

19 Counsel for the Respondent contends that there is no basis for the appointment of a receiver and that there are other ordinary legal remedies available that the Applicant could pursue. The Respondent also contends that there is no evidence that the Oakdale Premises are in jeopardy and that urgency has not been demonstrated. Counsel contends that there is no evidence to suggest that the appointment of a receiver is necessary without the court's intervention. Counsel further submits that the court should not intervene in the circumstances by giving the extraordinary remedy of appointing a receiver.

20 In argument, counsel to the Respondent indicated that the debtor does intend to take proceedings against BDC and that the principal has a limited guarantee involved. In these circumstances, counsel submits that BDC should not get the additional protection of having a court-appointed receiver.

21 Having considered the positions put forth by both sides, it seems to me that the appointment of a receiver, in this case, is justified. There has been a default. There is a contractual remedy provided for in the mortgage that contemplates the appointment of a receiver. As such, the relief cannot be seen to be extraordinary in nature. The Respondent has been in default for a considerable period of time. Further, the lack of an operating business has persuaded me that there is no prejudice to the debtor that is directly related to the appointment. The submissions of counsel (as to BDC as set out at [15] - [18]) in this respect, are persuasive.

22 The Receiver will, in all likelihood, be seeking directions from the court on a periodic basis. The Respondent can raise appropriate issues in respect of the receivership on the return of such motions.

23 The application is granted and the Fuller Landau Group Inc. is appointed Receiver.

Application granted.

End of Document

Tab 18

SUPERIOR COURT OF JUSTICE

COUNSEL SLIP / ENDORSEMENT

COURT FILE NO.: CV-23-00705869-00CL **DATE:** October 18, 2023

NO. ON LIST: 1

TITLE OF PROCEEDING: RBC V.TEN 4 SYSTEM LTD et. al

BEFORE JUSTICE: Osborne

PARTICIPANT INFORMATION

For Plaintiff, Applicant, Moving Party, Crown:

Name of Person Appearing	Name of Party	Contact Info
Doug Smith	RBC	dsmith@blg.com
Roger Jaipargas	RBC	rjaipargas@blg.com

For Defendant, Respondent, Responding Party, Defence:

Name of Person Appearing	Name of Party	Contact Info
Manjit Singh	TEN 4 SYSTEM LTD	MSingh@MSinghLaw.ca

ENDORSEMENT OF JUSTICE OSBORNE:

Chronology

1. The Applicant, RBC, seeks an order appointing msi Spergel Inc. as receiver over the assets and properties of the Respondents/Debtors Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc. pursuant to section 243(1) of the *BIA* and section 101 of the *CJA*.

2. The full Application Record was originally served September 13, 2023. At the first return date of September 20, 2023, I scheduled the hearing of the Application on the merits for October 11, 2023 at the request of the Respondents, Debtors, to give them their requested additional opportunity to fully respond and to file responding materials. I imposed a timetable that required the delivery of responding materials by October 2.

3. The Application was heard on the merits as scheduled on October 11, 2023.

4. While the matter was under reserve, counsel for the Respondents wrote to the Court unilaterally to advise that a funding commitment had been obtained. The Applicant objected to the unilateral communication, but requested a short case conference before the Court to address the matter. That case conference proceeded today.

5. Just prior to the case conference, the Respondents filed supplementary materials including, as discussed below, the late-breaking commitment referred to above.

6. The Applicant maintains its position that the appointment of a receiver is appropriate. The Respondent urges the Court to consider alternatives as further described below.

The Test for the Appointment of a Receiver

7. The test for the appointment of a receiver pursuant to section 243 of the *BIA* or section 101 of the *CJA* is not in dispute. Is it just or convenient to do so?

8. In making a determination about whether it is, in the circumstances of a particular case, just or convenient to appoint a receiver, the Court must have regard to all of the circumstances, but in particular the nature of the property and the rights and interests of all parties in relation thereto. These include the rights of the secured creditor pursuant to its security: *Bank of Nova Scotia v. Freure Village on the Clair Creek*, 1996 O.J. No. 5088, 1996 CanLII 8258.

9. Where the rights of the secured creditor include, pursuant to the terms of its security, the right to seek the appointment of a receiver, the burden on the applicant is lessened: while the appointment of a receiver is generally an extraordinary equitable remedy, the courts do not so regard the nature of the remedy where the relevant security permits the appointment and as a result, the applicant is merely seeking to enforce a term of an agreement already made by both parties: *Elleway Acquisitions Ltd. v. Cruise Professionals Ltd.,* 2013 ONSC 6866 at para. 27. However, the presence or lack of such a contractual entitlement is not determinative of the issue.

