Appeal File No.: C66503
Court File No.: CV-18-00608356-00CL

COURT OF APPEAL FOR ONTARIO

BETWEEN:

BUDUCHNIST CREDIT UNION LIMITED

Applicant
(Respondent in Appeal)

- and -

2321197 ONTARIO INC., CARLO DEMARIA, SANDRA DEMARIA, 2321198 ONTARIO INC. SASI MACH LIMITED, VICAR HOMES LTD. and TRADE CAPITAL FINANCE CORP.

Respondents
(Appellants)

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

BOOK OF AUTHORITIES OF THE RESPONDENT IN APPEAL, BUDUCHNIST CREDIT UNION LIMITED

[Motion to Quash Appeal]

Date: May 24, 2019

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COURT OF APPEAL FOR ONTARIO

CITATION: Business Development Bank of Canada v. Astoria Organic Matters Ltd., 2019 ONCA 269
DATE: 20190408
DOCKET: M50086 (C65512)

Feldman, Paciocco and Zarnett JJ.A.

BETWEEN

Business Development Bank of Canada

Applicant

and

Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Respondents

Melvyn L. Solmon, Frank Bennett and Rajiv Joshi, for the moving party SusGlobal Energy Belleville Ltd.

Steven Graff and Miranda Spence, for the responding party BDO Canada Ltd.

Heard: February 15, 2019

On motion to set aside the orders of Justice David Watt of the Court of Appeal for Ontario, dated December 10, 2018.

Zarnett J.A.:

Introduction

[1] A receiver is appointed under both Canada's *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), and Ontario's *Courts of Justice Act*, R.S.O. 1990, c. C.43 ("*CJA*"). The receivership order contains a "leave to sue provision" under

which the receiver cannot be sued without consent or leave of the court. What appeal route is available to a party who has been denied permission to sue? Is the appeal governed by the *BIA*, which provides for appeals as of right only in some cases, requires leave to appeal in other cases, and sets a short time limit for an appeal or a request for leave to appeal? Or is the appeal governed by the *CJA*, under which final orders may be appealed as of right to this court within a longer time limit than that in the *BIA*?

[2] The moving party SusGlobal Energy Belleville Ltd. ("SusGlobal") wishes to appeal orders of the Superior Court that:

a) denied SusGlobal leave to sue the responding party BDO Canada Ltd. ("BDO") in its capacity as court-appointed receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP; and,

b) denied SusGlobal's request to re-open its original application for leave so that it could file fresh evidence.

[3] On a motion before a single judge of this court (the "chambers judge"), SusGlobal's attempt to appeal was effectively terminated. The basis of the chambers judge's decision was that the *BIA*, not the *CJA*, governed SusGlobal's appeal; the provisions of the *BIA* providing for appeals as of right were not applicable to the appeal; and no grounds for granting leave to appeal existed.

[4] On this motion, SusGlobal challenges the decision of the chambers judge, raising only the issue of the correctness of the conclusion that the applicable appeal route is under the *BIA*, not the *CJA*. It argues that solely the *CJA* is applicable to its appeal.

[5] I would dismiss SusGlobal's motion. The proper appeal route is the *BIA* when the order sought to be appealed was made in reliance on jurisdiction under the *BIA*. That is the case here. The Superior Court dismissed SusGlobal's request to sue the receiver—the dismissal SusGlobal wishes to appeal—in reliance on the leave to sue provision in the receivership order. The court's authority to include that provision in the receivership order flowed by necessary implication from the statutory power to appoint a receiver under s. 243(1) of the *BIA*. I recognize that the *CJA* also provided such authority as part of the statutory power in s. 101 to appoint a receiver. But since authority for the leave to sue provision is found both in the *BIA* and the *CJA*, and since the receiver was appointed under both statutes, the appeal is governed by the *BIA* as a matter of paramountcy.

Background

[6] Business Development Bank of Canada was a secured creditor of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP ("Astoria"). Upon Astoria's insolvency, the Bank applied for an order under s. 243(1) of the *BIA* and s. 101 of the *CJA* appointing BDO as receiver of Astoria. On April 13, 2017,

Hainey J. granted that request. The order appointing BDO as receiver ("the receivership order") provided in relevant part as follows:

> 2. THIS COURT ORDERS that pursuant to section 243(1) of the BIA and section 101 of the CJA, BDO Canada Limited 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 all proceeds thereof (the "Property")...
>
> 3. THIS COURT ORDERS that the Receiver is hereby empowered...
>
> > (l) to sell, convey, transfer, lease or assign the Property or any part or parts thereof out of the ordinary course of business...
>
> 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.

[7] Paragraph 8, which is at the heart of this appeal, is identical to the paragraph of the same number included in the Commercial List of the Superior Court of Justice's Model Receivership Order.

[8] BDO, as court-appointed receiver, sold assets to SusGlobal under an Asset Purchase Agreement dated July 27, 2017. Shortly after closing SusGlobal complained about the amount of raw organic waste accumulated inside one of the facilities it had purchased, and the expenses of about $750,000 it had to incur as a consequence. SusGlobal claimed BDO had breached obligations owed to it and was responsible to compensate SusGlobal for its expenses. BDO denied

responsibility on multiple bases, including the "As is Where is" clause in the Asset Purchase Agreement.

[9] SusGlobal brought an application for permission to sue BDO under the leave to sue provision in para. 8 of the receivership order. On May 17, 2018, McEwen J. dismissed the application, finding that SusGlobal's allegations were not supported by evidence disclosing a *prima facie* case. On November 8, 2018, McEwen J. refused SusGlobal's request to reopen the application to allow SusGlobal to file fresh evidence.

[10] SusGlobal filed appeals from both decisions. Its notices of appeal were timely if the *CJA*, under which there is a 30-day time limit for commencing an appeal, governed the appeal route. They were late if the *BIA*, which imposes a 10-day time limit, governed. The notices of appeal alleged various errors in McEwen J.'s decisions. They also asserted that SusGlobal could appeal the decisions as of right to this court under s. 6(1)(b) of the *CJA*, because they were final orders of a judge of the Superior Court. In the alternative, if the *BIA* governed the appeal route, SusGlobal asked for an extension of time to comply with the time limits in the *BIA* and to appeal, or be granted leave to appeal, under it.

[11] The narrow issue before us does not require a review of whether the grounds of appeal SusGlobal wants to raise have merit. All that is in issue on this review motion is the proper appeal route.

The Decisions of the Chambers Judge

[12] SusGlobal moved before the chambers judge for orders:

a) that its notice of appeal had been properly served and filed under s. 6 of the *CJA*; or,

b) in the alternative, granting it an extension of time of 19 days in order to serve an appeal under s. 193(c) of the *BIA*; or,

c) in the further alternative, granting it an extension of time of 19 days to seek leave to appeal and granting leave to appeal pursuant to s. 193(e) of the *BIA*.[1]

[13] In a separate motion, SusGlobal moved before the chambers judge for orders:

a) declaring that the appeal from the application judge's decision denying SusGlobal leave to introduce fresh evidence is governed by s. 193(c) of the *BIA*, or in the alternative s. 6 of the *CJA*, such that leave to appeal is not required; or

b) in the alternative, granting leave to appeal pursuant to s. 193(e) of the *BIA*.

---

[1] The requests for an extension of time under the *BIA* and for leave to appeal under the *BIA* were brought, respectively, under r. 31(1) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368, and s. 193(e) of the *BIA*, which specify that a single judge may grant the requested relief. The parties proceeded on the basis that the availability of that relief was wrapped up with the question of which route governed the appeal; hence the question of whether the appeal was properly under the *CJA*. BDO did not move to quash the appeal, which is relief only a panel of this court can grant.

[14] The chambers judge dismissed the motions. He held that the *BIA* was the governing authority for the appeal, not the *CJA*; the root authority under which BDO was appointed was s. 243(1) of the *BIA*; appeals from decisions or orders made in proceedings instituted under the *BIA* are governed by the *BIA*, not the *CJA*; and the reference in the receivership order to the *CJA* did not have the effect of ousting the *BIA* as the source of appellate authority, nor could it as a matter of federal paramountcy.

[15] The chambers judge went on to hold that SusGlobal's appeals did not fit within any of the grounds in the *BIA* that permit appeals to this court as of right, including s. 193(c) of the *BIA*, cited by SusGlobal. Nor was the chambers judge prepared to exercise his discretion to grant leave to appeal under s. 193(e) of the *BIA*. Accordingly, he held that in a case where there was no right to appeal under the *BIA* and where granting leave to appeal under the *BIA* was not warranted, no extension of time to appeal or seek leave was warranted. He also held that there was no reviewable error in the application judge's discretionary decision not to admit SusGlobal's proposed fresh evidence.

[16] SusGlobal does not challenge the conclusions of the chambers judge referred to in para. 15 above. Instead, it argues that those conclusions are derivative of his conclusion about which statute governs the appeal route. SusGlobal argues that the *CJA* governs the appeal route. It follows, according to

SusGlobal, that it did not require leave to appeal or an extension of time, because its appeal was as of right under the *CJA* and was filed in time.

The Positions of the Parties

[17] SusGlobal does not contest that the receivership order was properly made and the receiver properly appointed, including under the *BIA*. It argues that power exists under both the *BIA* and the *CJA* to appoint a receiver, and both were explicitly referred to in, and formed the basis for, the receivership order. What is in issue, it argues, is the source of the authority for the leave to sue provision in the receivership order. SusGlobal argues that, since the Supreme Court of Canada held in *Saskatchewan (Attorney General) v. Lemare Lake Logging Ltd.*, 2015 SCC 53, [2015] 3 S.C.R. 419, at paras. 68 and 73, that provincial laws governing receivers were not rendered inoperative by s. 243 of the *BIA*, a receivership order may properly contain provisions authorized only by provincial law, in addition to provisions authorized by the *BIA*. As long as there is no operational conflict between the provincial and federal law and the provincial law does not frustrate the federal law's purpose, the provincial law will continue to apply alongside the federal law (here, s. 243): *Lemare Lake*, at paras. 15-17. The source of authority for a provision in the receivership order determines the proper appeal route from a disposition made under that provision.

[18] SusGlobal argues that the source of the court's power to include the leave to sue provision in the receivership order is not found in the *BIA*. The *BIA* extends that kind of protection in s. 215, but the scope of the protection does not include the type of receiver appointed here. Rather it refers to, among other persons, interim receivers who may be appointed under other provisions of the *BIA*, such as ss. 46(1) and (2). The *BIA* extends other protections to receivers in s. 251, which are not applicable here. SusGlobal's position is that the sole source of the authority for including the leave provision in the receivership order must therefore be provincial law flowing from s. 101 of the *CJA* and the related inherent jurisdiction of the court.

[19] It follows, SusGlobal argues, that it is appealing a decision in which the motion judge gave effect to a provision of the receivership order that was made under the *CJA*, even if other aspects of the receivership order were authorized by the *BIA*. The appeal from such a decision should be governed by the *CJA*, and should lie as of right to this court.

[20] BDO argues that the proceedings giving rise to and arising out of the receivership order are *BIA* proceedings; the reference in the receivership order to the *CJA* was unnecessary. The *BIA* and not the *CJA* appeal provisions should apply to any appeal in such proceedings: *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited*, 2012 ONCA 569, 295 O.A.C. 373, at paras. 19-20. Parliament has constitutional authority over the procedure in all

matters relating to bankruptcy: *Re Solloway Mills & Co. Ltd., In Liquidation, Ex Parte I.W.C. Solloway* (1934), [1935] O.R. 37 (C.A.), at pp. 43, 47. It should not be necessary to parse each provision of the order to determine its source. The appeal provisions of the *BIA* and *CJA* are in operational conflict and therefore the *BIA* provisions prevail under the doctrine of paramountcy. If the appeal provisions do not conflict, it is because it is possible to comply with both schemes. The only way to comply with both schemes is to follow the more restrictive provisions in the *BIA* appeal route.

[21] BDO further argues that if it is necessary to determine the source of the power to include the leave to sue provision in the receivership order, it is found in the *BIA* s. 243(1)(c) power to appoint a receiver to "take any other action that the court considers advisable." Alternatively, it is found in s. 215, which includes receivers within the category of "trustees", since s. 243(4) dictates that the only persons who can be appointed as receivers are trustees.

Relevant Statutory Provisions

BIA Provisions

[22] The *BIA* provides for the appointment of a receiver as a court officer:

> **243 (1)** 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.

[23] The *BIA* provides in s. 215 that leave of the court is required for actions against certain persons:

> **215** Except by leave of the court, no action lies against the Superintendent, an official receiver, an interim receiver or a trustee with respect to any report made under, or any action taken pursuant to, this Act.

[24] The *BIA* has a specific provision proscribing actions against a receiver in certain circumstances. Section 251 provides:

> **251** No action lies against a receiver for loss or damage arising from the sending or providing by the receiver of a notice pursuant to section 245 or a statement or report pursuant to section 246, if done in good faith in compliance or intended compliance with those sections.

[25] The *BIA* provides, as to appeals, 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:
>
> ...
>
> (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.

[26] An appeal or motion for leave to appeal must be commenced within 10 days of the making of the order or decision sought to be appealed: see rr. 31(1), (2), *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368.

CJA Provisions

[27] The *CJA* also provides for the appointment of a receiver. Section 101(1) provides that a judge of the Superior Court may, where it appears just or convenient to do so, appoint one by interlocutory order; s. 101(2) permits the court to include terms in such an order that are considered just:

> **101** (1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.
>
> (2) An order under subsection (1) may include such terms as are considered just.

[28] Section 6(1)(b) of the *CJA* provides for an appeal to this court from certain final orders of the Superior Court. Such an appeal must be commenced within 30 days of the making of the order appealed from: see r. 61.04(1), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

Analysis

(1) Determining the appeal route requires determining the basis for the leave to sue provision in the receivership order

[29] The question of how one determines the applicable appeal route when a receiver has been appointed under s. 243(1) of the *BIA* and under provincial law

was addressed in *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCCA 283, 61 C.B.R. (6th) 196. There, a receiver was appointed under both the *BIA* and British Columbia's *Law and Equity Act*, R.S.B.C. 1996, c. 253. The receiver applied for a declaration that a third party (BC Hydro) did not have a unilateral right to terminate an agreement with the debtor. The British Columbia Supreme Court refused to stay the receiver's application in favour of arbitration, and ruled that the agreement could not be terminated. BC Hydro sought to appeal. In holding that the *BIA* appeal route governed, Groberman J.A. stated, at para. 21:

> I acknowledge that, in a case such as the present one, where relief is sought under both common law equitable principles and the *Law and Equity Act* as well as under the *Bankruptcy and Insolvency Act*, there can be some question as to whether the appeal provisions of the *Bankruptcy and Insolvency Act* are engaged. In my view, the answer depends on whether the order under appeal is one granted in reliance on jurisdiction under the *Bankruptcy and Insolvency Act*. Where it is, the appeal provisions of that statute are applicable. [Emphasis added.]

[30] After finding that the orders sought to be appealed were made by a judge "purporting to act pursuant to powers conferred" by the *BIA*, Groberman J.A. held that the appeal provisions of the *BIA* applied: at para. 24.

[31] I agree with that approach. Applying it here, the question is whether the leave to sue provision, under which McEwen J. exercised authority to dismiss

SusGlobal's application for leave to sue the receiver, was included in the receivership order pursuant to jurisdiction flowing from the *BIA*.

[32] That question is one of statutory interpretation, informed by the historical understanding of the relationship between a leave to sue provision and a receivership, and by how the authority to include such provisions was understood before s. 243(1) was enacted, when appointments were made solely under provincial law. Before turning to the language of the *BIA* and the applicable interpretive principles, I discuss those background points.

(2) The relationship between a leave to sue provision and a court-ordered receivership

[33] Provisions of receivership orders that require consent or court permission for a court-appointed receiver to be sued have a long pedigree. Case law dating back almost a century considered it "settled law that a receiver appointed by the Court cannot be sued without leave": *Trusts & Guarantee Co. v. Oakwood Clubs* (1931), 40 O.W.N. 581 (H.C.J.). Text writers consider the inclusion of such provisions to be "common practice" and "customary", whether the receiver is appointed under the *BIA* or some other authority: *Bennett on Receiverships*, 3d ed. (Toronto: Thomson Reuters, 2011) at p. 283; L.W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *Bankruptcy and Insolvency Analysis*, 4th ed. (Toronto: Thomson Reuters, 2009), The Bankruptcy and Insolvency Act at L§26; Halsbury's Laws of Canada, *Receivers and Other Court Officers (2017 Reissue)*, at HRC-91,

92. The inclusion of a leave to sue provision in Ontario's Model Receivership Order, British Columbia's Model Receivership Order, the Alberta Template Receivership Order, and Nova Scotia's Receivership Order, among others, illustrates their widespread, practically uniform use.

[34] In *Ontario (Ontario Securities Commission) v. Gaudet* (1988), 65 O.R. (2d) 424 (H.C.J.), at p. 426, Reid J. described why a leave to sue provision is ubiquitous. It is essential to a court-appointed receivership:

> A receiver is an officer of the court. The leave requirement is usual in an order appointing a receiver. For the proper and orderly conduct of a receivership it has traditionally been regarded as essential that the receiver be party to all proceedings against the assets under its care, and that the estate be protected against groundless or unjustified proceedings. For these and other reasons the condition that leave be obtained is commonly included; indeed, I am not aware of any receivership order lacking one. In my view, it is essential. [Emphasis added.]