10. The Courts have considered numerous factors which have been historically taken into account in the determination of whether it is appropriate to appoint a receiver and which I have considered in this case:

    a. whether irreparable harm might be caused if no order is made, although as stated above, it is not essential for a creditor to establish irreparable harm if a receiver is not appointed where the appointment is authorized by the security documentation;

    b. the risk to the security holder taking into consideration the size of the debtor's equity in the assets and the need for protection or safeguarding of assets while litigation takes place;

c. the nature of the property;

d. the apprehended or actual waste of the debtor's assets;

e. the preservation and protection of the property pending judicial resolution;

f. the balance of convenience to the parties;

g. the fact that the creditor has a right to appointment under the loan documentation;

h. the enforcement of rights under a security instrument where the security-holder encounters or expects to encounter difficulties with the debtor;

i. the principle that the appointment of a receiver should be granted cautiously;

j. the consideration of whether a court appointment is necessary to enable the receiver to carry out its duties efficiently;

k. the effect of the order upon the parties;

l. the conduct of the parties;

m. the length of time that a receiver may be in place;

n. the cost to the parties;

o. the likelihood of maximizing return to the parties; and

p. the goal of facilitating the duties of the receiver.

See: *Canadian Equipment Finance and Leasing Inc. v. The Hypoint Company Limited*, 2022 ONSC 6186, and *Maple Trade Finance Inc. v. CY Oriental Holdings Ltd*., 2009 BCSC 1527 at para. 25, citing *Bennett on Receivership*, 2nd ed. (Toronto, Carswell, 1999).

11. How are these factors to be applied? The British Columbia Supreme Court put it, I think, correctly: "these factors are not a checklist but a collection of considerations to be viewed holistically in an assessment as to whether, in all the circumstances, the appointment of a receiver is just or convenient: *Pandion Mine Finance Fund LP v. Otso Gold Corp*., 2022 BCSC 136 at para. 54).

12. The issue is whether a receiver should be appointed in the circumstances of this case.

The Facts and Application of the Relevant Factors

13. Many, and indeed almost all, of the material facts are not in dispute. The Applicant relies on the Affidavit of Tro DerBedrossian sworn September 12, 2023 together with Exhibits thereto, and the Reply affidavit sworn October 4, 2023 together with Exhibits thereto.

14. Defined terms in this Endorsement have the meaning given to them in the Application materials unless otherwise stated.

15. Ten 4 is an Alberta Corporation extra provincially registered in Ontario, primarily engaged in the business of shipping, transportation and logistics. The director of Ten 4 is Nasir Mahmood. The other two numbered company Respondents are essentially holding companies that hold title to real estate properties.

16. RBC made available to the Debtors credit facilities. Those included an RBC visa business card agreement. The obligations of Ten 4 to RBC were guaranteed by each of the two numbered company Respondents and by Mr. Mahmood. His guarantee is for a maximum amount of $2.5 million plus interest.

17. As security for the advances thereunder, the parties entered into three general security agreements; one from each of the Debtors. Each GSA gives RBC the contractual right to appoint a receiver. The guarantees were entered into also. Mortgages registered on title to real property and assignments of rents and insurance were also given.

18. The Debtors are in default of their obligations. RBC has delivered demands and section 244 Notices of Intention. The defaults are material and have not been waived. As of August 31, 2023, Ten 4 was indebted to RBC in amounts as set out in the Application materials of approximately CDN $5,200,000 and USD $453,000. The numbered company Respondents are indebted in the approximate amounts of CDN $4.2 million and CDN $5.3 million respectively.

19. The concern of RBC has been exacerbated by the fact, of which it has just recently learned, that a writ of execution has been filed against Ten 4 on August 10, 2023 in respect of a judgment in favour of BVD Capital Corporation in the amount of $1,099,763.44, the enforcement of which would erode the RBC security.

20. In addition, the Respondents have committed covenant defaults in that, for example, Ten 4 is required to report to the bank on a monthly and quarterly basis with respect to aged accounts receivable and quarterly financial statements, neither of which were received on either of May 15, 2023 or August 14, 2023, as required. In addition, monthly reporting of borrowing base certificate, aged accounts receivables, payables in priority payables was not provided on September 30 as required.

21. RBC has therefore demanded payment of the obligations which are clearly (and admitted to be) repayable on demand according to their contractual terms. As stated above, demands and section 244 Notices were delivered, all in August, 2023. No repayment has been made by any of the Debtors or the guarantors.

22. RBC's concern, said in its materials to have been contributed to by unusual and suspicious account activity, was exacerbated by both the writ of action referred to above and also the non-payment of property taxes as a result of all of which the bank has significant concerns with respect to the business and stability of the Debtors and wishes to ensure that a Receiver is appointed to secure the collateral for the benefit of all stakeholders.

23. The Respondents rely on the Affidavit of Mr. Mahmood affirmed October 2, 2023, together with Exhibits thereto, the Supplementary Affidavit sworn October 10, 2023 together with Exhibits thereto, the Further Supplementary Affidavit of October 17, 2023 and the Affidavit of Abdul Ishaq sworn October 17, 2023 together with the one Exhibit thereto. I pause to observe that the last two affidavits were filed yesterday, without leave, in advance of the case conference today.

24. The Respondents advance the position that the triggering event for RBC was the fact that one of the primary customers of Ten 4, Northwest Carrier Ltd., paid certain outstanding accounts in the amount of CDN $1.1 million by cheque, and certain of those cheques were returned as NSF. All of this resulted in a trickle-down effect on the liquidity of the Respondents and their inability to pay RBC. The Respondents emphasized that this event was out of their control.

25. In addition, the Respondents say that Northwest subsequently paid approximately two thirds of the amount owing (CAD $720,840.57) but the balance remains outstanding. RBC submits and the banking records show that the relationship and transactions with Northwest are more complicated than indicated. Numerous different cheques from two different entities were sent. The returned cheques were effectively replaced on August 9 and 10, 2023, with the deposit to accounts of Ten 4 of a further series of 69 checks, totaling over $3,500,000 in the aggregate from two other entities that RBC believes to be connected to the Respondents or their principal. All of those 69 cheques were also all subsequently returned NSF between August 11 and August 14, 2023. This resulted in the overdraft position referred to above.

26. With respect to property taxes, the Respondents asserted, and subsequently filed supplementary materials confirm, that real property taxes had in fact been paid.

27. The Respondents stated that the accountant for Ten 4 was out of the country between July and September for vacation with the result that the company could not provide its August and September reports to RBC. In my view, it is not an answer to a contractual commitment to provide formal reports on the agreed-upon terms and by the agreed-upon deadlines, to say that an accountant was on vacation for some three months.

28. Concerningly to RBC, however, the Respondents disclosed for the first time in their responding materials filed just prior to the hearing of the Application that they are currently in the process of removing a charge registered by a non-party (Pride Truck Sales Ltd.) but encumbering the property of the Respondents in the amount of $6 million.

29. The Respondents maintain, however, that the $6 million charge against title to the property was registered in error, and that in fact it was supposed to be registered in a maximum amount of $3 million and moreover, the debt outstanding that is secured by the charge totals significantly less than that, and in any event, counsel for the Respondents advises that the Respondents are "in the process of settling that dispute". There is, however, no evidence in the Record beyond the admitted fact of the $6 million charge.

30. Finally, the Respondents submitted an appraisal report of the Property dated October 10, 2023 reflecting a current value of $17,140,000, with the result, the Respondents submit, that the bank is not at risk since there is ample equity in the property to pay out all indebtedness to RBC, even if that became necessary.

31. At the hearing of this Application on October 11, 2023, counsel for the Respondents advised that while the Respondents had no firm commitment for refinancing or a buyout, they were in active negotiations with third parties. No commitment was in the record.

32. As noted above, following the hearing, counsel to the Respondents wrote to the Court unilaterally to advise that commitment had in fact been obtained, resulting in the case conference today at the request of the Applicant. Also as noted above, further affidavit evidence was filed without leave yesterday, but I have considered it nonetheless.

33. As part of that evidence is what was represented by the Respondents to be a commitment letter which would fully satisfy the obligations to RBC. That commitment letter, dated October 12, 2023, is attached as Exhibit "A" to the affidavit of Abdul Ishaq.

34. However, and as submitted by counsel for the Applicant, the commitment letter is problematic in a number of ways:

    a. it contemplates first mortgage financing for the numbered company Respondents over the Property;

    b. the commitment, from Toronto Wire Solutions Corp., contemplates the numbered company Respondents as borrowers and a number of other parties, including Nasir Mahmood, to be joint and several guarantors;

    c. it contemplates a loan amount of $23,600,000 "in favour of [existing properties]", interest at 9% per annum payable monthly on account of interest-only in the amount of $177,000 per month or a one year term;

    d. it contemplates an advance date of January 16, 2024; and

    e. it includes various express conditions precedent to which the obligation to advance funds are expressly subject, including appraisals, inspections, surveys, "up-to-date Environmental Reports, satisfactory to the lender in its sole discretion" and other conditions.

35. In short, and having considered the commitment letter notwithstanding the manner and timing of its filing, it does not get the Respondents where they need to be. The commitment is highly conditional, and even if the conditions were met, it does not provide for funding until January next year. It simply does not answer the problem, let alone do so in any timely way.

36. I am satisfied that, considering all of the relevant factors in the circumstances of this case, that the appointment of a receiver is appropriate. Not only have the parties contractually agreed the appointment of a receiver in an event of default, which has clearly occurred here, but I am satisfied that it would otherwise be appropriate in any event.

37. The indebtedness is outstanding and payments are not being made. A receivership will provide for stability, transparency and orderly conduct under the supervision of a court-appointed officer that is necessary here. It may well be that the receiver negotiates a firm, unconditional and more expedient source of alternative funds, either with the proposed lender referred to in the commitment letter discussed above, or any other investor or lender. I would expect the receiver to investigate and explore all available options.

38. If those options bear fruit in the sense that there is a binding and unconditional commitment that will generate funds sufficient to pay out RBC inclusive of all indebtedness, fees, interest and costs, I would expect that the receivership could be terminated relatively quickly. But unless and until that occurs, a receivership is appropriate here.

39. There is considerable uncertainty about the status and amount of possibly competing claims. There is uncertainty about whether the value of the Property, even if accurate as reflected in the appraisal report, would be sufficient to pay out all claims. The fact that the mortgage is currently registered in the amount of $6 million (in addition to the security of RBC) suggests that there may not be a material surplus, if indeed there is any at all.