[35] In *Hamilton Wentworth Credit Union Ltd. v. Courtcliffe Parks Ltd.* (1995), 23 O.R. (3d) 781 (Gen. Div.), R.A. Blair J. (as he then was) provided further explanation about the essential relationship between leave to sue provisions and receiverships. He stated that a leave to sue provision is required to preserve the integrity of the court's role as supervisor over the preservation and realization of the assets within its administration. The court has an obligation, in ensuring the properly and orderly conduct of the receivership, to protect the estate from

groundless or unjustified proceedings: at pp. 787-88. See also *Manitoba Securities Commission v. Crocus Investment Fund*, 2006 MBQB 192, at para. 14.

[36] The essential and customary nature of a leave to sue provision in court-ordered receiverships informs the analysis of the source of the court's authority to include it.

(3) The authority for leave to sue provisions under provincial law

[37] Before Parliament amended the *BIA* in 2009 to include s. 243(1), appointments of receivers under provincial legislation included leave to sue provisions. What was the source of the authority for those provisions?

[38] In *Hamilton Wentworth*, which involved a receivership order made under the *CJA*, R.A. Blair J. situated the authority to include a leave to sue provision both in the court's inherent jurisdiction and in the statutory authority in the *CJA* to appoint the receiver. He stated, at p. 787:

> An order requiring that leave be obtained before steps are taken that will affect the assets under that administration is therefore, in my view, within the jurisdiction of the court, by virtue of its inherent jurisdiction and by virtue of its statutory jurisdiction respecting the appointment of receivers "where it appears to a judge of the court to be just [or] convenient to do so": the *Courts of Justice Act*, R.S.O. 1990, c. C.43, as amended. [Emphasis added.]

[39] McCawley J. expressed a similar view in relation to the Manitoba equivalent of s. 101 of the *CJA* in *Crocus Investment*, at para. 14:

> In Canada, it is common practice in situations where the court has appointed a Receiver to prohibit legal proceedings against the debtor and the Receiver unless leave of the court is first obtained. In addition to the inherent jurisdiction of the court to control its process, the authority to do so in this jurisdiction is found in s. 55 of *The Court of Queen's Bench Act*, C.C.S.M. c. C280. [Emphasis added.]

[40] I take two main points from these authorities, given that s. 243(1) of the *BIA* was enacted against the backdrop of already existing provincial legislation authorizing the appointment of receivers.

[41] First, there are similarities among the language of the *CJA* relied on in *Hamilton Wentworth*, the language of *The Court of Queen's Bench Act* discussed in *Crocus Investment*, and the language of the *BIA*. They all speak of the court appointing a receiver when it considers it to be just or convenient to do so.

[42] Second, although *Hamilton Wentworth Credit Union* and *Crocus Investment* relied on statutory authority and inherent jurisdiction, the Supreme Court of Canada has since clarified that, in the insolvency context, statutory authority is to be considered before inherent jurisdiction (see the discussion below at paras. 62-63). A finding of statutory authority makes any reference to inherent jurisdiction unnecessary.

(4) In light of the principles of interpretation, s. 243(1) includes the authority for a leave to sue provision

[43] Against that backdrop, I turn to s. 243(1) of the *BIA*. It provides that "a court may appoint a receiver...if it considers it to be just or convenient to do so". The

receiver may be appointed to take any action the court considers advisable, including to take possession of property of the insolvent person, exercise control over that property and the insolvent person's business, etc.

[44] The modern approach to statutory interpretation instructs a court to consider the words of a statute "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": *Belwood Lake Cottagers Association Inc. v. Ontario (Environment and Climate Change)*, 2019 ONCA 70, at para. 39, citing *Montréal (City) v. 2952-1366 Québec Inc.*, 2005 SCC 62, [2005] 3 S.C.R. 141, at paras. 9-12, and *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at p. 41. While there is a presumption that the plain meaning of a statute's words reflect Parliament's intention, that plain meaning is only one aspect of the modern approach: *Belwood Lake*, at para. 42. The court must read statutory provisions in their entire context. This involves considering "the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and Parliament's intent both in enacting the Act as a whole, and in enacting the particular provision at issue": *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84, at para. 34.

[45] Since the modern approach to statutory interpretation is contextual, the fact that s. 243(1) of the *BIA* lacks express words to the effect that a court may include a leave to sue provision when appointing a receiver is the beginning, not the end

of the analysis. A proper understanding of the section's words in their context and in light of the purpose of the legislation leads to the conclusion that Parliament must be taken, by necessary implication, to have clothed the court with the power to require leave to sue a receiver appointed under s. 243(1).

[46] Parliament enacted s. 243(1) in the context of the legal landscape set out above. It is unlikely that Parliament would have authorized the court to appoint a receiver and at the same time excluded the power to do so with provisions considered to be essential to the court's role in a receivership. Further, Parliament legislated that a receiver should be appointed when just or convenient, using language also found, for example, in the *CJA*. The terms essential to a receiver's appointment and to the court's role in a receivership inevitably inform a court's assessment of whether it may be just or convenient to appoint a receiver. It is therefore also unlikely that Parliament intended the court to appoint a receiver when just or convenient while depriving the court of the power to include an essential term in the appointment. A leave to sue provision is essential to a receivership; it is required to preserve the integrity of the court's role as supervisor of the receivership.

[47] Reading s. 243(1) as providing the power to include a leave to sue provision accords with Parliament's purpose in enacting s. 243(1), as set out by the Supreme Court in the course of its paramountcy analysis in *Lemare Lake Logging*. Abella and Gascon JJ., writing for the majority, described the purpose of s. 243 as "the

establishment of a regime allowing for the appointment of a national receiver, thereby eliminating the need to apply for the appointment of a receiver in multiple jurisdictions" and increasing efficiency: *Lemare Lake*, at paras. 45, 67.

[48] Since Parliament's purpose in enacting the provision was to eliminate the need for a patchwork of receivers appointed under provincial legislation, it follows that the court's power to appoint a national receiver under s. 243(1) of the *BIA* comprehends the power to include essential receivership terms. At the time that the two bills establishing and amending s. 243 received royal assent (Bill C-55 in 2005 and Bill C-12 in 2007), the court's power to include a leave to sue provision in a receivership order was firmly entrenched – leave to sue provisions were ubiquitous and were considered essential.[2] Parliament is presumed to have known the facts relevant to the "conception and operation" of its legislation: Ruth Sullivan, *Sullivan on the Construction of Statutes*, 6th ed. (Toronto: LexisNexis, 2014) at p. 205.

[49] Further, accepting SusGlobal's position would run counter to the purpose of s. 243(1). On SusGlobal's argument, since a leave to sue provision can only be grounded in provincial authority, and since each province's authority does not normally extend beyond that province, a national receiver appointed under the *BIA*

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[2] Leave to sue provisions were contained in both Ontario and British Columbia's 2004 Model Receivership Order, for instance.

would have to seek a leave to sue provision from a court in each province. This is exactly the patchwork scenario that s. 243(1) was enacted to avoid.

[50] In my view, the power to include a leave to sue provision in a receivership order is thus necessarily implied by the statutory power to appoint a receiver in s. 243(1). In *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, [2006] 1 S.C.R. 140, at para. 51, Bastarache J. set out the rationale for the doctrine of "jurisdiction by necessary implication":

> The mandate of this Court is to determine and apply the intention of the legislature without crossing the line between judicial interpretation and legislative drafting. That being said, this rule allows for the application of the "doctrine of jurisdiction by necessary implication"; the powers conferred by an enabling statute are construed to include not only those expressly granted but also, by implication, all powers which are practically necessary for the accomplishment of the object intended to be secured by the statutory regime created by the legislature. [Emphasis added; citations omitted.]

See also *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, at paras. 19-20.

[51] Though *ATCO Gas* dealt with the enabling statute of an administrative tribunal and *Cunningham* dealt with a court established by statute, the same reasons for applying the doctrine of necessary implication in those contexts exist here. By expressly empowering a court, in the *BIA*, to appoint a receiver as a court officer authorized to take a broad range of actions when just or convenient to do so, Parliament must be taken to have clothed the court with the power to make

orders that are essential to the functioning of its officer, the court-appointed national receiver, and to the court's role in supervising it.

[52] This view is fortified when one looks at the scope of what a receiver appointed under s. 243(1) of the *BIA* may be empowered to do. The breadth of that is informed, in part, by what courts considered an interim receiver could be empowered to do under the former s. 47(2) of the *BIA*. As Moir J. noted in *Railside Developments Ltd. (Re)*, 2010 NSSC 13, 62 C.B.R. (5th) 193, at para. 66, Parliament used, in s. 243(1), the general words of the former s. 47(2) that had applied to interim receivers. Prior to its amendment, s. 47(2) read as follows:

> (2) The court may direct an interim receiver appointed under subsection (1) to do any or all of the following:
>
> > (a) take possession of all or part of the debtor's property mentioned in the appointment;
> >
> > (b) exercise such control over that property, and over the debtor's business, as the court considers advisable; and
> >
> > (c) take such other action as the court considers advisable.

[53] In *GMAC Commercial Credit Corporation - Canada v. T.C.T. Logistics Inc.*, 2006 SCC 35, [2006] 2 S.C.R. 123, the Supreme Court commented on the breadth of the former s. 47(2), while also cautioning that the section was not open-ended, at para. 45:

> These statutory parameters, though sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property, are not open-ended. The powers given to the

> bankruptcy court under s. 47(2) are powers to direct the interim receiver's conduct. That section does not, explicitly or implicitly, confer authority on the bankruptcy court to make unilateral declarations about the rights of third parties affected by other statutory schemes.

[54] Reading s. 243(1) and the court's powers thereunder as sufficiently flexible to authorize a wide range of conduct dealing with the taking, management, and eventual disposition of the debtor's property is consistent with the court having the power to include a leave to sue provision in a receivership order. A receiver directed by the court to take possession and control of property and to sell it, for example, may be subject to claims by those with whom the court has directed or authorized the receiver to deal. This is a central reason for the leave to sue provision's necessity.

[55] Finding that s. 243(1) includes the power to authorize a leave to sue provision by necessary implication does not confer an open-ended power on the court. Though a leave to sue provision affects when third parties may sue the receiver, it does not eliminate the right to sue or involve making unilateral declarations about the rights of third parties affected by other statutory schemes. This is especially so given the low threshold for obtaining permission to sue: see *Holmes v. Schonfeld Inc.*, 2016 ONCA 148, at para. 29, citing *GMAC*, at para. 59.

(5) Sections 215 and 251 of the *BIA* do not alter the conclusion that the *BIA* provides the authority to include a leave provision in a receivership order

[56] SusGlobal argues that Parliament specified, in s. 251, when a receiver is to be protected from suit, and that that contradicts the notion that the *BIA* authorizes a leave to sue provision. I disagree. Section 251 deals with circumstances under which a receiver cannot be sued at all. It does not displace the right of the court to include an essential term in a receivership order requiring court permission to launch claims for matters falling outside of s. 251.

[57] SusGlobal also relies on the failure to specifically include a receiver in s. 215 to argue that s. 243(1) of the *BIA* does not authorize a leave to sue provision. In my view, even accepting that s. 215 of the *BIA* does not specifically include receivers would not change the conclusion that s. 243(1) does authorize such provisions.

[58] Section 215 provides that certain officials cannot be sued without court permission. Some of the enumerated officials, such as the Superintendent or an official receiver, are not appointed by court order (although some, such as official receivers, are deemed to be officers of the court): see ss. 5(1), 12(2). Trustees in bankruptcy can be empowered without a court order: see s.14. Even interim receivers, who are court-appointed, fill a role that is a creature of the *BIA*, with specific statutory limits on their activities and powers: see for example s. 47.

[59] Section 243(1) receivers, on the other hand, are court-appointed and take their powers from the court appointment order. And it is those types of receivers who, when appointed under other statutes, were historically clothed with customary and common terms essential to their appointment, such as that found in the receivership order's leave to sue provision. The *BIA* power of appointment carries with it the power to impose that type of term. It would be anomalous to read s. 215 as providing for the protection of the officials specified in it, while also prohibiting the court from including, in a s. 243(1) *BIA* appointment, a term essential to the very receivership s. 243(1) contemplates.

[60] I also note, contrary to SusGlobal's argument, that some cases have treated s. 215 as though it applied to receivers appointed under s. 243(1) of the *BIA:* see *Crate Marine Sales Ltd. (Re)*, 2017 ONSC 178, 45 C.B.R. (6th) 267, at paras. 22, 59, and *Romspen Investment Corporation v. Courtice Auto Wreckers*, 2016 ONSC 1808, 36 C.B.R. (6th) 141, at paras. 4, 55-57, rev'd but not on this point 2017 ONCA 301, 138 O.R. (3d) 373, leave to appeal ref'd [2017] S.C.C.A. No. 238. In *Romspen*, this court treated an appeal from a refusal to grant permission to sue as governed by the *BIA* appeal routes. Both *Crate Marine* and *Romspen*, however, did not deal with any argument that s. 215, due to its wording, should be taken not to apply to receivers appointed under s. 243(1). They did not address the arguments SusGlobal or BDO make here about that wording and therefore did not decide the issue. Given my conclusion that s. 243(1) authorizes the inclusion of

leave to sue provisions in receivership orders, it is unnecessary to further deal with the s. 215 point here. The leave to sue provision can stand as authorized by the *BIA* without resort to s. 215. It is certainly not prohibited by s. 215.

(6) Resorting to inherent jurisdiction is unnecessary

[61] As noted above, SusGlobal's argument is, in part, that inherent jurisdiction related to the *CJA* is a source of power for the leave to sue provision, and that this also takes the appeal route outside of the *BIA*. I do not agree that resort to inherent jurisdiction is necessary or that it would take the appeal route where SusGlobal wants it to go.

[62] In *Century Services Inc. v. Canada (Attorney General)*, 2010 SCC 60, [2010] 3 S.C.R. 60, at paras. 64-65, the Supreme Court endorsed the hierarchical approach to interpreting insolvency legislation suggested by Justice Georgina R. Jackson and Dr. Janis Sarra – namely, that courts should first look to statutory authority, exhausting their statutory interpretive function before resorting to inherent jurisdiction: Georgina R. Jackson & J. Sarra, "Selecting the Judicial Tool to get the Job Done: An Examination of Statutory Interpretation, Discretionary Power and Inherent Jurisdiction in Insolvency Matters", in Janis P. Sarra, ed., *Annual Review of Insolvency Law 2007* (Toronto: Thomson Reuters, 2008) at p. 42. Although *Century Services* involved an interpretive issue respecting the *Companies Creditors Arrangement Act*, R.S.C., 1985 c. C-36, Jackson and Sarra's approach encompasses insolvency legislation more generally.

[63] The Supreme Court endorsed Jackson and Sarra's approach outside of the insolvency context in *Endean v. British Columbia*, 2016 SCC 42, [2016] 2 S.C.R. 162. They cautioned that inherent jurisdiction should be relied upon sparingly, at para. 24:

> The courts have recognized that, given the broad and loosely defined nature of these powers, they should be "exercised sparingly and with caution": *Caron*, at para. 30. It follows that courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that forms their inherent jurisdiction. As The Honourable Georgina Jackson and Janis Sarra write, "[i]t is only where broad statutory authority is unavailable that inherent jurisdiction needs to be considered as a possible judicial tool to utilize in the circumstances". [Citations omitted.]

[64] Because of my conclusion that s. 243(1) confers power to include a leave to sue provision, considering inherent jurisdiction is unnecessary. I note, however, that s. 183(1) preserves the inherent jurisdiction of the Superior Court sitting in *BIA* matters: *Kingsway General Insurance Company v. Residential Warranty Co. of Canada Inc. (Trustee of)*, 2006 ABCA 293, 25 C.B.R. (5th) 38, at para. 19. Section 183(1) reads:

> **183 (1)** The following courts are invested with such jurisdiction at law and in equity as will enable them to exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act during their respective terms, as they are now, or may be hereafter, held, and in vacation and in chambers:

> (a) in the Province of Ontario, the Superior Court of Justice.

[65] Accordingly, referring to a power as flowing from inherent jurisdiction does not necessarily take an appeal out of the *BIA* stream. Because the power in question here is statutory, it is unnecessary to consider that issue further.

(7) The *BIA* appeal route governs

[66] Since para. 8 of the receivership order, the leave to sue provision, is authorized by the statutory authority to appoint a receiver in s. 243(1) of the *BIA*, SusGlobal's complaint loses its force. It does not matter that such a provision is or could also be grounded in the *CJA* power to appoint a receiver. As long as the *BIA* is one of the sources that authorizes the leave to sue provision, an appeal from an order made under it necessarily implicates a provision sourced in the *BIA*.