40. A receivership will allow for the orderly exploration, investigation and analysis of those claims, and the available assets, all in circumstances where potential chaos of competing claims, and the ensuing expensive litigation, can be avoided or minimized. It will also allow for the avoidance of further chaos and an analysis of the receivables and payables of the Debtors.

41. Counsel for the Respondents urges that the Court considered creative or more flexible relief, such as a standstill agreement and an order imposing terms that no further encumbrances could be placed on the Property of the Debtors without consent or order of the Court, and that the indebtedness to Pride secured by the mortgage is in question referred to above in the aggregate sum of $6 million, be limited to an amount of $2 million in the aggregate.

42. Even if I had the jurisdiction to impose such terms, which I am far from certain I do, I would decline to do so in the circumstances of this case. Such would amount to rewriting of the agreements between the Debtors and counterparties which are not represented here and in which in my view would not be appropriate in any event.

43. For all of these reasons, I am satisfied that the appointment of a receiver is not only just or convenient, as is the test, but indeed that it is just *and* convenient in the circumstances.

44. Order to go in the form signed by me today which is effective immediately and without the necessity of issuing and entering.

Court File No. CV-23-00705869-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE HONOURABLE · MR.	)	TUESDAY, THE 18th
	)	
JUSTICE OSBORNE	)	DAY OF OCTOBER, 2023

ROYAL BANK OF CANADA

Applicant

- and -

TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.

Respondents

ORDER
(Appointment Order)

THIS APPLICATION made by the Applicant for an Order pursuant to section 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "**BIA**") and section 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended (the "**CJA**") appointing msi Spergel inc. as receiver (the "**Receiver**") without security, of all of the assets, undertakings and properties of Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc. (collectively, the "**Debtors**") acquired for, or used in relation to a business carried on by the Debtors, was heard this day by Zoom videoconference.

ON READING the affidavit of Tro DerBedrossian sworn September 12, 2023 and the exhibits thereto and on hearing the submissions of counsel for Royal Bank of Canada and no one appearing for any other parties, although duly served, as appears from the affidavit of service of Mariela Adriana Gasparini sworn September ·, 2023 and on reading the consent of msi Spergel inc. to act as the Receiver.

SERVICE

1. **THIS COURT ORDERS** that the time for service of the Notice of Application and the Application Record is hereby abridged and validated so that this application is properly returnable today and hereby dispenses with further service thereof.

APPOINTMENT

2. **THIS COURT ORDERS** that pursuant to section 243(1) of the BIA and section 101 of the CJA, msi Spergel inc. is hereby appointed Receiver, without security, of all of the assets, undertakings and properties of the Debtors acquired for, or used in relation to a business carried on by the Debtors, including and without limiting the generally of the foregoing, the lands and premises described in Schedule “A” hereto, and all proceeds thereof (the "**Property**").

RECEIVER’S POWERS

3. **THIS COURT ORDERS** that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

(a) to take possession of and exercise control over the Property and any and all proceeds, receipts and disbursements arising out of or from the Property;

(b) to receive, preserve, and protect the Property, or any part or parts thereof, including, but not limited to, the changing of locks and security codes, the relocating of Property to safeguard it, the engaging of independent security personnel, the taking of physical inventories and the placement of such insurance coverage as may be necessary or desirable;

(c) to manage, operate, and carry on the business of the Debtors, including the powers to enter into any agreements, incur any obligations in the ordinary course of business, cease to carry on all or any part of the business, or cease to perform any contracts of the Debtors;

(d) to engage consultants, appraisers, agents, experts, auditors, accountants, managers, counsel and such other persons from time to time and on whatever basis, including on a temporary basis, to assist with the exercise of the Receiver's powers and duties, including without limitation those conferred by this Order;

(e) to purchase or lease such machinery, equipment, inventories, supplies, premises or other assets to continue the business of the Debtors or any part or parts thereof;

(f) to receive and collect all monies and accounts now owed or hereafter owing to the Debtors and to exercise all remedies of the Debtors in collecting such monies, including, without limitation, to enforce any security held by the Debtors;

(g) to settle, extend or compromise any indebtedness owing to the Debtors;

(h) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtors, for any purpose pursuant to this Order;

(i) to initiate, prosecute and continue the prosecution of any and all proceedings and to defend all proceedings now pending or hereafter instituted with respect to the Debtors, the Property or the Receiver, and to settle or compromise any such proceedings. The authority hereby conveyed shall extend to such appeals or applications for judicial review in respect of any order or judgment pronounced in any such proceeding;

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate;

(k) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business,

(i) without the approval of this Court in respect of any transaction not exceeding $250,000, provided that the aggregate consideration for all such transactions does not exceed $500,000; and

(ii) with the approval of this Court in respect of any transaction in which the purchase price or the aggregate purchase price exceeds the applicable amount set out in the preceding clause;

and in each such case notice under subsection 63(4) of the Ontario *Personal Property Security Act*, or section 31 of the Ontario *Mortgages Act*, as the case may be, shall not be required;

(l) to apply for any vesting order or other orders necessary to convey the Property or any part or parts thereof to a purchaser or purchasers thereof, free and clear of any liens or encumbrances affecting such Property;

(m) to report to, meet with and discuss with such affected Persons (as defined below) as the Receiver deems appropriate on all matters relating to the Property and the receivership, and to share information, subject to such terms as to confidentiality as the Receiver deems advisable;

(n) to register a copy of this Order and any other Orders in respect of the Property against title to any of the Property;

(o) to make an assignment into bankruptcy on behalf of any of the Debtors;

(p) to apply for any permits, licences, approvals or permissions as may be required by any governmental authority and any renewals thereof for and on behalf of and, if thought desirable by the Receiver, in the name of the Debtors;

(q) to enter into agreements with any trustee in bankruptcy appointed in respect of the Debtors, including, without limiting the generality of the foregoing, the ability to enter into occupation agreements for any property owned or leased by the Debtors;

(r) to exercise any shareholder, partnership, joint venture or other rights which the Debtors may have; and

(s) to take any steps reasonably incidental to the exercise of these powers or the performance of any statutory obligations.

and in each case where the Receiver takes any such actions or steps, it shall be exclusively authorized and empowered to do so, to the exclusion of all other Persons (as defined below), including the Debtors, and without interference from any other Person.

DUTY TO PROVIDE ACCESS AND CO-OPERATION TO THE RECEIVER

4. **THIS COURT ORDERS** that (i) the Debtors, (ii) all of its current and former directors, officers, employees, agents, accountants, legal counsel and shareholders, and all other persons acting on its instructions or behalf, and (iii) all other individuals, firms, corporations, governmental bodies or agencies, or other entities having notice of this Order (all of the foregoing, collectively, being "**Persons**" and each being a "**Person**") shall forthwith advise the Receiver of the existence of any Property in such Person's possession or control, shall grant immediate and continued access to the Property to the Receiver, and shall deliver all such Property to the Receiver upon the Receiver's request.

5. **THIS COURT ORDERS** that all Persons shall forthwith advise the Receiver of the existence of any books, documents, securities, contracts, orders, corporate and accounting records, and any other papers, records and information of any kind related to the business or affairs of the Debtors, and any computer programs, computer tapes, computer disks, or other data storage media containing any such information (the foregoing, collectively, the "**Records**") in that Person's possession or control, and shall provide to the Receiver or permit the Receiver to make, retain and take away copies thereof and grant to the Receiver unfettered access to and use of accounting, computer, software and physical facilities relating thereto, provided however that

nothing in this paragraph 5 or in paragraph 6 of this Order shall require the delivery of Records, or the granting of access to Records, which may not be disclosed or provided to the Receiver due to the privilege attaching to solicitor-client communication or due to statutory provisions prohibiting such disclosure.

6. **THIS COURT ORDERS** that if any Records are stored or otherwise contained on a computer or other electronic system of information storage, whether by independent service provider or otherwise, all Persons in possession or control of such Records shall forthwith give unfettered access to the Receiver for the purpose of allowing the Receiver to recover and fully copy all of the information contained therein whether by way of printing the information onto paper or making copies of computer disks or such other manner of retrieving and copying the information as the Receiver in its discretion deems expedient, and shall not alter, erase or destroy any Records without the prior written consent of the Receiver. Further, for the purposes of this paragraph, all Persons shall provide the Receiver with all such assistance in gaining immediate access to the information in the Records as the Receiver may in its discretion require including providing the Receiver with instructions on the use of any computer or other system and providing the Receiver with any and all access codes, account names and account numbers that may be required to gain access to the information.

7. **THIS COURT ORDERS** that the Receiver shall provide each of the relevant landlords with notice of the Receiver's intention to remove any fixtures from any leased premises at least seven (7) days prior to the date of the intended removal. The relevant landlord shall be entitled to have a representative present in the leased premises to observe such removal and, if the landlord disputes the Receiver's entitlement to remove any such fixture under the provisions of the lease, such fixture shall remain on the premises and shall be dealt with as agreed between any applicable secured creditors, such landlord and the Receiver, or by further Order of this Court upon application by the Receiver on at least two (2) days notice to such landlord and any such secured creditors.

NO PROCEEDINGS AGAINST THE RECEIVER

8. **THIS COURT ORDERS** that no proceeding or enforcement process in any court or tribunal (each, a "**Proceeding**"), shall be commenced or continued against the Receiver except with the written consent of the Receiver or with leave of this Court.

NO PROCEEDINGS AGAINST THE DEBTORS OR THE PROPERTY

9. **THIS COURT ORDERS** that no Proceeding against or in respect of the Debtors or the Property shall be commenced or continued except with the written consent of the Receiver or with leave of this Court and any and all Proceedings currently under way against or in respect of the Debtors or the Property are hereby stayed and suspended pending further Order of this Court.

NO EXERCISE OF RIGHTS OR REMEDIES

10. **THIS COURT ORDERS** that all rights and remedies against the Debtors, the Receiver, or affecting the Property, are hereby stayed and suspended except with the written consent of the Receiver or leave of this Court, provided however that this stay and suspension does not apply in respect of any "eligible financial contract" as defined in the BIA, and further provided that nothing in this paragraph shall (i) empower the Receiver or the Debtors to carry on any business which the Debtors are not lawfully entitled to carry on, (ii) exempt the Receiver or the Debtors from compliance with statutory or regulatory provisions relating to health, safety or the environment, (iii) prevent the filing of any registration to preserve or perfect a security interest, or (iv) prevent the registration of a claim for lien.