[67] In cases like this, where the court's power may be grounded in the *BIA* or the *CJA*, the doctrine of paramountcy would prevent an appellant from resorting to the *CJA* appeal provisions as they are in operational conflict with those of the *BIA* in respect of timing and leave requirements. To the question "May one appeal without leave and do so after 10 days have expired?" one enactment says "yes" and the other says "no", meeting the test for operational conflict: see *Alberta (Attorney General) v. Moloney,* 2015 SCC 51, [2015] 3 S.C.R. 327, at para. 19, citing *Multiple Access Ltd. v. McCutcheon*, [1982] 2 S.C.R. 161, at p. 191; see also *Lemare Lake*, at paras. 18-19. The only manner in which the appeal provisions

could be found not to conflict is if it were possible to comply with both schemes. Because the *BIA* provisions are more restrictive than the *CJA* provisions, complying with both schemes entails complying with the *BIA* provisions. Either way, SusGlobal was required to follow the *BIA* appeal route.

Conclusion

[68] SusGlobal has failed to show an error in the underlying premise of the chambers judge's decisions, namely that the *BIA* governed SusGlobal's proposed appeals. That premise was correct. The authority that grounded the application judge's refusal to grant SusGlobal leave to sue the receiver is found in both the *BIA* and *CJA*. Federal paramountcy dictates that the *BIA* appeal provisions govern. SusGlobal's motion must therefore be dismissed.

[69] BDO is entitled to its costs of the motion, fixed at $15,000 inclusive of disbursements and HST.

Released: "A." APR – 8 2019

"B. Zuker J.A."

"I agree. K. Feldman J.A."

"I agree. D. Stratas J.A."

TAB 2

COURT OF APPEAL FOR ONTARIO

DATE: 20190107
DOCKET: M49872 (C65512)

Watt J.A. (In Chambers)

BETWEEN

Business Development Bank of Canada

Applicants

and

Astoria Organic Matters Ltd. and Astoria Organic Matters Canada LP

Respondents

Melvyn L. Solmon and Rajiv Joshi, for the moving party Susglobal Energy Belleville Ltd.

Miranda Spence and Kyle Plunkett, for the responding party BDO Canada Ltd. (the Receiver)

Heard: December 10, 2018

ENDORSEMENT

[1] On December 10, 2018, I dismissed a motion brought by Susglobal Energy Belleville Ltd. ("Susglobal") for various alternative remedies in connection with a Fresh as Amended Notice of Appeal it served and filed from an order refusing it leave to commence a claim against BDO Canada Ltd. ("BDO Canada") in its capacity as Court-appointed Receiver of Astoria Organic Matters Ltd. and Astoria Organic Matters Canada L.P. ("Astoria").

[2] At that time, I promised the parties that I would provide reasons for the conclusions I had reached. Those reasons follow.

The Background Facts

[3] A bit of background to begin.

The Business of Astoria

[4] Astoria operated an organic recycling facility and a waste transfer station. The company mixed and processed various organic wastes with leaf and yard waste to form clear compost for agricultural and landscape markets.

The Receivership

[5] On April 13, 2017 BDO Canada was appointed as the Receiver of Astoria. The formal order, consistent with the model template Receivership order established by the *Commercial List Users' Committee*, refers not only to s. 243 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), but also to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c C.43 ("*CJA*").

[6] Following its appointment as Receiver, BDO Canada continued the business of Astoria in the ordinary course with Astoria staff.

The Asset Purchase Agreement

[7] On July 27, 2017, the Receiver entered into an Asset Purchase Agreement ("APA") with, among others, Susglobal. Under the APA, Susglobal agreed to acquire some of Astoria's assets. The deal closed on September 15, 2017.

The Letter

[8] About six weeks after the deal closed, on October 30, 2017, Susglobal wrote to the Receiver. Susglobal alleged that prior to closing, the Receiver was grossly negligent in its operation of Astoria. According to Susglobal, BDO Canada:

i. allowed the volume of raw organic waste to exceed the allowances prescribed by the environmental compliance approvals maintained by the Ontario Ministry of Environment and Climate Change ("OECC"); and

ii. withheld information from Susglobal relating to the results of an annual odour sampling program conducted in a building at the Astoria facility.

The Investigation

[9] BDO Canada investigated Susglobal's allegations and found them to be without merit. The Receiver communicated these findings to Susglobal by letter two weeks later.

The Original Motion

[10] Susglobal sought leave from a judge of the Superior Court of Justice to permit it to commence a claim against BDO Canada in its capacity as Court-appointed Receiver of Astoria, for damages for gross negligence, or in the alternative, for wilful misconduct and breach of the APA and the order appointing the Receiver.

The Decision of the Motion Judge

[11] At the conclusion of a three-day hearing, the presiding judge ("the motion judge") reserved his decision. In his reasons, the motion judge found:

i. that Susglobal failed to produce any credible and reliable evidence to support its claim of excess organic waste in a building at the facility;

ii. that, in any event, s. 3.03 of the APA, the "As is, Where is" clause, absolved the Receiver of any liability; and

iii. that, even if Susglobal had been able to establish the excess organic waste it alleged was in a building at the Astoria facility, this would not constitute *prima facie* evidence of wilful misconduct or gross negligence on the part of the Receiver.

The reasons were released on May 17, 2018.

The Appeal

[12] On June 15, 2018, Susglobal initiated its appeal from the decision of the motion judge. It did so by filing a Notice of Appeal and a Certificate Respecting Evidence. Three days later, on June 18, 2018, Susglobal filed a Fresh as Amended Notice of Appeal. In neither notice did Susglobal seek leave to appeal.

The Motion to Re-Open

[13] About three weeks after initiating its appeal, Susglobal sought to re-open its original motion and file fresh evidence. The proposed fresh evidence included:

i. an undated report that Susglobal said it had filed with the OECC on March 29, 2018; and

ii. a confirmatory email from an OECC representative on June 25, 2018 acknowledging receipt of the Susglobal report.

The Decision on Re-opening

[14] On November 8, 2018, the motion judge dismissed the motion to re-open the original motion. Among other things, the motion judge concluded:

i. that the underlying information advanced as fresh evidence was available to Susglobal prior to the hearing of the original motion, but not tendered there; and

ii. that, even if received, the proposed fresh evidence would not have changed the result on the original motion.

This Motion

[15] On this motion, Susglobal seeks several alternative forms of relief:

i. an order that the Fresh as Amended Notice of Appeal was properly served and filed under s. 6 *CJA*;

ii. in the alternative, if the appeal is governed by s. 193(c) of the *BIA*, an order *nunc pro tunc* extending the time for serving and filing the notice of appeal from 10 to 29 days; and

iii. in the further alternative, if the appeal is governed by s. 193(e) of the *BIA*, an order granting leave to appeal and an order *nunc pro tunc* extending the time for filing the Fresh as Amended Notice of Appeal from 10 days to 29 days.

Analysis

[16] To resolve the issues put in play by this motion, it is helpful to begin with the threshold issue of which statutory regime governs this appeal. The *BIA*? Or the *CJA*?

Issue #1: The Governing Statute

[17] As I will explain, I am satisfied that it is the *BIA* and not the *CJA* that governs this appeal.

[18] The judgment under appeal was rendered on a motion brought by Susglobal seeking leave to commence a claim against the Court-appointed Receiver of Astoria for damages for gross negligence, alternatively for wilful misconduct and breach of the APA and the order of the judge who appointed the Receiver. The root authority invoked to appoint the Receiver was s. 243(1) of the *BIA*.

[19] As part of its exclusive authority over bankruptcy and insolvency, Parliament has jurisdiction over procedural law in bankruptcy matters. As a result, Parliament has the authority to authorize, as well as to limit or prohibit, appeals as it deems appropriate: *Re Solloway Mills & Co.*, [1935] O.R. 37 (C.A.), at p. 43.

[20] Appeals from decisions or orders made in proceedings instituted under the *BIA*, it follows, are governed by the *BIA* and the *Bankruptcy and Insolvency General Rules*, C.R.C. c. 368 ("*BIA* Rules"), not by the *CJA* or the Rules of Civil Procedure, R.R.O., 1990, Reg. 194: *Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Co.*, 2012 ONCA 569, at para. 19. See also, *Dabbs v. Sunlife Assurance Co. of Canada* (1998), 41 O.R. (3d) 97 (C.A.), at para. 13.

[21] The reference in the formal order to s. 101 of the *CJA* does not have the effect of ousting the operation of the *BIA* as the source of appellate authority. The

order is in standard form and to hold that its reference to the *CJA* trumps the application of the *BIA* would be to turn the doctrine of federal paramountcy applicable in cases of incompatibility between provincial and federal legislation on a subject-matter of exclusive federal authority on its head. See, *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, [2015] 3 S.C.R. 327, at paras. 14-19.

[22] In the result, I am satisfied that this appeal is governed by the provisions of the *BIA*, in particular, s. 193 of that Act and the *BIA* rules.

Issue #2: Appeals as of Right under the *BIA*

[23] Section 193 of the *BIA* authorizes appeals to this court from orders and decisions of judges in proceedings under the Act. The section is in these terms:

> 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.

[24] An appeal lies to this court as of right in the circumstances described in ss. 193(a) to (d). In all other circumstances, leave to appeal must be sought from a single judge under s. 193(e). Under r. 31(2) of the *BIA* rules, the notice of appeal in cases in which reliance is placed on s. 193(e) must include the application for leave: *Ontario Wealth Management Corp. v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500 (Ch'rs), at paras. 38-39.

[25] As its primary source of appellate jurisdiction under the *BIA*, Susglobal invoked s. 193(c). Recent jurisprudence has rejected an expansive application of the automatic right of appeal contained in this provision and held it inapplicable to orders that:

i. are procedural in nature;

ii. do not bring into play the value of the debtor's property; or

iii. do not result in a loss.

See, *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225 (Ch'rs), at paras. 49, 50, 53; *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611 (Ch'rs), at para. 22.

[26] Recall what Susglobal sought before the original motion judge: leave to sue the Court-appointed Receiver to recover damages for alleged gross negligence, wilful misconduct, breach of the APA and of the order appointing the Receiver. In

its essence, the order sought was procedural in nature – the right to sue, to pursue a remedy in damages.

[27] Further, the order under appeal did not contain any element of a final determination of the economic interests of the claimant. Nor is there any basis in the evidentiary record to support the assertion that the decision resulted in an economic loss. Susglobal did not seek to have the motion judge determine its actual alleged losses. What it sought was the right to pursue the Receiver for its alleged losses. What it lost was a chance to sue.

[28] Success on appeal will put no money in Susglobal's treasury. Its gain is one of chance – the right to sue to prove its case on liability and in damages. Thus its appeal falls outside the entry portal of s. 193(c) since it does not directly involve property exceeding $10,000 in value.

Issue #3: Leave to Appeal under Section 193(e)

[29] In the further alternative, Susglobal invokes s. 193(e) of the *BIA* and seeks leave to appeal from the decision of the motion judge. I would not grant leave to appeal in the circumstances of this case.

[30] Leave to appeal under s. 193(e) is discretionary. Although the provision itself is unrevealing of the factors that may or must be considered in determining whether leave may be granted, prior decisions have identified as relevant factors:

i. whether the appeal raises issues of general importance to the practice in bankruptcy or insolvency matters, or to the administration of justice as a whole, and thus is one that this court should consider and address;

ii. whether the appeal is *prima facie* meritorious; and

iii. whether the appeal would unduly hinder the progress of the bankruptcy or insolvency proceedings.

See, *Business Development Bank of Canada v. Pine Tree Resort Inc.*, 2013 ONCA 282 (Ch'rs), at para. 29.

[31] A review of the motion judge's reasons as a whole betrays Susglobal's claim that issues of general importance to the practice in bankruptcy or insolvency matters or to the administration of justice as a whole are involved and ripe for appellate decision in this case.

[32] The motion judge was well aware of and devoted his reasons to his assigned task. And that was to determine whether Susglobal could establish a *prima facie* case that the Receiver had engaged in gross negligence or wilful misconduct in the manner Susglobal alleged. After a careful, unerring and clear-eyed assessment of the evidence adduced on the motion, the judge, in richly detailed and well-documented reasons, concluded that Susglobal had failed to meet its burden. No more. No less.

[33] Susglobal's assertion that the motion judge's assessment of the "As is, Where is" clause in s. 303 of the APA represents a comment on such clauses generally, thus is a matter of general importance to the bankruptcy or insolvency Bar, falls on barren ground. Absolution under the clause was fact-specific. The alleged excess of which Susglobal complains was in plain view. The Receiver made the facility available to Susglobal staff who toured frequently. Susglobal had full access to and reviewed relevant data.

[34] Nor am I persuaded that Susglobal's appeal is meritorious.

[35] A proposed appeal is *prima facie* meritorious where the decision:

i. is contrary to law;

ii. amounts to an abuse of judicial power; or

iii. involves an obvious error causing prejudice for which there is no remedy.

See, *Pine Tree*, at para. 31.

[36] In its original motion, Susglobal sought leave to sue the Court-appointed Receiver. Susglobal was required to adduce evidence, if it could, to establish a *prima facie* case that the Receiver demonstrated a marked departure from the standards by which responsible and competent people in equivalent circumstances would have acted or conducted themselves or was recklessly indifferent in its conduct.

[37] The motion judge concluded that Susglobal had failed to meet its burden. His conclusion, supported by several findings of fact grounded on uncontroverted evidence, are uncontaminated by errors of law or principle or any misapprehensions of substance. They are entitled to deference in this court.

[38] A final factor worthy of consideration is prejudice. By this I mean the prejudice suffered by the Receiver and the Debtors' estate in responding to Susglobal's claims rather than in pursuing an efficient and expeditious administration of the Debtors' estate, as is its task under the *BIA*.

Issue #4: The Extension of Time

[39] It follows from what I have said that Susglobal's notice of appeal was not filed within the time required by the *BIA* rules. Were this a case within s. 193(c) where no leave is required, or one meriting leave under s. 193(e), it would be necessary to determine whether an extension of time should be granted. In the absence of an automatic right of appeal under s. 193(c) and leave under s. 193(e), the motion for an extension of time also fails.

TAB 3

2015 ONCA 368
Ontario Court of Appeal

Akagi v. Synergy Group (2000) Inc.

2015 CarswellOnt 7407, 2015 ONCA 368, 125 O.R. (3d) 401, 254 A.C.W.S. (3d) 186, 25 C.B.R. (6th) 260, 334 O.A.C. 279, 74 C.P.C. (7th) 45

Trent Akagi, Applicant (Respondent) and Synergy Group (2000) Inc. (aka Synergy Group Inc., Synergy Group 2000 Inc., The Synergy Group 2000 Inc., The Synergy Group, Inc., (2000), The Synergy Group Incorporated, The Synergy Group 2000 Incorporated) and Integrated Business Concepts Inc., Respondents (Appellants)

Janet Simmons, R.A. Blair, R.G. Juriansz JJ.A.

Heard: December 12, 2014
Judgment: May 22, 2015
Docket: CA C57582, C59494, C59496, C59497, C59498, C59499, C59500, C59508, C59509, C59510, C59511

Counsel: J. Lisus, J. Renihan for Appellants, Student Housing Canada and R.V. Inc.
J. Spotswood and W. McDowell for Appellants, Integrated Business Concepts Inc. and Vincent Villanti
D. Magisano, S. Puddister for Appellant, Ravendra Chaudhary
M. Katzman for Appellants, Synergy Group (2000) Inc., Shane Smith, Nadine Theresa Smith, David Prentice, and Jean Lucien Breau and 1893700 Ontario Limited.
J. Leon, R. Promislow for Respondent, J.P. Graci & Associates (the court appointed receiver)
T. Corsianos for Respondent, Trent Akagi

Subject: Civil Practice and Procedure; Corporate and Commercial; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
V Bankruptcy and receiving orders
V.4 Rescission or stay of order

Headnote

Bankruptcy and insolvency --- Bankruptcy and receiving orders — Rescission or stay of order
Applicant contributed funds to tax program marketed and sold by respondents — Tax program did not generate tax loss allocations for applicant — Applicant sued respondents for fraud and obtained default judgment — Applicant obtained ex parte order appointing receiver over all assets, undertakings and property of respondent — Receivership order morphed into wide-ranging investigative receivership, freezing and otherwise reaching assets of 43 additional individuals and entities — Respondents' application to set aside receivership orders was dismissed — Respondents appealed — Appeal allowed — Initial order and subsequent orders were set aside — All of contested orders were set aside — Receivership orders stood on fundamentally flawed premise and were unjustifiably overreaching in powers they granted — Procedural concerns arose out of ex parte nature of extraordinary orders, casual manner in which they were processed, and failure to make full disclosure — Fact judgment was based on fraud was insufficient by itself to support order — Applicant was required to show that receivership order freezing and otherwise interfering with debtors' assets and assets of others was needed to protect his ability to recover on debt — Record reflected no evidence of any attempt by applicant to collect on judgment other than to apply for appointment of receiver — There was no evidence that respondents had insufficient assets to satisfy judgment —

There was no evidence of urgency or of any reason to believe that, if given notice, respondents would take steps to frustrate legal process or undermine applicant's prospects of recovery — Order authorizing issuance of certificates of pending litigation had to be set aside — There was no action or application commenced by applicant asserting claim to interest in land or requesting certificate of pending litigation — There was no indication that either applicant's claim or claims sought to be protected on behalf of 3800 unnamed investors gave rise to any claims to interest in land.