NO INTERFERENCE WITH THE RECEIVER

11. **THIS COURT ORDERS** that no Person shall discontinue, fail to honour, alter, interfere with, repudiate, terminate or cease to perform any right, renewal right, contract, agreement, licence or permit in favour of or held by the Debtors, without written consent of the Receiver or leave of this Court.

CONTINUATION OF SERVICES

12. **THIS COURT ORDERS** that all Persons having oral or written agreements with the Debtors or statutory or regulatory mandates for the supply of goods and/or services, including without limitation, all computer software, communication and other data services, centralized banking services, payroll services, insurance, transportation services, utility or other services to

the Debtors are hereby restrained until further Order of this Court from discontinuing, altering, interfering with or terminating the supply of such goods or services as may be required by the Receiver, and that the Receiver shall be entitled to the continued use of the Debtor's current telephone numbers, facsimile numbers, internet addresses and domain names, provided in each case that the normal prices or charges for all such goods or services received after the date of this Order are paid by the Receiver in accordance with normal payment practices of the Debtors or such other practices as may be agreed upon by the supplier or service provider and the Receiver, or as may be ordered by this Court.

RECEIVER TO HOLD FUNDS

13. **THIS COURT ORDERS** that all funds, monies, cheques, instruments, and other forms of payments received or collected by the Receiver from and after the making of this Order from any source whatsoever, including without limitation the sale of all or any of the Property and the collection of any accounts receivable in whole or in part, whether in existence on the date of this Order or hereafter coming into existence, shall be deposited into one or more new accounts to be opened by the Receiver (the "**Post Receivership Accounts**") and the monies standing to the credit of such Post Receivership Accounts from time to time, net of any disbursements provided for herein, shall be held by the Receiver to be paid in accordance with the terms of this Order or any further Order of this Court.

EMPLOYEES

14. **THIS COURT ORDERS** that all employees of the Debtors shall remain the employees of the Debtors until such time as the Receiver, on the Debtor's behalf, may terminate the employment of such employees. The Receiver shall not be liable for any employee-related liabilities, including any successor employer liabilities as provided for in section 14.06(1.2) of the BIA, other than such amounts as the Receiver may specifically agree in writing to pay, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*.

PIPEDA

15. **THIS COURT ORDERS** that, pursuant to clause 7(3)(c) of the Canada *Personal Information Protection and Electronic Documents Act*, the Receiver shall disclose personal

information of identifiable individuals to prospective purchasers or bidders for the Property and to their advisors, but only to the extent desirable or required to negotiate and attempt to complete one or more sales of the Property (each, a "**Sale**"). Each prospective purchaser or bidder to whom such personal information is disclosed shall maintain and protect the privacy of such information and limit the use of such information to its evaluation of the Sale, and if it does not complete a Sale, shall return all such information to the Receiver, or in the alternative destroy all such information. The purchaser of any Property shall be entitled to continue to use the personal information provided to it, and related to the Property purchased, in a manner which is in all material respects identical to the prior use of such information by the Debtors, and shall return all other personal information to the Receiver, or ensure that all other personal information is destroyed.

LIMITATION ON ENVIRONMENTAL LIABILITIES

16. **THIS COURT ORDERS** that nothing herein contained shall require the Receiver to occupy or to take control, care, charge, possession or management (separately and/or collectively, "**Possession**") of any of the Property that might be environmentally contaminated, might be a pollutant or a contaminant, or might cause or contribute to a spill, discharge, release or deposit of a substance contrary to any federal, provincial or other law respecting the protection, conservation, enhancement, remediation or rehabilitation of the environment or relating to the disposal of waste or other contamination including, without limitation, the *Canadian Environmental Protection Act*, the Ontario *Environmental Protection Act*, the *Ontario Water Resources Act*, or the Ontario *Occupational Health and Safety Act* and regulations thereunder (the "**Environmental Legislation**"), provided however that nothing herein shall exempt the Receiver from any duty to report or make disclosure imposed by applicable Environmental Legislation. The Receiver shall not, as a result of this Order or anything done in pursuance of the Receiver's duties and powers under this Order, be deemed to be in Possession of any of the Property within the meaning of any Environmental Legislation, unless it is actually in possession.

LIMITATION ON THE RECEIVER'S LIABILITY

17. **THIS COURT ORDERS** that the Receiver shall incur no liability or obligation as a result of its appointment or the carrying out the provisions of this Order, save and except for any gross negligence or wilful misconduct on its part, or in respect of its obligations under sections 81.4(5) or 81.6(3) of the BIA or under the *Wage Earner Protection Program Act*. Nothing in this Order shall derogate from the protections afforded the Receiver by section 14.06 of the BIA or by any other applicable legislation.