Table of Authorities

Cases considered by *R.A. Blair J.A.*:

Baker v. Paddock Inn Peterborough Ltd. (1977), 16 O.R. (2d) 38, 2 B.L.R. 101, 1977 CarswellOnt 44 (Ont. H.C.) — referred to

CanaSea PetroGas Group Holdings Ltd., Re (2014), 2014 CarswellOnt 14845, 2014 ONSC 6116, 18 C.B.R. (6th) 283 (Ont. S.C.J.) — considered

Century Services Inc. v. New World Engineering Corp. (2007), 2007 CarswellOnt 9945 (Ont. S.C.J.) — referred to

Chilian v. Augdome Corp. (1991), 78 D.L.R. (4th) 129, 44 O.A.C. 263, 2 O.R. (3d) 696, 49 C.P.C. (2d) 1, 1991 CarswellOnt 422 (Ont. C.A.) — referred to

DeGroote v. DC Entertainment Corp. (2013), 7 C.B.R. (6th) 232, 2013 CarswellOnt 15647, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]) — referred to

East Guardian SPC v. Mazur (2014), 19 C.B.R. (6th) 317, 2014 ONSC 6403, 2014 CarswellOnt 15935, 64 C.P.C. (7th) 90 (Ont. S.C.J.) — referred to

Erdman, Re (2012), 91 C.B.R. (5th) 82, 2012 CarswellOnt 6945, 2012 ONSC 3268 (Ont. S.C.J.) — referred to

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 ONSC 4136, 2011 CarswellOnt 5867, 80 C.B.R. (5th) 259 (Ont. S.C.J. [Commercial List]) — considered

General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc. (2011), 2011 CarswellOnt 8054, 2011 ONSC 4704, 81 C.B.R. (5th) 265, 282 O.A.C. 345 (Ont. Div. Ct.) — referred to

Illidge (Trustee of) v. St. James Securities Inc. (2002), 2002 CarswellOnt 1829, 34 C.B.R. (4th) 227, (sub nom. *Illidge (Bankrupt) v. St. James Securities Inc.)* 159 O.A.C. 311, 60 O.R. (3d) 155 (Ont. C.A.) — referred to

Loblaw Brands Ltd. v. Thornton (2009), 2009 CarswellOnt 1588, 78 C.P.C. (6th) 189 (Ont. S.C.J.) — considered

Ontario v. Shehrazad Non Profit Housing Inc. (2007), 2007 CarswellOnt 2113, 2007 ONCA 267, 46 C.P.C. (6th) 195, 49 C.P.C. (6th) 195, 223 O.A.C. 76, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]) — referred to

Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd. (2007), 2007 CarswellOnt 1567, 27 B.L.R. (4th) 299 (Ont. S.C.J. [Commercial List]) — referred to

Pandya v. Simpson (2005), 2005 CarswellOnt 10517 (Ont. S.C.J. [Commercial List]) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Romspen Investment Corp. v. Hargate Properties Inc. (2011), 2011 ABQB 759, 2011 CarswellAlta 2133, 86 C.B.R. (5th) 49 (Alta. Q.B.) — referred to

Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd. (1987), 1987 CarswellOnt 383, 16 C.P.C. (2d) 130 (Ont. H.C.)

— considered

Stroh v. Millers Cove Resources Inc. (1995), 1995 CarswellOnt 3551 (Ont. Gen. Div. [Commercial List]) — considered

Stroh v. Millers Cove Resources Inc. (1995), 85 O.A.C. 26, 1995 CarswellOnt 275 (Ont. Div. Ct.) — referred to

236523 Ontario Inc. v. Nowack (2013), 2013 ONSC 7479, 2013 CarswellOnt 16986 (Ont. S.C.J. [Commercial List]) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3
Generally — referred to

s. 163 — considered

Business Corporations Act, R.S.O. 1990, c. B.16
Generally — referred to

s. 161 — referred to

Canada Business Corporations Act, R.S.C. 1985, c. C-44
s. 229 — referred to

s. 230 — referred to

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101 — considered

s. 103 — considered

Securities Act, R.S.O. 1990, c. S.5
Generally — referred to

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
Generally — referred to

APPEAL by respondents from judgment dismissing application to set aside receivership orders.

R.A. Blair J.A.:

Overview

1 The appointment of a receiver in a civil proceeding is not tantamount to a criminal investigation or a public inquiry. Regrettably, those responsible for obtaining the appointment in this case thought that it was. As a result, the receivership proceeded on an entirely misguided course.

2 Mr. Akagi contributed funds to a tax program, marketed and sold by the Synergy Group. It was supposed to generate tax loss allocations for him, but did not. He sued Synergy Group (2000) Inc. ("Synergy") and certain individuals associated with it for fraud and obtained default judgment in the amount of approximately $137,000. On June 14, 2013, Mr. Akagi applied for, and obtained, an *ex parte* order appointing a receiver over all assets, undertakings and property of Synergy and an

additional company, Integrated Business Concepts Inc. ("IBC").

3 The primary evidence in support of the application consisted of a three-page affidavit sworn by Mr. Akagi and copies of three affidavits from representatives of the Canadian Revenue Agency (the "CRA"). The representatives' affidavits outlined the details of a CRA investigation into the tax loss allocation scheme and indicated that, besides Mr. Akagi, there may be as many as 3800 other investors who were defrauded. The materials did not disclose that the CRA investigation had been terminated in February 2013 — some four months before Mr. Agaki brought the *ex parte* application.

4 Subsequently, through a series of further *ex parte* applications, the receivership order morphed into a wide-ranging "investigative receivership", freezing and otherwise reaching the assets of 43 additional individuals and entities (including authorizing the registration of certificates of pending litigation against their properties). None of the additional targets was a party to the receivership proceeding, only three had any connection to the underlying Akagi action, and only two were actually judgment debtors.

5 On September 16, 2013, the appellants moved before the application judge in a "come-back proceeding" to set aside the receivership orders. Their application was dismissed. They now appeal from the September 16 order and the previous *ex parte* orders.

6 All of the receivership orders were sought and obtained pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which gives the court broad powers to make such an order "where it appears to a judge of the court to be just or convenient to do so." Accordingly, the appeal does not involve issues that may arise in connection with the appointment of a receiver under the numerous other statutes that contain such powers, or by way of a private appointment by a secured creditor under a security document. Nor does the appeal concern a class proceeding or other form of representative action.

7 Mr. Akagi is an unsecured judgment creditor. However, it is apparent from the record that the relief sought was intended to reach far beyond his interests in that capacity. It was intended to empower the Receiver to root out the details of the broader tax allocation scheme as it affected a large number of other investors beyond Mr. Akagi — although to what end is unclear, as there is no pending or intended proceeding on behalf of those investors.

8 For the reasons that follow, I would allow the appeal and set aside all of the contested orders.

Factual Background

The Tax Loss Allocation Scheme

9 Mr. Akagi invested more than $100,000 through Synergy in what he understood were small businesses managed by IBC that would generate legitimate business losses. Synergy's "Tax Reduction Strategy" program was misrepresented to him as a means of achieving substantial tax savings through the allocation to him of his proportionate share of those losses.

10 Mr. Akagi made an initial investment of $20,000 in November 2006. He received documentary confirmation: that he and Synergy agreed "to explore alternative income tax strategies by purchasing units in small to medium businesses"; that Synergy, as Transfer Agent, was to act as liaison between Mr. Akagi and IBC "to facilitate the placement of capital into...small and medium sized, privately owned businesses"; and that "IBC agree[ed] to execute the purchase on behalf of the Purchaser, provide complete documentation to support the purchase and any related tax benefit and provide all necessary follow-up documentation and service in the event that [the CRA] requests substantiating proof of Purchaser's Participation and any resulting Income Tax Deduction Claims."

11 In March 2007, Mr. Akagi received a documentary package from Synergy for the purposes of preparing his 2006 tax returns. The business entity in which he had purportedly invested was said to have suffered a total loss of $164,500, of which his proportionate share was $104,000. Mr. Akagi deducted that amount and received a tax credit of $27,262.10.

12 Having received that benefit, Mr. Akagi invested a further $90,000 with Synergy for the purposes of his 2007 taxation year. He received the same type of documentary confirmation. At the end of February 2008, he received a letter from an entity known as the International Business Consultants Association ("IBCA") enclosing a cheque in the amount of $248.78,

purportedly representing his share of IBCA's profits for the 2007 year.

13 The honeymoon was short-lived, however. On March 19, 2008, Mr. Akagi received a letter from the CRA stating that an audit was being conducted on IBC with respect to the 2006 taxation year. A few days later, Synergy sent a letter advising Mr. Akagi that the CRA did not "approve of [Synergy's] Profit and Loss Business Development Program", and that Synergy would not be issuing tax forms for the 2007 tax year until it had cleared matters with the CRA. Mr. Akagi was given the option of filling in and returning a form to obtain a refund of his investment for 2007. Although he did so, his $90,000 investment was not returned.

14 In December 2008, the CRA advised Mr. Akagi that it was questioning his loss claim for 2006 and that it was the position of CRA that the IBCA loss arrangement "constitutes a sham or sham transactions." In May 2009, Mr. Agaki received a Notice of Re-Assessment for the 2006 taxation year, completely disallowing his claimed business losses of $104,000. In the end, the CRA waived some penalties and interest, and Mr. Akagi repaid $54,842.58.

The Underlying Proceedings: The Akagi Action

15 In August 2009, Mr. Akagi commenced an action against Synergy and four individuals connected with it — Shane Smith, David Prentice, Sandra Delahaye, and Jean Lucien Breau (the "Akagi action"). Smith acted and held himself out as the president of Synergy. Prentice acted and held himself out as its vice-president. Delahaye, a chartered accountant, was the salesperson who sold the investment to Mr. Akagi. Breau, according to the corporate records, was the sole shareholder and director of Synergy.

16 In the action, Mr. Akagi claimed $116,575.98 in damages, representing the monetary losses he had sustained as a result of what he alleged to be an unlawful conspiracy to defraud him. He also claimed punitive damages. The defendants were noted in default (except for Breau, who was never served), and Mr. Akagi moved, without further notice, for default judgment. In May 2010, Cullity J. granted default judgment, awarding Mr. Akagi the claimed compensatory damages plus $25,000 in punitive damages. He dismissed Mr. Agaki's claim for equitable tracing because he had failed to identify any fund or property in the pleadings to which the funds could be traced.

17 Immediately upon learning of the default judgment, the defendants moved to set it aside. Justice Whitaker did so on September 3, 2010. His order was upheld on appeal, subject to the following conditions: (i) the defendants were to pay Mr. Akagi $15,000 in costs thrown away, plus $7,000 for his costs on appeal; and (ii) the defendants were to pay $60,000 to the credit of the action pending the outcome of the proceedings.

18 The defendants complied with these conditions.

19 Mr. Akagi subsequently moved for summary judgment against Synergy and the defendants Smith and Prentice.[1] On May 14, 2012, McEwen J. granted summary judgment in the amount of $90,000, representing Mr. Akagi's outstanding 2007 investment. However, McEwen J. declined to grant summary judgment on the claims for fraud and conspiracy to defraud on the basis that the defendants' materials raised triable issues on those claims. By agreement of the parties, the $60,000 earlier paid into court to the credit of the action remained in court and was not be applied to the $90,000 judgment.

20 The saga continued, however. Mr. Akagi moved once again to strike the statements of defence of Synergy, Smith and Prentice, and for an order directing that the $60,000 be paid out to him in partial satisfaction of his $90,000 partial summary judgment. On October 5, 2012, Roberts J. granted that relief. On January 18, 2013, Roberts J. made a further order: (i) directing the Registrar to note Synergy, Smith and Prentice in default; and (ii) directing Mr. Akagi to proceed to trial to determine the issues left to be tried by McEwen J.

21 Justice Chiappetta heard the undefended trial of the remaining issues and, on April 24, 2013 — on the basis of the fraud and conspiracy to defraud claims in the Akagi action — awarded Mr. Akagi $116,575.98 in compensatory damages, $30,000 in punitive damages, and $17,000 in costs. On January 23, 2015, a different panel of this court dismissed the appeal from this judgment.

22 I note here that the $90,000 sum awarded by McEwen J. is a component of the $116,575.98 compensatory damages

awarded by Chiappeta J. In the end, Mr. Akagi's outstanding claim against Synergy, Smith and Prentice is approximately $182,000, consisting of: (i) $116,575.98 in compensatory damages; (ii) $30,000 in punitive damages; and (iii) $36,000 in costs. From this must be subtracted the $60,000 already paid, leaving a balance of approximately $122,000.

23 It is this claim that spawned the sprawling receivership outlined below.

The Initial Ex Parte Receivership Application

24 No steps appear to have been taken to effect recovery on the judgment. Nevertheless, on June 14, 2013 — less than two months after the judgment was granted — Mr. Akagi brought an *ex parte* application before the Commercial List in Toronto, seeking the appointment of J.P. Graci & Associates as Receiver of the assets, property and undertakings of Synergy and IBC (IBC had not been made a defendant in the Akagi action).

25 In support of the initial application, Mr. Akagi filed a three-page affidavit characterizing himself as a victim of fraud perpetrated by Synergy, Smith and Prentice (as set out in the summary judgment materials before McEwen J.), and as a judgment creditor of Synergy, Smith and Prentice (the "Debtors") as a result of Chiappetta J.'s judgment awarding him compensatory and punitive damages.

26 In addition, without swearing as to his belief in the truth of their contents, Mr. Akagi attached three documents relating to an investigation by the CRA into the affairs of Synergy and IBC: (i) a copy of an Information to Obtain Production Order, presented by a CRA officer, Andrew Suga, to a judge five years earlier (in July 2008); (ii) a copy of an affidavit sworn three years earlier (on June 25, 2010) by a CRA officer, Sophie Carswell; and (iii) a copy of a second affidavit sworn by Ms. Carswell on March 2, 2012. Also attached, again without swearing as to his belief in the truth of their contents, were copies of three newspaper articles regarding the execution of search warrants by the RCMP on June 6, 2013 (in a matter unrelated to Mr. Akagi, but purporting to relate to Synergy and Smith).

27 The thrust of the information contained in the CRA documents was that, at the time the documents were executed, the CRA was conducting a criminal investigation relating to Synergy and IBC's tax allocation program. In particular, CRA officials were investigating the affairs of Synergy, IBC, Smith, Prentice and Breau, as well as those of the appellants Vincent Villanti (the president of IBC) and Ravendra Chaudhary (a chartered accountant working with IBC and Villanti) and various other persons. The tax scheme (defined by Ms. Carswell as the "Tax Plan") was described as follows:

> In the Tax Plan, arm's length individuals who purchased "units" as part of the Tax Plan have deducted certain losses in their 2004, 2005 and 2006 T1 individual income Tax Returns ("T1 Returns"), which they were led to believe were partnership losses validly deductible against other income. These losses purportedly originated from the operations of struggling small and medium sized enterprises ("Joint Venture Partners" or "JVPs" hereinafter) who contributed them to a pool of losses by way of signing Joint Venture Partnership Agreements with the Independent Business Consulting Association (hereinafter "IBCA"). No such losses are deductible in the T1 Returns of the Unit Purchasers.
>
> The net result of the Alleged Offenders' activities is that:
>
> > a) Purchasers of units in the Tax Plan (hereinafter "Unit Purchasers") were defrauded of the money they had paid to the Allege Offenders, because what they received for the money paid was not deductible in their Income Tax Returns, contrary to what they were led to believe.
> >
> > b) The Unit Purchasers claimed losses in their respective T1 Returns for the calendar years 2004, 2005 and 2006, resulting in the understatement of their income taxes payable to the Crown, and
> >
> > c) The Alleged Offenders understated their income from their participation in the promotion and sale of the Tax Plan, thus understating the taxable income and consequent income tax thereon in their own respective income tax returns (corporate and individual) for the taxation years 2004, 2005 and 2006.
>
> As a result of its findings in the investigation to date, the essence of the CRA's theory of the offences currently is that the individuals cited above as Alleged Offenders ... acting personally or through corporations or entities which they

> controlled, participated in the promotion and sale of the Tax Plan which the Affiant believes to be fraudulent because the overwhelming majority of JVPs' losses as shown on their financial statements were fraudulently inflated in arriving at the loss figures shown on the T2124 Statements of Business Activities issued by the Alleged Offenders to the Unit Purchases as part of the Tax Plan.

28 The Suga Information to Obtain, referred to above, described a similar tax scheme, although in much greater detail.

29 As noted, Mr. Akagi did not say what, if any, knowledge he had of the information contained in the Carswell and Suga material or that he believed in the truth of their contents. Nor did he or the Receiver — then or at any time during the subsequent *ex parte* applications discussed below — disclose that the CRA had terminated its investigation in February 2013, four months before the receivership application (albeit, as it later turned out, the RCMP was, at the same time, conducting a continuing investigation into the same alleged scheme).

30 On the basis of this record, on June 14, 2013, the application judge granted the receivership order sought, stating in a brief four-line endorsement that he was "satisfied that the grounds for relief sought have been made out and that a Receiving Order [should] issue in the form filed." The Order was made pursuant to s. 101 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. I shall refer to this Order as the "Initial Order".

31 Mr. Akagi submits that "the application judge appointed the receiver for the purpose of investigating the Synergy Alternative Tax Investment Program *on behalf of all investors therein*, and not just on behalf of Mr. Akagi" (emphasis added). However, the Initial Order makes no mention of the Synergy Alternative Tax Investment Program, much less of the power to investigate any such program. That said, the Receiver appears to have treated the Initial Order as entitling it to embark on such an inquiry, and at some point in the evolution of the receivership the application judge appears to have accepted that he had put an "investigative receivership" into place.

32 What follows is a brief description of how the receivership evolved.

The Subsequent Ex Parte Expansions of the Receiver's Powers

June 24, 2013

33 Just ten days after the Initial Order, the Receiver applied *ex parte* for expanded powers. It sought authorization to direct financial institutions to disclose information and documentation regarding payments and transfers of funds not only by Synergy and IBC (the only entities subject to the Initial Order), but also by or at the direction of an expanded list of targets: Independent Business Consulting Association, Independent Business Consultants Association, Integrated Business Consultants Association, 565819 Ontario Ltd., Vincent Villanti, Jean Breau, Larry Haliday, Joe Loshiavo, Shane Smith, David Prentice, Ravendra Kumar Chaudhary and Nadine Smith.

34 The Receiver did not file a notice of motion, notice of application or a factum. The only additional material filed beyond that which informed the Initial Order was the Receiver's First Report. In another brief endorsement, the application judge granted the order sought.

35 As I shall explain later, it is at this point that the receivership truly began to embark on its impermissible voyage. The expanded order was sought on the premise that "[t]he Receivership concerns a tax scheme...described by Canada Revenue Agency", as set out in the excerpt from Ms. Carswell's affidavit, set out above. Based on CRA's documents, the "scheme" was described as involving 3,815 "victims", and the list of "Alleged Offenders" in Ms. Carswell's affidavit became the expanded target list outlined above.

June 28, 2013

36 Still, the Receiver was not content.

37 Four days later, on June 28, the matter was back before the application judge, again *ex parte* with no notice of motion or application, no further evidence and no factum. This time, there was not even an additional Receiver's Report. The Receiver sought a further expansion of its powers, authorizing it, amongst other things, to examine the financial account statements and related records in the hands of any financial institutions of the Debtors and IBC, as well as the others on the expanded target list. The enlarged authority was granted. In another brief endorsement the application judge stated that "[h]aving heard from counsel [he was] satisfied the relief sought is in the circumstances [was] appropriate and so approved in terms of the draft order signed."

August 2, 2013

38 On August 2, 2013 the Receiver obtained what can only be described as a breathtakingly broad extension of the Initial Order. Recall that the only judgment debtors of Mr. Akagi were — and are — Synergy, Smith and Prentice. The only respondents on the initial application — and the only entities made subject to the Initial Order — were Synergy and IBC. IBC is not, and never has been, a debtor of Mr. Akagi.

39 Here is what happened leading up to August 2.

40 On July 30, 2013, the Receiver e-mailed the application judge with a copy of its Second Report, dated that same date. On July 31, counsel for the Receiver appeared before the application judge, but there is nothing in the court file to indicate what submissions were made. On August 1, counsel for the Receiver e-mailed the application judge again, attaching a draft order that would become the August 2 Order. In the e-mail, counsel offered to make themselves available if the judge "would like a call to discuss the draft order." There is no record of any such discussion. On August 2, the application judge sent an e-mail to counsel for the Receiver, stating: "I hereby authorize the attached order to issue." No reasons were provided.

41 Again, this order was sought and obtained *ex parte*, without any formal notice of motion or application, and without any evidence other than the filing of the Receiver's Second Report.

42 The Second Report summarized the results of the Receiver's investigations after serving the June 24 and June 28 "Disclosure Orders" on various financial institutions. The information received included bank statements of a large number of individuals and corporations named in the earlier orders or in some way associated or affiliated with them. The Receiver's conclusion was "that the alleged offenders have set up a complex matrix of companies and bank accounts". It also identified certain properties said to be associated with the appellant Chaudhary and others, and certain information obtained from the appellants Smith and Prentice at their examinations in aid of execution held on July 26, 2013.

43 What makes the reach of the August 2 Order breathtakingly broad is the following:

- It extended the Receiver's powers to include and apply to: a list of 43 additional individuals and entities identified in Schedule "A" to the Order; any affiliates of those individuals or entities (as defined in the *Ontario Business Corporations Act* ("OBCA")); any corporations or other entities directly or indirectly controlled by the individuals listed or of which they were directors or officers; any corporation in respect of which the listed individuals were entitled to conduct financial transactions; and finally, any entity with a registered head office at the premises occupied by Synergy and IBC.

- The Schedule "A" list was inaccurately defined as comprising "Additional Debtors". Of those on the list, only Synergy, Smith and Prentice were debtors to Mr. Akagi.

- The Order contained sweeping injunctive provisions — operating on a worldwide scale — enjoining all of the 45 listed individuals and entities from dealing with their assets, property or undertakings, wherever located, in any way, and freezing their accounts by enjoining any financial institution served with the order from "disbursing, transferring or dealing with any funds or assets deposited in all [their] accounts".

- The Order authorized the Receiver to register certificates of pending litigation against the properties of not only the Debtors and IBC, but the 41 "Additional Debtors" listed in Schedule "A", despite no action or application having been commenced seeking such relief.[2] The Court's attention was not drawn to s. 103 of the *Courts of Justice Act*, which

requires the commencement of an action claiming an interest in land as a condition to issuing a certificate of pending litigation.

• Not only did the Order freeze the accounts of the Debtors and the "Additional Debtors", it granted the Receiver a $500,000 borrowing charge against the frozen funds to fund the Receiver's activities.

44 All of this evolved out of a receivership that could only have been granted in aid of execution of Mr. Akagi's outstanding judgment of, at most, approximately $122,000, against the three judgment Debtors — Synergy, Smith and Prentice. As noted above, Smith and Prentice were not even subject to the Initial Order, nor were they examined in aid of execution until July 26, 2013, more than a month *after* the Initial Order was made. Nor was there any evidence before the application judge on the initial application — or thereafter for that matter — indicating that Mr. Akagi had taken any steps to enforce his judgment or that his recovery was likely to be in any jeopardy. As far as the record shows, none of the Debtors or "Additional Debtors" is insolvent.

45 I shall refer to the *ex parte* Orders of June 24, June 28 and August 2, 2013, as the "Subsequent Orders".

The September 16, 2013 "Come-back Hearing"

46 Sometime after the August 2 Order was granted, the various appellants were notified of the Initial and Subsequent Orders. On August 14, 2013, they applied to the application judge to have the orders set aside. On September 16, 2013, their requests were dealt with by way of a "come-back hearing", and dismissed for written reasons delivered that day. I shall refer to this Order as the "Come-Back Hearing Order".

47 At the come-back hearing, the Receiver filed its Third, Fourth and Fifth Reports dated August 15, September 8 and September 16, 2013. Mr. Akagi filed a responding motion record, as did the appellants.

48 The application judge dismissed the complaint that the Receiver had breached its obligations to the court and to the parties to make full disclosure, by failing to disclose the fact that the CRA had terminated its investigation several months before the application for the initial order. He was satisfied there was no lack of full disclosure. There was evidence on the June 14 application that the RCMP was investigating the matter and, while there was no specific evidence that the CRA had referred the matter to the RCMP, this was implicit in the reference to recent search warrant executions by the RCMP. The application judge concluded that there was "no suggestion that CRA [had] discontinued to pursue what is its concern, namely fraudulent activity in the sale of tax losses to investors which lacked reality."

49 Secondly, the application judge rejected the appellants' argument that the materials filed did not satisfy the test for injunctive relief (as applied to interim receivers) set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), at paras. 47-48. He concluded:

> The second ground for setting aside namely, that the *RJR MacDonald* test was not met, does not in my view succeed on this material. It is conceded that there is a serious issue of fraud alleged and given the large number of investors (over 3800) of relatively small sums ($10-15,000) I conclude it was appropriate that there be an investigative Receiving Order issued. Otherwise many investors would not know of the potential fraud. The irreparable harm on the material clearly extends beyond Mr. Akagi and does extend to a great number of other investors who have not the resources to pursue to judgment as has Mr. Akagi who remains an unsatisfied judgment debtor.

50 Thirdly, the application judge rejected the argument that the Initial and Subsequent Orders constituted execution before judgment, analogous to a *Mareva* injunction. In his view, the relief sought was simply a "freezing subject to further order in support of an ongoing investigation."

51 Finally, after recognizing the "powerful and important intrusion" of a receivership order under s. 101 of the *Courts of Justice Act*, and acknowledging that the test for the appointment of a receiver was "comparable" to the test for interlocutory injunctive relief, the application judge concluded:

> Comparable does not mean precisely. This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaws Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer the legitimate concerns of investors.

Final or Interlocutory Order

52 Counsel for Mr. Akagi advanced two arguments that he submits undermine this Court's jurisdiction to hear the current appeal.

53 First, he argued that the orders under attack are interlocutory and therefore this Court does not have jurisdiction to deal with them. In the circumstances here, I disagree.

54 The Initial Order was obtained on application. No relief was claimed other than the appointment of a receiver. There was nothing more to be disposed of once that relief was granted. In the context of the proceedings, it was not intended to be interim or interlocutory in nature pending the outcome of a proceeding involving Mr. Akagi or anyone else.

55 Although Mr. Akagi's counsel refers to the orders as "separate receivership orders", the character of the Subsequent Orders is unclear because the Receiver did not file a notice of motion, notice of application or any formal record on any of the subsequent *ex parte* proceedings.

56 In any event, they are subsumed in the September 16, 2013 Come-Back Hearing Order, which is a final order. It finally disposes of the receivership issues between the parties to the Initial Order and between the Receiver and the numerous non-parties caught by the Subsequent Orders. There is no action or application in which any further rights will be determined. There will be no pleadings defining the issues and giving the appellants the opportunity to defend. This conclusion is consistent with decisions of this court, faced with similar circumstances, holding that a receivership order obtained by way of application is a final order from which an appeal lies directly to this Court: see e.g., *Illidge (Trustee of) v. St. James Securities Inc.* (2002), 60 O.R. (3d) 155 (Ont. C.A.); *Ontario v. Shehrazad Non Profit Housing Inc.*, 2007 ONCA 267, 85 O.R. (3d) 81 (Ont. C.A. [In Chambers]).

57 Secondly, counsel for Mr. Akagi argued that a direct appeal to this court from the Initial and Subsequent Orders is inappropriate because the *Rules of Civil Procedure* provide for the steps to be taken to set aside an *ex parte* order. Again, I disagree. This argument overlooks the fact that the come-back hearing effectively provided that very procedure.

58 For these reasons, an appeal lies to this Court from the Come-Back Hearing Order.

Discussion and Analysis

59 It will be apparent from the foregoing narration that, in my view, the receivership orders must be set aside. They stand on a fundamentally flawed premise and are unjustifiably overreaching in the powers they grant. Procedurally, they call for at least a word of caution as well, although it is not necessary to dispose of the appeal on this basis in view of the more substantive issues raised by the orders. The procedural concerns arise out of the *ex parte* nature of this developing set of extraordinary orders, the somewhat casual manner in which they were processed, and the failure to make full disclosure.

60 I will return momentarily to these issues, and to the particulars of this case. First, however, it may be useful (i) to revisit the framework of this proceeding, and (ii) to comment briefly on the relatively new notion of an "investigative receiver" — so named for the powers the receiver is granted — as it begins to stride across the commercial law landscape.

The Framework of This Proceeding

61 The Initial Order and Subsequent Orders were sought and obtained by relying on s. 101 of the *Courts of Justice Act*. Mr. Akagi is an unsecured judgment creditor with a judgment based on fraud.

62 This is not the case of a secured creditor requesting the appointment of a receiver under its security instrument by court order rather than by private appointment. Nor is it a case involving the appointment of a receiver under insolvency legislation, such as the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("BIA"), or under the *Securities Act*, R.S.O. 1990, c. S.5 (where the court has the power to appoint a receiver to protect investors in certain circumstances). As noted earlier, it is not a class proceeding or other form of representative action.

63 This is a case where a judgment creditor seeks to use an unsatisfied judgment as an entrée to obtain a receivership in order to freeze the assets and investigate the affairs of not only the debtors, but also of a complex mix of related and not-so related entities and individuals. And to do so not to protect his own interests, but those of some 3800 other investors who may have been victims of a similar fraud, but who have not sought to assert a similar claim.

64 This is made clear in the initial notice of application, both in the outline of the factual grounds for the receivership and in the summary of why Mr. Akagi said it was in the interests of justice that the Receiver be appointed. Ground 10 in the notice of application states:

> It is in the interests of justice that a Receiver be appointed over Synergy and IBC:
>
> (a) Judicial process will ensure that an independent court officer will control the process and address competing claims.
>
> (b) The Court appointed Receiver can investigate and work with authorities to locate and realize upon assets for the benefit of all creditors.
>
> (c) The complex business structure would make litigation by individuals untenable. The Court appointed Receiver can deal with such complexities on behalf of all victims.
>
> (d) The Court appointed Receiver can prevent further wasting of assets and help to preserve assets for the benefit of all victims/creditors.

"Investigative" or "Investigatory" Receiverships

65 The idea of appointing a receiver or monitor with investigative powers — and sometimes, with only those powers — has emerged in recent years. This Court has not previously been asked to consider whether, or in what circumstances, a s. 101 receiver may be empowered in this fashion. For the purposes of this appeal, it is not necessary that the contours of such an appointment be traced in a detailed manner. Suffice it to say that the idea of appointing a receiver to investigate into the affairs of a debtor is not itself unsound. Rather, it is the runaway nature of the use to which the concept has been put in this case that gives rise to the problem.

66 Indeed, whether it is labelled an "investigative" receivership or not, there is much to be said in favour of such a tool, in my view — when it is utilized in appropriate circumstances and with appropriate restraints. Clearly, there are situations where the appointment of a receiver to investigate the affairs of a debtor or to review certain transactions — including even, in proper circumstances, the affairs of and transactions concerning related non-parties — will be a proper exercise of the court's "just and convenient" authority under s. 101 of the *Courts of Justice Act*. See, for example, *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.); *Pandya v. Simpson* [2005 CarswellOnt 10517 (Ont. S.C.J. [Commercial List])] (17 November 2005), Toronto, 05-CL-6159; *Century Services Inc. v. New World Engineering Corp.* [2007 CarswellOnt 9945 (Ont. S.C.J.)] (28 July 2006), Toronto, 06-CL-6558; *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.); *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.); *DeGroote v. DC Entertainment Corp.*, 2013 ONSC 7101 (Ont. S.C.J. [Commercial List]); *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.); *236523 Ontario Inc. v. Nowack*, 2013 ONSC 7479 (Ont. S.C.J. [Commercial List])

(relief denied); *Romspen Investment Corp. v. Hargate Properties Inc.*, 2011 ABQB 759 (Alta. Q.B.).

67 It goes without saying that the root principles governing the appointment of any receiver remain in play in this context, however, and in this respect, two "bookend" considerations, are particularly germane. On the one hand, the authority of the court to appoint a receiver under s. 101 of the *Courts of Justice Act* "where it appears...just or convenient to do so" is undoubtedly broad and must be shaped by the circumstances of individual cases. At the same time, however, the appointment of a receiver is an extraordinary and intrusive remedy and one that should be granted only after a careful balancing of the effect of such an order on all of the parties and others who may be affected by the order. In the case of a receivership in aid of execution, at least, the appointment requires evidence that the creditor's right to recovery is in serious jeopardy. It is the tension between these two considerations that defines the parameters of receivership orders in aid of execution.

68 A review of some of the authorities referred to above will illustrate how these tensions have been resolved in the particular context of a receivership clothed with investigative powers.

Stroh v. Millers Cove Resources Inc.

69 The first is *Stroh v. Millers Cove Resources Inc.*, [1995] O.J. No. 1376 (Ont. Gen. Div. [Commercial List]), aff'd [1995] O.J. No. 1949 (Ont. Div. Ct.). Because it involved an oppression remedy claim, the appointment of an inspector under the *OBCA* was an available option.[3] Justice Farley appointed a receiver to take control of the assets of a company and to investigate and conduct an independent review of certain self-dealing transactions by the company's majority shareholder, of which the company's directors were unaware. In affirming his decision, the Divisional Court underlined that "the main thrust" of the order was to ensure that the company's assets and arrangements "[could] be fully examined and considered so that future actions [could] then be planned": para. 7.

70 It is important to note that in *Stroh* the defendant corporation was not an operating company and that Farley J. only granted the receivership remedy after giving counsel the opportunity to re-attend before him and make further submissions about whether the officer to be appointed should be a receiver/manager, a monitor, an inspector or something else. He ultimately concluded that the only way the investigation stood any chance of success (because of the secrecy of the majority shareholder and the power it exercised) was to appoint a receiver with the authority he granted.

71 In other words, Farley J. carefully fashioned the remedy to meet the needs of the oppression remedy claimants in the proceeding.

Udayan Pandya v. Courtney Wallis Simpson and Century Services v. New World Engineering Corporation

72 A decade later, Ground J. made a similar order in *Pandya v. Simpson* (17 November 2005), Toronto, 05-CL-6159, as did Morawetz J. in *Century Services Inc. v. New World Engineering Corp.* (28 July 2006), Toronto, 06-CL-6558. Both cases involved the appointment of a receiver for the primary purpose of monitoring and investigating the assets and affairs of defendants.