RECEIVER'S ACCOUNTS

18. **THIS COURT ORDERS** that the Receiver and counsel to the Receiver shall be paid their reasonable fees and disbursements, in each case at their standard rates and charges unless otherwise ordered by the Court on the passing of accounts, and that the Receiver and counsel to the Receiver shall be entitled to and are hereby granted a charge (the "**Receiver's Charge**") on the Property, as security for such fees and disbursements, both before and after the making of this Order in respect of these proceedings, and that the Receiver's Charge shall form a first charge on the Property in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subject to sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

19. **THIS COURT ORDERS** that the Receiver and its legal counsel shall pass its accounts from time to time, and for this purpose the accounts of the Receiver and its legal counsel are hereby referred to a judge of the Commercial List of the Ontario Superior Court of Justice.

20. **THIS COURT ORDERS** that prior to the passing of its accounts, the Receiver shall be at liberty from time to time to apply reasonable amounts, out of the monies in its hands, against its fees and disbursements, including legal fees and disbursements, incurred at the standard rates and charges of the Receiver or its counsel, and such amounts shall constitute advances against its remuneration and disbursements when and as approved by this Court.

FUNDING OF THE RECEIVERSHIP

21. **THIS COURT ORDERS** that the Receiver be at liberty and it is hereby empowered to borrow by way of a revolving credit or otherwise, such monies from time to time as it may

consider necessary or desirable, provided that the outstanding principal amount does not exceed $500,000 (or such greater amount as this Court may by further Order authorize) at any time, at such rate or rates of interest as it deems advisable for such period or periods of time as it may arrange, for the purpose of funding the exercise of the powers and duties conferred upon the Receiver by this Order, including interim expenditures. The whole of the Property shall be and is hereby charged by way of a fixed and specific charge (the "**Receiver's Borrowings Charge**") as security for the payment of the monies borrowed, together with interest and charges thereon, in priority to all security interests, trusts, liens, charges and encumbrances, statutory or otherwise, in favour of any Person, but subordinate in priority to the Receiver's Charge and the charges as set out in sections 14.06(7), 81.4(4), and 81.6(2) of the BIA.

22. **THIS COURT ORDERS** that neither the Receiver's Borrowings Charge nor any other security granted by the Receiver in connection with its borrowings under this Order shall be enforced without leave of this Court.

23. **THIS COURT ORDERS** that the Receiver is at liberty and authorized to issue certificates substantially in the form annexed as Schedule "B" hereto (the "**Receiver's Certificates**") for any amount borrowed by it pursuant to this Order.

24. **THIS COURT ORDERS** that the monies from time to time borrowed by the Receiver pursuant to this Order or any further order of this Court and any and all Receiver's Certificates evidencing the same or any part thereof shall rank on a *pari passu* basis, unless otherwise agreed to by the holders of any prior issued Receiver's Certificates.

SERVICE AND NOTICE

25. **THIS COURT ORDERS** that the E-Service Protocol of the Commercial List (the "**Protocol**") is approved and adopted by reference herein and, in this proceeding, the service of documents made in accordance with the Protocol (which can be found on the Commercial List website at http://www.ontariocourts.ca/scj/practice/practice-directions/toronto/e-service-protocol/) shall be valid and effective service. Subject to Rule 17.05 this Order shall constitute an order for substituted service pursuant to Rule 16.04 of the Rules of Civil Procedure. Subject to Rule 3.01(d) of the Rules of Civil Procedure and paragraph 21 of the Protocol, service of documents in accordance with the Protocol will be effective on transmission. This Court further

orders that a Case Website shall be established in accordance with the Protocol with the following URL ‘https://www.spergelcorporate.ca/engagements’.

26. **THIS COURT ORDERS** that if the service or distribution of documents in accordance with the Protocol is not practicable, the Receiver is at liberty to serve or distribute this Order, any other materials and orders in these proceedings, any notices or other correspondence, by forwarding true copies thereof by prepaid ordinary mail, courier, personal delivery or facsimile transmission to the Debtor's creditors or other interested parties at their respective addresses as last shown on the records of the Debtors and that any such service or distribution by courier, personal delivery or facsimile transmission shall be deemed to be received on the next business day following the date of forwarding thereof, or if sent by ordinary mail, on the third business day after mailing.

GENERAL

27. **THIS COURT ORDERS** that the Receiver may from time to time apply to this Court for advice and directions in the discharge of its powers and duties hereunder.

28. **THIS COURT ORDERS** that nothing in this Order shall prevent the Receiver from acting as a trustee in bankruptcy of the Debtors.

29. **THIS COURT HEREBY REQUESTS** the aid and recognition of any court, tribunal, regulatory or administrative body having jurisdiction in Canada or in the United States to give effect to this Order and to assist the Receiver and its agents in carrying out the terms of this Order. All courts, tribunals, regulatory and administrative bodies are hereby respectfully requested to make such orders and to provide such assistance to the Receiver, as an officer of this Court, as may be necessary or desirable to give effect to this Order or to assist the Receiver and its agents in carrying out the terms of this Order.