73 As Morawetz J. reasoned in *Century Services*, the appointment of a receiver was "necessary to monitor the affairs of the defendants so that a more fulsome investigation [could] be undertaken." No power was given to seize or freeze assets and the order was very specific that the receiver "shall not operate or unduly interfere with the business of the corporate defendants."

74 In short, the focus was on investigating the affairs of *the defendants* in order to protect the rights of *the plaintiff*. That is, the relief granted was carefully designed to meet the needs of the particular proceeding itself (unlike here, where the investigative receivership reached numerous non-party "alleged offenders" unrelated to the underlying proceedings to protect the interests of thousands of unrelated, non-party "victims").

Loblaw Brands Ltd. v. Thornton and General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living

75 It appears to have been D.M. Brown J. (as he then was) who adopted the terminology of an "investigative" or, as he called it, an "investigatory" receiver. As far as I can determine from the Canadian, American, British and other common law jurisprudence, his decisions in *Loblaw Brands Ltd. v. Thornton*, [2009] O.J. No. 1228 (Ont. S.C.J.), and *General Electric Canada Real Estate Financing Holding Co. v. Liberty Assisted Living Inc.*, 2011 ONSC 4136 (Ont. S.C.J. [Commercial List]), aff'd 2011 ONSC 4704 (Ont. Div. Ct.), are the first to have recognized such a receiver as, in effect, a specific class of receiver. Neither of these authorities assists the respondent in justifying the receivership as it evolved here, however.

76 *Loblaw Brands* — a decision upon which the application judge relied — is not this case at all. It involved a fraud perpetrated against Loblaw by an employee (Thornton) who diverted about $4.2 million in supplier rebate payments from Loblaw to his own company (IBL).

77 Prior to the appointment of the "investigatory receiver", Brown J. had granted a *Norwich Pharmacal*[4] order followed by a *Mareva* injunction against the assets of Thornton and IBL. Based on the investigation following those orders, Loblaw learned that IBL's bank account contained less than $44,000 and Thornton's less than $6,000. On the other hand, the accounts revealed outgoing transfers of over $900,000 for payments to various car dealerships, the purchase of a cottage, mortgage payments, home improvements and cash transfers to Thornton's son.

78 Based on these facts, Brown J. appointed a receiver "to locate, investigate, and monitor" the property of Thornton and IBL and "to secure access for the Receiver to such books, record, documents and information the Receiver considers necessary to conduct an investigation of transfers of funds by or from Paul Thornton or IBL, or their banks or trust accounts, to the other defendants or other persons": para. 17.

79 In one sense, this was quite a broad order. However, *Loblaw Brands* is markedly different from the present case in a number of ways.

80 First, the *Loblaw* receivership was grounded in necessity in relation to the collection of the defrauded funds by the claimant Loblaw: given the huge disparity between the amount of money diverted from Loblaw to IBL ($4.2 million) and the value of Thornton and IBL's known assets (approximately $50,000), Brown J. concluded that "without the appointment of a receiver the plaintiff's right to recovery could be seriously jeopardized": para. 16. These circumstances do not apply here. Mr. Akagi is owed approximately $122,000. There is no evidence of any dramatic disparity between the assets of Synergy, Smith and Prentice (much less IBC) and the amount of the outstanding judgment. Nor is there any evidence that Mr. Akagi's right to recover on the judgment is in jeopardy.

81 Secondly, the *Loblaw* receivership was very carefully tailored to preserve Loblaw's right to recover without providing the Receiver with overreaching powers to interfere with the rights of others. The *Loblaw* Receiver's mandate was "to locate, investigate and monitor" (para. 17); it was not empowered to seize and freeze, as was the Receiver here. Nor were the targeted individuals and entities whose assets were encumbered and affairs interfered with anywhere nearly as wide-spread or tangentially associated with the parties to the proceeding as is the case here.

82 Finally, the *Loblaw* receivership was also very carefully crafted to protect the interests of Loblaw alone. Here, however, the receivership is more concerned — if not entirely concerned — with protecting the interests of the 3800 other investors who are said to have been defrauded in the tax allocation scheme. The assets being chased in this receivership are not those needed to protect Mr. Akagi's interests at all; they relate to the interests of those 3800 unrelated, non-party individuals who may or may not find themselves in the same situation as Mr. Akagi.

83 Nor does Brown J.'s decision in *General Electric* — a bankruptcy proceeding — provide a basis for justifying the orders here.

84 *General Electric* involved four bankrupt companies and two related non-bankrupt companies that were part of a group of companies called the Liberty Group. The Liberty Group owned and operated a number of retirement homes. Prior to their bankruptcies, the four bankrupt companies defaulted on their secured obligations to General Electric. The Receiver subsequently assigned the companies into bankruptcy and became the trustee in bankruptcy under the BIA.

85 In the course of the bankruptcy proceeding, it became apparent that, during the bankrupt companies' period of

insolvency, there had been a series of intercompany payments from them to the two related but solvent corporations under the Liberty Group umbrella: Liberty Assisted Living Inc. ("Liberty") and 729285 Ontario Limited ("729285"). Liberty had been the manager of the retirement homes and 729285 was a shareholder of the company that held all of the shares of the bankrupt companies. In addition, three retirement residences had been sold in the face of court orders prohibiting such sales.

86 The trustee tried to obtain financial information regarding these transactions from the bankrupt companies and from Liberty and 729285. In spite of court orders requiring disclosure of the information and requiring the companies' officers to attend for examinations under s. 163 of the BIA, the information was either not provided or, if provided, was inconsistent, unreliable and misleading. Faced with this stonewalling, the trustee sought the appointment of an "investigative receiver" to investigate the affairs of Liberty and 729285.

87 Justice Brown granted the order with respect to 729285, but declined to do so with respect to Liberty. He concluded there was a strong case that the bankrupt companies had made preference payments to 729285 while insolvent. Because the companies had provided unreliable and inconsistent information on their s. 163 examinations and had compounded that problem by making misrepresentations to the court about the true state of the transferred proceeds, he was satisfied, at para. 103, that:

> Those factors point[ed] to the need to allow an independent third party (a) to look into the transactions which took place between the Bankrupt Companies and 729285, (b) to ascertain the true state of 729185's interest in any of the [funds] — whether they were in trust for others or whether the company enjoyed a beneficial interest in them — and, (c) to figure out the true state of the affairs regarding those to whom the [funds] were paid.

88 With respect to Liberty, however, Brown declined to grant such an order. Since Liberty had managed the bankrupt companies, there were contract-based reasons for payments to and from the companies and there was no evidence that the proffered explanations were unreliable.

89 Again, then, *General Electric* is a case where the investigative powers granted to the Receiver were carefully weighed and carefully tailored to protect the rights of the applicant in relation to the affairs of companies closely related to the bankrupt companies.

90 Some consistent themes emerge from these authorities:

- The appointment of the investigative receiver is necessary to alleviate a risk posed to the plaintiff's right to recovery: *Loblaw Brands*, at paras. 10, 14 and 16.

- The primary objective of investigative receivers is to gather information and "ascertain the true state of affairs" concerning the financial dealings and assets of a debtor, or of a debtor and a related network of individuals or corporations: *General Electric*, at para. 15. One authority characterized the investigative receiver as a tool to equalize the "informational imbalance" between debtors and creditors with respect to the debtor's financial dealings: *East Guardian SPC v. Mazur*, 2014 ONSC 6403 (Ont. S.C.J.), at para. 75.

- Generally, the investigative receiver does not control the debtor's assets or operate its business, leaving the debtor to continue to carry on its business in a manner consistent with the preservation of its business and property: see e.g., *Loblaw Brands*, at para. 17; *Century Services*.

- Finally, in all cases the investigative receivership must be carefully tailored to what is required to assist in the recovery of the claimant's judgment while at the same time protecting the defendant's interests, and to go no further than necessary to achieve these ends.

91 An additional theme that is reflected in the authorities relates to the application of the three-part test set out by the Supreme Court of Canada in *RJR-MacDonald*, at paras. 47-48. The *RJR-MacDonald* test requires the applicant to demonstrate: (i) that there is a serious issue to be tried;[5] (ii) that the creditor will suffer irreparable harm if the relief is not granted; and (iii) that the balance of convenience favours the creditor. The test is often applied where the receivership order is

purely interlocutory and ancillary to the pursuit of other relief claimed — where it is, in effect, execution before judgment.

92 Although the application judge applied the test at the time of the Comeback Hearing — concluding that it had been met here — I need not dwell on whether that was so, or on the role of *RJR-MacDonald* in the receivership context generally, for the purposes of this appeal. The Initial Order, Subsequent Orders, and Come-Back Hearing Order must be set aside in any event, in my view, for the reasons that follow.

The Investigative Receivership in This Case

93 In spite of the positive features of investigative receivers, as set out above, there are risks as well. This appeal provides a case in point. The Receiver, in particular, took a useful concept and ran too far with it. In addition, a number of procedural safeguards were at least obscured in the dust of the chase.

The Procedural Issues

94 Because of the substantive frailties undermining the receivership, it is not necessary to determine this appeal based on the procedural issues raised.[6] It bears noting, however, that if the matter had not proceeded through the numerous steps on an *ex parte* basis, as it did, it would have been less likely to have gone astray, as it did. The same may be said of the somewhat relaxed procedural approach taken to the proceedings. Had the normally salutary processes of the Commercial List — carefully designed to permit the parties to get to the merits of a dispute and resolve them in "real time" without trampling their procedural rights — not been permitted to become overly casual, as they did, the galloping nature of the receivership may well have been reined in.

95 *Ex parte* proceedings are to be taken sparingly, and only then on full disclosure and in circumstances where it is demonstrated that notice to other parties would undermine the purpose of the proceeding. As Penny J. noted recently in *CanaSea PetroGas Group Holdings Ltd., Re*, 2014 ONSC 6116 (Ont. S.C.J.), at para. 28, applicants are under "high obligations of candor and disclosure on an *ex parte* application."

96 At best, the steps taken in pursuit of the orders here sailed very close to this line. There is a reason for requiring a proper record of steps taken, including a notice of motion or application, a motion or application record, a proper evidentiary foundation and adequate judicial reasons: it is otherwise impossible to determine subsequently what was at issue and the basis for the order made. This is particularly so where the relief sought involves the extraordinary, *Mareva*-like nature of a receivership order, much less a receivership order of the sweep that emerged from these proceedings.

97 Beyond the Receiver's failure to prepare any of the above-listed documents, the appellants place considerable emphasis on the Receiver's failure to disclose, during the *ex parte* steps in the proceeding, that the CRA had discontinued its investigation — on the particulars of which the applicant relied — in February 2013, several months before the initial receivership application was made. It was not until almost two weeks *after* the August 2 Order that the termination of the CRA investigation was first brought to the Court's attention, and even then, it was raised indirectly: in its Third Report, dated August 15, 2013, the Receiver confirmed that the CRA had referred its investigation to the RCMP.

98 There was some indication in the materials filed when the Initial Order was sought, however, that the RCMP was also investigating the matter. Based on this — despite the absence of evidence that the CRA had referred the matter to the RCMP or that the CRA had itself discontinued its investigation — the application judge "was satisfied there was no lack of full disclosure."

99 The application judge was well-positioned to determine whether he had been misled by any material non-disclosure, and his decision in that regard is entitled to deference. That said, in my view, the failure to disclose that the very investigation upon which the *ex parte* receivership application was founded had been discontinued, at the very least, sailed close to the line of failing to make full and fair disclosure.

The Substantive Issues

The "Roving Receivership"

100 The fundamental flaw underlying the Initial and Subsequent Orders is the faulty premise that the Receiver could be appointed in these circumstances to carry out a broad, stand-alone, investigative inquiry — the civil equivalent of a criminal investigation or public inquiry — for the purposes of determining whether wrongs were suffered by an unidentified hodgepodge of non-party persons who were not represented by anyone in the proceedings, who had expressed no interest in becoming parties or in having their rights protected in the proceedings, and whose interests did not need to be protected to preserve the interests of the appointing creditor. This flawed premise is compounded by the overreaching nature of the relief granted, namely, the authority to both: (i) investigate, without notice, the private financial affairs of a myriad of targets only indirectly, if at all, related to the defendants, as well as further potential targets far beyond the actual debtors and the need to protect Mr. Akagi's interests; and (ii) tie up and freeze the assets and property of those targets, again without notice, pending the termination of the receivership.

101 Mr. Akagi sought the appointment of a receiver because he had an unsatisfied judgment against Synergy, Smith and Prentice for approximately $122,000. The purpose of appointing a receiver in aid of execution under s. 101 of the *Courts of Justice Act* is to protect the interests of the claimant seeking the order where there is a real risk that its recovery would otherwise be in "serious jeopardy": *Ryder Truck Rental Canada Ltd. v. 568907 Ontario Ltd.*, [1987] O.J. No. 2315 (Ont. H.C.), at para 6.

102 Put simply, the reach of the Subsequent Orders granting the Receiver enhanced powers is beyond the scope of what could be justified in a single-creditor receivership involving an outstanding claim of, at most, perhaps $122,000. To the extent the Initial Order was granted for the same roving purpose — as the Receiver submits it was — that Order must also be vacated.

103 That the receivership was intended from the beginning to be — and certainly became — an investigation of the affairs of those involved in the broad tax scheme (and of others even beyond that) on behalf of 3800 non-party investors is apparent from both the position taken by the Receiver and the application judge's following comment from his September 16 reasons:

> This is a case where some 3800 investors on their own would not be able to adequately investigate the activities of their agent (Synergy) in dealing on their behalf with CRA. A Receiver under s. 101 provides an equitable remedy and in circumstances where, as here, its purpose is investigative. For that reason as in *Loblaw Brands Limited v. Thornton* (CV-09-373422) a Receiver may be appointed to investigate when other means are not available to answer legitimate concerns of investors.

104 As explained above, *Loblaw Brands* is distinguishable from the present case. While I agree that s. 101 provides an equitable remedy for the appointment of an investigative receiver in appropriate circumstances, the type of receivership envisaged and put into place by the application judge goes beyond what is authorized by that provision.

The Initial Order of June 14, 2013

105 Even if the Initial Order was not granted for the "roving" purpose discussed above, but only to aid the execution of Mr. Akagi's judgment (the only legal or equitable basis upon which it could have been granted pursuant to s. 101 of the *Courts of Justice Act*), it must still be set aside.

106 It is true that the judgment against Synergy, Smith and Prentice was based on fraud. However, this is insufficient, by itself, to support such an order, in my view. In this context, Mr. Akagi is a judgment creditor. He was required to show that a receivership order freezing and otherwise interfering with the debtors' assets — and, in this case, not only the debtors' assets but the assets of others as well — was needed to protect his ability to recover on the debt.

107 However, the record reflects no evidence of any attempt by Mr. Akagi to collect on the judgment in any fashion other than to apply for the appointment of the Receiver. Nor was there any evidence that Synergy or the other defendants had

insufficient assets to satisfy the judgment, much less that it was necessary to reach the assets of IBC (which was not a party to the Akagi action) in order to protect Mr. Akagi's interests. Finally, with respect to the *ex parte* nature of the application, there was no evidence of urgency or of any reason to believe that, if given notice, Synergy or IBC (or Smith or Prentice, for that matter) would take steps to frustrate the legal process or undermine Mr. Akagi's prospects of recovery.

108 The Initial Order must be set aside on this basis as well.

The Certificates of Pending Litigation

109 The final Subsequent Order, granted *ex parte* on August 2, 2013, authorized the Receiver to register certificates of pending litigation not only against the property of Synergy and IBC (the original targets of the receivership application) but also against the property of the 43 "Additional Debtors" sought to be added to the receivership, only two of which were debtors to the underlying Akagi action.

110 There are at least two problems with this aspect of the Order.

111 First, no action or application has been commenced by Mr. Akagi, or anyone else, asserting a claim to an interest in land or requesting a certificate of pending litigation. Pursuant to s. 103 of the *Courts of Justice Act* and rule 42.01(2), these requirements are mandatory before an order authorizing the issuance of a certificate of pending litigation can be made: *Chilian v. Augdome Corp.* (1991), 78 D.L.R. (4th) 129, 2 O.R. (3d) 696 (Ont. C.A.), at p. 714; *Erdman, Re*, 2012 ONSC 3268 (Ont. S.C.J.), at para. 65. Nor was it asserted before this Court that Mr. Akagi, or anyone else, intended to commence such an action.

112 Secondly, there is no indication that either Mr. Akagi's claim or the claims sought to be protected on behalf of the 3800 unnamed investors give rise to any claims to an interest in land. The thrust of the claim is that they were all victims of a fraudulent tax allocation scheme, not a fraudulent land investment scheme. While there may be other ways of immobilizing the lands of targeted entities — such as the "freezing" orders otherwise attacked in these proceedings — a certificate of pending litigation cannot be issued in the air against unknown and undescribed lands regarding which no claim is, or could be, asserted.

113 For these reasons, the August 12 Order authorizing the issuance of certificates of pending litigation must be set aside.

Disposition

114 For the foregoing reasons, I would set aside the Initial Order dated June 24, 2013, the Subsequent Orders dated June 24, 2013, June 28, 2013 and August 2, 2013, and the Come-Back Hearing Order dated September 16, 2013.

115 If the parties cannot agree on costs, they may make brief written submissions, not to exceed 8 pages in length, within 30 days of the release of these reasons.

Janet Simmons J.A.:
I agree

R.G. Juriansz J.A.:
I agree

Appeal allowed.

Footnotes

1 The defendant Breau was never served with the proceedings, and by the time of the summary judgment motion, the defendant Delahaye had made an assignment in bankruptcy.

2 The Receiver now concedes that an error was made in granting this authorization, but argues that the lands should remain encumbered in some other fashion.

3 Legislation governing the affairs of corporations provides for the appointment of an "an inspector" to carry out "an investigation" into the business and affairs of a corporation or its affiliates: see the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44 ("CBCA"), ss. 229-230; the *Ontario Business Corporations Act*, R.S.O. 1990, c. B.16 ("OBCA"), s. 161. In general, this relief is available at the instance of a shareholder where it is apparent that the corporation's books and records are not properly kept or are inaccurate, or where there has been some deceit or oppressive conduct practiced against the shareholders: *Baker v. Paddock Inn Peterborough Ltd.* (1977), 16 O.R. (2d) 38 (Ont. H.C.), at p. 39. Its purpose is to ensure that a corporation discharges its core obligation to provide shareholders with an accurate picture of its financial position: *Pandora Select Partners, LP v. Strategy Real Estate Investments Ltd.*, [2007] O.J. No. 993 (Ont. S.C.J. [Commercial List]), at para. 13. The court has broad powers to make any order it thinks fit, but, in particular, is empowered to appoint an inspector to conduct an investigation and to authorize the inspector to enter any premises in which the court is satisfied there might be relevant information, to examine anything and to make copies of any document or record found on the premises, and to require any persons to produce documents or records to the inspector. While this case does not concern this corporate statutory framework, the notion of a receiver with investigative powers appears to have been born in that context. Nothing in these reasons is meant to suggest that an investigative receiver is intended to supplant the appointment of an inspector under the relevant legislation.

4 That is, an order providing for discovery of a non-party prior to trial.

5 It is not necessary to comment here on the debate in the authorities as to whether it is necessary for a creditor seeking the appointment of an investigative receiver to demonstrate fraud. It is accepted in this case that there has been fraud; Mr. Akagi's judgment is based on that finding.

6 I will deal with the issues surrounding the authorization of certificates of pending litigation separately.

End of Document

TAB 4

2007 ONCA 267
Ontario Court of Appeal [In Chambers]

Ontario v. Shehrazad Non Profit Housing Inc.

2007 CarswellOnt 2113, 2007 ONCA 267, 156 A.C.W.S. (3d) 523, 223 O.A.C. 76, 46 C.P.C. (6th) 195, 49 C.P.C. (6th) 195, 85 O.R. (3d) 81

HER MAJESTY THE QUEEN IN RIGHT OF ONTARIO (Applicant / Respondent / Responding Party) and SHEHRAZAD NON PROFIT HOUSING INC. (Respondent / Appellant / Moving Party)

J.C. MacPherson J.A.

Heard: March 16, 2007
Judgment: April 13, 2007
Docket: CA M34757, C46620

Counsel: Michael Jaeger for Respondent / Appellant / Moving Party
Troy Harrison for Applicant / Respondent / Responding Party

Subject: Civil Practice and Procedure

Related Abridgment Classifications

Civil practice and procedure
XXII Judgments and orders
XXII.15 Final or interlocutory
XXII.15.a Interlocutory judgment or order
XXII.15.a.i What constituting
XXII.15.a.i.A For purpose of appeal

Civil practice and procedure
XXIII Practice on appeal
XXIII.12 Staying of proceedings pending appeal
XXIII.12.a General principles

Headnote

Civil practice and procedure --- Judgments and orders — Final or interlocutory — Interlocutory judgment or order — What constituting — For purpose of appeal
Corporation provided social housing services and depended on funding from Ministry of Municipal Affairs and Housing — Corporation also received subsidies from Ministry — Funding for construction projects was provided through mortgages insured by Canada Mortgage Housing Corporation — Corporation was run by board of directors made up of volunteers — Problems arose between board and Ministry concerning finances of corporation — Ministry suspended subsidy payments on basis that corporation failed to make mortgage payments on projects — Corporation argued that all of its financial obligations were up to date except mortgage payments — Ministry brought application for appointment of receiver and manager in order to prepare for sale of projects to another non-profit corporation — Corporation brought action against Ministry for over $3 million in damages and for reinstatement of subsidies — Ministry defended and counterclaimed for $4 million in damages — Application judge refused corporation's motions for stay of receivership application, consolidation of proceedings and change of venue — Application judge ordered appointment of receiver and manager and held that corporation was insolvent

— Corporation appealed and brought motion for stay of appointment of receiver pending hearing of appeal — Ministry opposed motion on grounds that Court of Appeal had no jurisdiction to hear motion because order appealed was interlocutory order — Motion granted — Corporation brought appeal in correct court — Ministry did not bring motion to appoint receiver, rather it made application — Judge specifically referred to it as application in his endorsement — Draft order prepared by Ministry referred to application — Corporation's motion for stay should be considered on merits.

Civil practice and procedure --- Practice on appeal — Staying of proceedings pending appeal — General principles
Corporation provided social housing services and depended on funding from Ministry of Municipal Affairs and Housing — Corporation also received subsidies from Ministry — Funding for construction projects was provided through mortgages insured by Canada Mortgage Housing Corporation — Corporation was run by board of directors made up of volunteers — Problems arose between board and Ministry concerning finances of corporation — Ministry suspended subsidy payments on basis that corporation failed to make mortgage payments on projects — Corporation argued that all of its financial obligations were up to date except mortgage payments — Ministry brought application for appointment of receiver and manager in order to prepare for sale of projects to another non-profit corporation — Corporation brought action against Ministry for over $3 million in damages and for reinstatement of subsidies — Ministry defended and counterclaimed for $4 million in damages — Application judge refused corporation's motions for stay of receivership application, consolidation of proceedings and change of venue — Application judge ordered appointment of receiver and manager and held that corporation was insolvent — Corporation appealed and brought motion for stay of appointment of receiver pending hearing of appeal — Ministry opposed motion on grounds that corporation did not meet test for obtaining stay — Motion granted — There were serious issues to be determined on appeal that were not frivolous or vexatious — Financial state of corporation was contested issue — There was procedural issue of whether it was appropriate to appoint receiver in circumstances where Ministry did not appear to be concerned about having its debts repaid, but was concerned only with transferring business to another corporation — Corporation risked suffering irreparable harm should stay be refused — Corporation faced risk that projects could be transferred to another non-profit corporation by receiver — Balance of convenience favoured granting of stay — Ministry would suffer continued financial losses if stay was granted, but this was purely financial and therefore compensable — Effect of stay would only be to aggravate losses temporarily until appeal was heard.

Table of Authorities

Cases considered by *J.C. MacPherson J.A.*:

Circuit World Corp. v. Lesperance (1997), 1997 CarswellOnt 1840, 33 O.R. (3d) 674, 100 O.A.C. 221 (Ont. C.A. [In Chambers]) — considered

Illidge (Trustee of) v. St. James Securities Inc. (2002), 2002 CarswellOnt 1829, 34 C.B.R. (4th) 227, (sub nom. *Illidge (Bankrupt) v. St. James Securities Inc.)* 159 O.A.C. 311, 60 O.R. (3d) 155 (Ont. C.A.) — followed

Kanda Tsushin Kogyo Co. v. Coveley (1997), 96 O.A.C. 324, 1997 CarswellOnt 80 (Ont. Div. Ct.) — referred to

Longley v. Canada (Attorney General) (2007), 2007 CarswellOnt 1804 (Ont. C.A. [In Chambers]) — considered

RJR-MacDonald Inc. v. Canada (Attorney General) (1994), [1994] 1 S.C.R. 311, 1994 CarswellQue 120F, 1994 CarswellQue 120, 54 C.P.R. (3d) 114, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 164 N.R. 1, (sub nom. *RJR-MacDonald Inc. c. Canada (Procureur général))* 60 Q.A.C. 241, 111 D.L.R. (4th) 385 (S.C.C.) — followed

Statutes considered:

Courts of Justice Act, R.S.O. 1990, c. C.43
s. 101(1) — considered

Rules considered:

Rules of Civil Procedure, R.R.O. 1990, Reg. 194
R. 14.05(3)(g) — considered

R. 41.02 — considered

MOTION by corporation for stay of order of Spence J. dated January 20, 2007 pending hearing of appeal.

J.C. MacPherson J.A.:

A. Introduction

1 The moving party, Shehrazad Non-Profit Housing Inc. (the "Corporation"), seeks a stay pending appeal of the order of Spence J. dated January 20, 2007 appointing a receiver. The respondent, the Ministry of Municipal Affairs and Housing (the "Ministry"), opposes the motion on two bases: (1) the Court of Appeal has no jurisdiction to hear the motion because the order being appealed is an interlocutory order and, therefore, an appeal must be taken, to the Divisional Court; and (2) on the merits, the moving party cannot meet the test for obtaining a stay.

B. Facts

(1) The Parties

2 The Corporation was established in 1985 to provide social housing services in the City of Kitchener. The Corporation operates two social housing projects, known as Shehrazad I and Shehrazad II. Each project is governed by a contract between the Corporation and the Ministry. The Corporation depends on funding from the Ministry. Funding for the construction of the projects was provided through mortgages insured by the Canada Mortgage Housing Corporation ("CMHC"). The Ministry is ultimately liable for the mortgage payments in the event the Corporation defaults. The Corporation also received subsidies from the Ministry. Each project is governed by a different subsidy scheme, but generally speaking, the subsidies are designed to compensate for the difference between the Corporation's operating costs and revenues.

3 The Corporation is run by a Board of Directors made up of volunteers, many of whom have been involved since its inception.

4 Several years ago, problems between the Board and the Ministry arose concerning the finances of the Corporation. On July 21, 2003, the Ministry sent a letter to the Board raising a number of concerns. The Ministry and the Corporation were in the process of establishing a plan for retrofitting the housing projects. The Ministry requested a list of firms that the Corporation wanted to include in the tender process. The Ministry also pointed to a number of financial concerns. It alleged that the Corporation had accumulated a deficit, unfunded replacement reserves, mortgage arrears, outstanding loans, excess costs, significant vacancies and outstanding financial statements. In the letter, the Ministry demanded immediate action on the part of the Corporation and stated that it would "exercise the remedies available" if necessary. The Corporation responded by letter on September 10, 2003. The Ministry was not satisfied with the Corporation's response and suspended subsidy payments in September 2003.

5 The Ministry alleges that the Corporation failed to make mortgage payments on Shehrazad I from 2002 to 2006 and on Shehrazad II from 2003 to the present. The Ministry has been indemnifying CMHC for these mortgage payments. Between 2005 and 2006, the projects underwent a $1.7 million retrofit, funded by the Ministry.

6 The Corporation states that, with the exception of the mortgage payments, all of its financial obligations are up to date. It further notes that it re-started mortgage payments on Shehrazad I in 2006.

(2) The Litigation

7 The Ministry commenced an application in Toronto (on the Commercial List) for the appointment of a receiver and

manager on February 27, 2006. In its Notice of Application, the Ministry states that the appointment of a receiver is necessary in order to prepare for the sale of the projects to another non-profit corporation.

8 On September 18, 2006, the Corporation launched an action in Kitchener against the Ministry for over $3 million in damages and for the reinstatement of subsidies.

9 In a statement of defence and counterclaim filed by the Ministry in October 2006, the Ministry seeks over $4 million in damages.

10 The application for the appointment of a receiver was heard on January 20, 2007. The application judge refused the Corporation's motions for a stay of the receivership application, a consolidation of the proceedings and a change of venue to Kitchener. The application judge ordered the appointment of a receiver and manager. He held that the Corporation was insolvent, the receiver was qualified and there was "a risk to the assets and the operation of the project".

11 The Corporation is appealing the order of the application judge and seeks a stay of the appointment of the receiver pending the hearing of the appeal.

C. Issues

12 The issues are:

(1) Does the court have jurisdiction to order a stay?

(2) If the answer to (1) is 'Yes', should a stay pending appeal be ordered?

D. Analysis

(1) Jurisdiction

13 The Ministry submits that the Corporation has brought its appeal in the wrong court and that the appeal should be to the Divisional Court with leave. It follows that the motion for a stay of the application judge's order should also be to the Divisional Court and this court does not have jurisdiction to issue a stay of the order.

14 The Ministry commenced its application, including the relief to appoint a receiver and manager, pursuant to s. 101(1) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, which provides:

> 101(1) In the Superior Court of Justice, an interlocutory injunction or mandatory order may be granted or a receiver or receiver and manager may be appointed by an interlocutory order, where it appears to a judge of the court to be just or convenient to do so.

The Ministry submits that the application judge's order pursuant to this provision was, by definition, interlocutory.

15 I disagree. The Ministry did not bring a motion to appoint a receiver; rather, it made an application. The judge specifically referred to it as an application in his endorsement. The draft order prepared by the Ministry refers to an application.

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 para. 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 a stay should be considered on the merits.

(2) The Merits

18 Recently, in *Longley v. Canada (Attorney General)*, [2007] O.J. No. 929 (Ont. C.A. [In Chambers]) at para. 14 Weiler J.A. reaffirmed that the test from *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (S.C.C.), test is to be used on a motion for a stay pending appeal:

> The test for staying an order pending an appeal is the same as the test for an interlocutory injunction: *Circuit World Corp. v. Lesperance et al.* (1997), 33 O.R. (3d) 674 (C.A.) at 676-677. First, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be determined on the appeal. Second, the court must determine if the appellant would suffer irreparable harm if the application were refused. Finally, the balance of convenience must be determined by assessing which of the parties would suffer greater harm from the granting or refusal of the remedy pending a decision on the merits.

Is there a serious issue to be determined on appeal?

19 In *Circuit World*, Laskin J.A. held that this first part of the test constitutes a low threshold. At p. 677, he wrote that the court "should not extensively review the merits of the appeal," but it must determine that the issues raised are not frivolous or vexatious.

20 In this case, the Corporation submits that the following serious issues must be determined:

- Whether or not the appointment of a receiver is necessary;
- Whether or not the appointment of Grant Thornton Limited as receiver is appropriate;
- Whether or not the appointment of a receiver should occur prior to a resolution of the damages claims;
- Whether or not the subsidies terminated by the Ministry were justifiably terminated and whether or not an abuse of process occurred.

In essence, the Corporation argues that a receiver should not have been appointed.

21 The Ministry argues that there are no serious issues concerning the application judge's appointment of a receiver. It states that the application judge properly considered the relationship between the parties, whether the Ministry's security was at risk, and the prejudice to the parties. The Ministry further submits that the outcome of the subsidy action is irrelevant to the receivership application — even if the Corporation were successful, it would still owe the Ministry over $1 million and have an operating deficit.

22 In my view, the Corporation raises questions that are not merely frivolous or vexatious. First, the financial state of the Corporation is a contested issue. The Ministry argues (and the application judge held) that the Corporation is insolvent. Conversely, the Corporation argues that it is up to date on its financial commitments, except for the money owing on the mortgages. The Corporation further argues that it would not owe this money but for the Ministry's cessation of the subsidy payments. Therefore, issues for determination on appeal include whether the Corporation was in fact insolvent and whether the action for damages is relevant to that question.

23 Second, while this was not raised by either party, it appears to me that there may be a procedural issue to be determined on appeal, namely, whether it was appropriate for the Ministry to commence an application for the appointment of a receiver without that application being ancillary to another proceeding for relief. According to r. 14.05(3)(g) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, an application for the appointment of a receiver can be brought "when ancillary to relief claimed in a proceeding properly commenced by a notice of application." Similarly, r. 41.02 contemplates that a motion for the appointment of a receiver can be brought "in a pending or intended proceeding." In this case, the Ministry commenced its application for the appointment of a receiver without seeking any other relief. In fact, it was not until the Corporation commenced an action for damages that the Ministry counterclaimed seeking the repayment of its debts. This suggests that the Ministry's sole purpose in appointing a receiver was to transfer the operation of the projects to another non-profit corporation. While the Corporation has not raised this procedural issue, it does argue that the purpose behind the application was for the Ministry "to 'wash its hands' of this social housing project and transfer administrative responsibility over the project to the Region of Waterloo." Arguably, there is an issue as to whether it was appropriate to appoint a receiver in these circumstances where the Ministry did not appear to be concerned about having its debts repaid, but was concerned only with transferring the business to another corporation.

24 On balance, given the low threshold for this stage of the test, I conclude that there are serious issues to be determined on appeal that are not frivolous or vexatious.

Would the moving party suffer irreparable harm if the stay is refused?

25 The Corporation raises a number of arguments that point to the irreparable harm it would suffer if a stay is not granted. In my view, the strongest argument is that the Corporation faces the risk that the projects could be transferred to another non-profit corporation by the receiver. As set out in the affidavit of Edna Coupal, "the harm against Shehrazad would be irreparable, as it would lose its primary assets (*i.e.* the housing projects), all its sources of income (*i.e.* rents), and its reason for being (*i.e.* to manage non-profit housing in Kitchener at the premises)." In *RJR-MacDonald*, irreparable harm was described as "harm which either cannot be quantified in monetary terms or which cannot be cured" (p. 341). In this case, the harm suffered by the Corporation should the projects be transferred by the receiver would not be compensable or curable.