30. **THIS COURT ORDERS** that the Receiver be at liberty and is hereby authorized and empowered to apply to any court, tribunal, regulatory or administrative body, wherever located, for the recognition of this Order and for assistance in carrying out the terms of this Order, and that the Receiver is authorized and empowered to act as a representative in respect of the within

proceedings for the purpose of having these proceedings recognized in a jurisdiction outside Canada.

31. **THIS COURT ORDERS** that the Applicant shall have its costs of this Application, up to and including entry and service of this Order, provided for by the terms of the Applicant's security or, if not so provided by the Applicant's security, then on a substantial indemnity basis to be paid by the Receiver from the Debtors' estate with such priority and at such time as this Court may determine.

32. **THIS COURT ORDERS** that any interested party may apply to this Court to vary or amend this Order on not less than seven (7) days' notice to the Receiver and to any other party likely to be affected by the order sought or upon such other notice, if any, as this Court may order.

33. **THIS COURT ORDERS** that this Order and all of its provisions shall take effect as of 12:01a.m on the date of this Order and shall be immediately enforceable without the need for further entry or filing.

_____

SCHEDULE "A"

Cedar Creek Rd, Ayr, Ontario

PIN 03848-0355 (LT)
PT LT 28, CON 11, PT 1, 58R15460; NORTH DUMFRIES.

Registered Owner: 1000043321 Ontario Inc.

2396 Cedar Creek Rd, Ayr, Ontario

PIN 03848-0068 (LT)
PT LT 28 CON 11 NORTH DUMFRIES AS IN WS546774; NORTH DUMFRIES

Registered Owner: 1000122550 Ontario Inc.

SCHEDULE "B"

RECEIVER CERTIFICATE

CERTIFICATE NO. _____

AMOUNT $_____

1. THIS IS TO CERTIFY that msi Spergel inc., the receiver (the "**Receiver**") of the assets, undertakings and properties of acquired for, or used in relation to a business carried on Ten 4 System Ltd., 1000043321 Ontario Inc. and 1000122550 Ontario Inc. (collectively, the "**Debtors**"), including all proceeds thereof (collectively, the "**Property**") appointed by Order of the Ontario Superior Court of Justice (Commercial List) (the "Court") dated the 20th day of September, 2023 (the "**Order**") made in an action having Court file number __-CL-_____, has received as such Receiver from the holder of this certificate (the "**Lender**") the principal sum of $_____, being part of the total principal sum of $_____ which the Receiver is authorized to borrow under and pursuant to the Order.

2. The principal sum evidenced by this certificate is payable on demand by the Lender with interest thereon calculated and compounded [daily][monthly not in advance on the _____ day of each month] after the date hereof at a notional rate per annum equal to the rate of _____ per cent above the prime commercial lending rate of Bank of _____ from time to time.

3. Such principal sum with interest thereon is, by the terms of the Order, together with the principal sums and interest thereon of all other certificates issued by the Receiver pursuant to the Order or to any further order of the Court, a charge upon the whole of the Property, in priority to the security interests of any other person, but subject to the priority of the charges set out in the Order and in the *Bankruptcy and Insolvency Act*, and the right of the Receiver to indemnify itself out of such Property in respect of its remuneration and expenses.

4. All sums payable in respect of principal and interest under this certificate are payable at the main office of the Lender at Toronto, Ontario.

5. Until all liability in respect of this certificate has been terminated, no certificates creating charges ranking or purporting to rank in priority to this certificate shall be issued by the Receiver

to any person other than the holder of this certificate without the prior written consent of the holder of this certificate.

6. The charge securing this certificate shall operate so as to permit the Receiver to deal with the Property as authorized by the Order and as authorized by any further or other order of the Court.

7. The Receiver does not undertake, and it is not under any personal liability, to pay any sum in respect of which it may issue certificates under the terms of the Order.

DATED the _____ day of _____, 20__.

msi Spergel inc., solely in its capacity as Receiver of the Property, and not in its personal capacity

Per: _____

Name:

Title:

Court File No. CV-23-00705869-00CL

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED; AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

ROYAL BANK OF CANADA	**- and -**	**TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.**
Applicant		**Respondents**

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT TORONTO

ORDER
(Appointment Order)

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide St West
Toronto, Ontario M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas (LSO No. 43275C)
Tel: 416-367-6266
RJaipargas@blg.com

Lawyers for the Applicant

139398450:v6

Court of Appeal File No. COA-23-OM-0304

ROYAL BANK OF CANADA	**- and -**	**TEN 4 SYSTEM LTD., 1000043321 ONTARIO INC. AND 1000122550 ONTARIO INC.**
Respondent		Moving Party

COURT APPEAL FOR ONTARIO

BOOK OF AUTHORITIES

BORDEN LADNER GERVAIS LLP
Bay Adelaide Centre, East Tower
22 Adelaide Street West
Toronto ON M5H 4E3
Tel: 416-367-6000
Fax: 416-367-6749

Roger Jaipargas – LSO No. 43275C
Tel: 416-367-6266
rjaipargas@blg.com

Douglas O. Smith – LSO No. 36915R
Tel: 416.367.6015
Email: dsmith@blg.com

Lawyers for Royal Bank of Canada.