26 The Ministry notes in its factum that evidence of irreparable harm "must be clear and not speculative": *Kanda Tsushin Kogyo Co. v. Coveley* (1997), 96 O.A.C. 324 (Ont. Div. Ct.) at para. 14. While the harm discussed above was expressed in terms of a "risk", this risk seems more than speculative given that the receiver's mandate is to transfer the business to a new entity.

Does the balance of convenience favour the granting of a stay?

27 This stage of the analysis requires balancing the harm that would be suffered by each party. I have concluded that the Corporation risks suffering irreparable harm should the stay be refused.

28 The harm to the Ministry must also be considered. Essentially, the harm that the Ministry will suffer if the stay is granted is continued financial losses. This is purely financial and therefore is technically compensable. However, the ability of the debtor to pay is a relevant consideration and the Ministry argues that the Corporation is insolvent: *RJR-MacDonald*, p. 341. The Ministry states that it has already incurred substantial losses. However, the effect of a stay would only be to aggravate these losses temporarily until the appeal is heard (probably a matter of months). When this is compared to the harm that the Corporation risks suffering if the stay is refused, this factor favours granting the stay.

E. Disposition

29 The motion for a stay of the application judge's order dated January 20, 2007 pending appeal to this court is granted.

30 The appeal is to be perfected within 30 days of the release of these reasons. Once perfected, the appeal should be heard on an expedited basis.

31 The Corporation is entitled to its costs of the motion fixed at $5000 inclusive of disbursements and GST.

Motion granted.

TAB 5

 Original
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.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.C Leave by judge

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]).

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 6

2016 ONCA 225
Ontario Court of Appeal

2403177 Ontario Inc. v. **Bending Lake** Iron Group Ltd.

2016 CarswellOnt 4553, 2016 ONCA 225, 264 A.C.W.S. (3d) 26, 347 O.A.C. 226, 35 C.B.R. (6th) 102, 396 D.L.R. (4th) 635

2403177 Ontario Inc., Applicant (Respondent/Responding Party) and Bending Lake Iron Group Limited, Respondent (Appellant/Responding Party)

David Brown J.A., In Chambers

Heard: March 8, 2016
Judgment: March 22, 2016
Docket: CA M46061 (C61637)

Counsel: Kenneth Kraft, for Moving Party, A. Farber & Partners Inc.
Robert MacRae, for Responding Party, Bending Lake Iron Group Limited

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.ii Availability
XVII.7.b.ii.A Future rights

Headnote

Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — To Court of Appeal — Availability — Future rights
Debtor went into receivership with one major asset, undeveloped iron ore mine site, and consented to Sales and Investor Solicitation Process — Debtor opposed receiver's motion for court approval of asset purchase agreement with LH and sought postponement of sale — Motion judge approved sale and ordered vesting of property in LH upon filing of receiver's certificate — Debtor filed notice of appeal — Debtor did not perfect appeal within required time, and LH would not close sale agreement until debtor exhausted appeals — Receiver brought motion for declaration that debtor required leave to appeal — Motion granted — Issue was whether approval and vesting order (AVO) fell under s. 193 of Bankruptcy and Insolvency Act or if debtor required leave — Receiver submitted AVO was matter of procedure not falling within s. 193(c) — For order to involve future rights, it must involve future rights of those with economic interest in debtor company and there was no evidence that any affected Aboriginal community had such an interest — AVO affected present, existing rights of debtor's creditors and shareholders, not future rights — Debtor did not raise issue about receiver's constitutional duty to consult until appeal — Debtor's argument that sale process should be postponed to let shareholders re-finance company did not bring into play value of property — Debtor's secured lenders supported sale agreement, notwithstanding they would suffer significant shortfall — Debtor required leave to appeal AVO.

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s. 193(a) — considered

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s. 193(b) — considered

s. 193(c) — considered

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MOTION by receiver for declaration that debtor required leave to appeal sale approval and vesting order.

***David Brown J.A., In Chambers*:**

I. Overview

1 This motion considers the somewhat awkward and anachronistic appeal provisions contained in s. 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). A. Farber & Partners Inc. was appointed receiver of the property of Bending Lake Iron Group Limited (the "Debtor") pursuant to s. 243(1) of the *BIA*. The Receiver moves for directions whether the Debtor requires leave to appeal under s. 193(e) of the *BIA* from the approval and vesting order made by the motion judge on January 8, 2016, 2016 ONSC 199 (Ont. S.C.J.), transferring all the Debtor's property to an unrelated purchaser, Legacy Hill Resources Ltd. ("Legacy Hill"). At the conclusion of the hearing, I held that the Debtor did require leave to appeal and set a timetable for its leave motion. These are my reasons for so ordering.

II. History of the Receivership

2 The Debtor went into receivership on September 11, 2014 on the application of its secured creditor, 2403177 Ontario Inc. (the "Receivership Order"). The Debtor's major asset is an undeveloped iron ore mine site located northwest of Thunder Bay, Ontario.

3 By order dated November 27, 2014, the court approved a Sales and Investor Solicitation Process for the Debtor's property (the "SISP Order"). Significantly, the Debtor consented to the SISP Order.

4 In November 2015, the Receiver moved for court approval of an asset purchase agreement it had entered into with Legacy Hill for substantially all of the Debtor's property (the "Sale Agreement"). The Debtor opposed the motion and, in turn, brought its own motion seeking a variety of relief, including the postponement of the sale of its property.

5 The motion judge approved the Sale Agreement and ordered the vesting of the Debtor's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order"). As well, the motion judge dismissed the Debtor's motion to postpone the sale and for other relief.

6 The Debtor filed a notice of appeal dated January 13, 2016 seeking to set aside the Approval and Vesting Order. Section 195 of the *BIA* provides that all proceedings under an order appealed from are stayed until the appeal is disposed of. However, the Debtor did not perfect its appeal within the time required by the *Rules of Civil Procedure*, and this court has issued a notice of intention to dismiss the appeal for delay unless it is perfected by March 22, 2016.

7 Legacy Hill is not prepared to close the Sale Agreement until the Debtor has exhausted its appeal rights in this court.

8 The Receiver moves for a declaration that the Debtor requires leave to appeal. Granting such relief would quash the Debtor's existing notice of appeal.

III. Issue on the Motion

9 The central issue on this motion is whether the Approval and Vesting Order falls into any of the categories of cases identified in s. 193 of the *BIA* in which an appeal lies as of right to this court, or whether the Debtor must obtain leave to appeal under s. 193(e). Section 193 of the *BIA* provides:

> 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.

10 The Debtor submits that the Approval and Vesting Order falls within ss. 193(a), (b), and (c), and therefore an appeal lies as of right. I shall consider the Debtor's submissions on each sub-section in turn.

IV. Section 193(A): Does the Approval and Vesting Order Involve Future Rights?

A. Positions of the parties

11 The Debtor submits the point in issue in its appeal involves future rights. The Debtor makes the following submissions in its factum:

> [T]here remains outstanding a Notice of Motion seeking a finding that the Receiver has violated the Crown's fiduciary duty to Aboriginal Peoples, as well as the Honour of the Crown, such duties being owed by the Receiver as an Officer of the Court. This motion has not been heard as of yet.
>
> . . . . .
>
> The future rights of the "affected Aboriginal communities" will very much be affected by the confirmation of the Vesting Order as granted by [the motion judge].

12 In order to assess this submission, some review is required of the evidence the Debtor placed before the motion judge on the sale approval motion about "affected Aboriginal communities" and of the relief the Debtor plans to seek in a further motion before the motion judge.

B. Debtor's evidence concerning "affected Aboriginal communities"

13 Mr. Henry Wetelainen, the President and CEO of the Debtor, swore an affidavit which was filed in opposition to the Receiver's motion to approve the Sale Agreement. In it, he deposed that, in early 2015, after the Receivership Order had been made, he held discussions with Legacy Hill about a possible "partnership/co-operative development in rescuing [the Debtor] from receivership." He described his discussions with Legacy Hill as attempts to attract a financial partner to assist in the refinancing of the Debtor in order to terminate the Receivership.

14 At various points in his affidavit, Mr. Wetelainen stated he had pursued those discussions as part of his "continued efforts on behalf of [the Debtor] and its creditors, shareholders, stakeholders and affected Aboriginal communities." He

deposed that the termination of the receivership would have a "concurrent benefit to [the Debtor], its creditors, shareholders, stakeholders and affected Aboriginal communities."

15 Despite having pursued discussions with Legacy Hill in early 2015, Mr. Wetelainen opposed the Sale Agreement. He took the position that Legacy Hill had breached a fiduciary duty owed to the Debtor by dealing with the Receiver. Frankly, it is difficult to understand that position given that under the Receivership Order and the SISP Order, Mr. Wetelainen, as an officer of the Debtor, was not permitted to pursue the discussions he did with Legacy Hill without the knowledge and concurrence of the Receiver.

16 In any event, Mr. Wetelainen's evidence disclosed that the main reason he opposed the Sale Agreement was that he wanted more time for the Debtor to find financing to take out its secured creditors and terminate the receivership. In his affidavit, he explained why the Debtor was seeking orders to postpone approval of the Sale Agreement:

> The Orders being sought from the Court will ensure that all of the creditors, shareholders, stakeholders and affected Aboriginal communities be given an appropriate period of time pursuant to Court Order to permit [the Debtor] to complete the Corporate requirement for the purpose of providing the creditors, shareholders, stakeholders and affected Aboriginal communities to invest in Special Shares in [the Debtor] in order to retire the debt that [the applicant] has agreed to reduce to the amount as reflected in the Assets Purchase Agreement.
>
> . . . . .
>
> The net result of the successful refinancing of [the Debtor] will be that all the shareholders will have their share value protected and [the Debtor] will be required to deal with unsecured creditors in a fair fashion. At all times during the financing proceedings with [Legacy Hill], I anticipated that there would be a compromise with respect to the amount of debt owed to the Applicant.

17 In Mr. Wetelainen's view, the Sale Agreement is a "disasterous agreement that will wipe out millions of dollars of shareholder value, creditor obligations to stakeholders and various Aboriginal communities."

18 A further reason given by Mr. Wetelainen for his opposition to the Receiver's sale was that an asset purchase by Legacy Hill ran "a very substantial risk of [Legacy Hill] alienating all of the affected Aboriginal communities as well as the members of the communities where a workforce would have been drawn from and whose cooperation would have been received. The Aboriginal Employment Preferences Policy identifies these clearly articulated goals."

C. The Debtor's pending motion

19 The Debtor intends to bring a motion before the motion judge at the end of May seeking an order that it be granted leave to commence an action against the Receiver "for damages as a result of the failure of the Receiver to uphold the honour of the Crown and the Crown's fiduciary duties to Aboriginal peoples including the Aboriginal communities affected by the actions of the Receiver." In its notice of motion, the Debtor asserts it had provided "continual notice" to the Receiver that Aboriginal communities were directly affected by the receivership, yet the Receiver failed to maintain the honour of the Crown by not notifying affected Aboriginal communities of its intention to seek a sale of the Debtor's assets.

D. Analysis

20 The concept of "future rights" as a category of cases appealable to this court as of right traces its origins to the late nineteenth century federal *Winding-Up Act*.[1] The passage of time has not improved the clarity of the concept. In *Elias v. Hutchison*,[2] McGillivray C.J.A. commented, at para. 20, that "the authorities leave me in a state of uncertainty as to what a future right is at all, let alone what there is about a future right that would require a treatment of cases involving future rights different from cases that do not involve future rights."

21 Although the category of "future rights" increasingly seems an anachronistic and confusing basis upon which to ground appeal rights, courts have attempted to cloak the term "future rights" with some practical meaning. In *Ravelston Corp., Re*,[3] Doherty J.A. stated, at para. 18:

> The meaning of the phrase "future rights" is not obvious. Caselaw holds that it refers to future legal rights and not to procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal ... Rights that presently exist, but may be exercised in the future or altered by the order under appeal are present rights and not future rights...
>
> [Citations omitted.]

22 Doherty J.A. went on to adopt, at para. 19, the view expressed in *Elias v. Hutchison*, at paras. 100-101, that s. 193(a) of the *BIA* "must refer to rights which could not at the present time be asserted but which will come into existence at a future time."

23 More recently, Blair J.A., in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*,[4] stated, at para. 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.

24 The Debtor's argument that the Approval and Vesting Order involves the future rights of "affected Aboriginal communities" is vague and difficult to follow. Nevertheless, I do not accept it for several reasons.

25 First, for an order to involve future rights, it must involve the future rights of those with an economic interest in the debtor company - i.e. its creditors or shareholders.[5] On the sale approval motion, the Debtor did not adduce evidence that any "affected Aboriginal community" had such an economic interest in the Debtor, nor did any "affected Aboriginal community" adduce such evidence on the motion. The Receiver, in its December 21, 2015 Supplemental Report to its Third Report, informed the court that based on its review of the Debtor's creditors listing, "no Aboriginal groups are creditors of [the Debtor]."

26 Second, at this stage of the process it does not lie in the Debtor's mouth to contend that the Receiver failed to give proper notice to "affected Aboriginal communities". The time to raise such an issue was when the Receiver sought approval of the SISP Order, yet the Debtor consented to that order.

27 Third, to the extent that the Approval and Vesting Order affects the rights of those with an economic interest in the Debtor, it affects the present, existing rights of the Debtor's creditors and shareholders, not their future rights.

28 Finally, it is clear from Mr. Wetelainen's affidavit that the Debtor's real complaint about the effect of the Approval and Vesting Order is one concerning the "commercial advantages or disadvantages that may accrue from the order challenged on appeal." Mr. Wetelainen objected to the Sale Agreement because its approval would wipe out shareholder equity and preclude efforts by the shareholders to raise financing to pay out the Debtor's secured creditors. That has nothing to do with "future rights" within the meaning of s. 193(a).

29 I conclude that the point in issue in the Debtor's challenge of the Approval and Vesting Order does not involve future rights within the meaning of s. 193(a) of the *BIA*.

V. Section 193(B): Will The Approval and Vesting Order Affect Other Cases of a Similar Nature in This Proceeding?

A. Positions of the parties

30 The Debtor submits that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceeding. In its factum, the Debtor argues that in granting the Approval and Vesting Order the motion judge failed "to deal with the rights of the affected Aboriginal communities," an issue the Debtor wishes to raise on its appeal. The Debtor argues that the same issue will lie at the heart of its motion before the motion judge later in May seeking leave to sue the Receiver. The Debtor contends that because the Approval and Vesting Order likely will affect its motion for leave to sue

the Receiver, s. 193(b) of the *BIA* applies.

31 The Receiver disputes that the issues on appeal would impact other issues in the receivership.

B. Analysis

32 The jurisprudence under s. 193(b) of the *BIA* has consistently interpreted the section as meaning that a right of appeal will lie where "the decision in question will likely affect another case raising the same or similar issues in the same bankruptcy proceedings."[6] The cases have expressed different views on whether the decisions covered by s. 193(b) can only concern rights asserted against the bankrupt by parties other than the bankrupt, or whether the issue may concern rights asserted by multiple persons against the bankrupt, rather than one person's rights arising in multiple contexts.[7] Regardless, s. 193(b) must concern "real disputes" likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings.[8]

33 Section 193(b) possesses several anachronistic features. First, while permitting an appeal of right on an issue that likely will arise again in an insolvency proceeding might appear to foster the efficient conduct of insolvency proceedings, in reality any automatic appeal right will slow down insolvency proceedings which usually operate on a "real-time" basis. As well, the language of s. 193(b) does not measure the overall significance of the issue to the proceeding - minor issues which might arise again are treated in the same fashion as major ones. Finally, most contemporary insolvency litigation sees one judge assigned to manage the proceeding from its inception to its end. Under a "one judge" model of case management, common or repeat issues tend to get grouped together for adjudication at one time, not at different stages of the proceeding.

34 I do not accept the Debtor's submission that the Approval and Vesting Order is likely to affect other cases of a similar nature in the receivership proceedings.

35 The Receiver filed evidence on this motion which shows the Debtor did not raise any issue about a receiver's constitutional duty to consult "affected Aboriginal communities" either in its materials or during its submissions on the sale approval motion. The Debtor does not dispute this evidence. Accordingly, the Debtor will be seeking to raise the duty to consult issue for the first time on appeal.

36 In the normal course, appeals are not the proper forum in which to raise brand new issues that significantly expand or alter the landscape of the litigation.[9] The burden rests on an appellant to persuade the court that all the facts necessary to address the point are before the court as fully as if the issue had been raised in the court below.[10] It is far from clear that the Debtor would succeed in persuading this court that the interests of justice require an exception to this normal course of litigation. The Debtor faces several high hurdles.

37 First, the Debtor consented to the SISP Order which authorized the Receiver to proceed with the sales process. The Debtor did not raise the issue of a duty to consult "affected Aboriginal communities" about a sale at that time; it is difficult to conceive how it can do so now.

38 Second, it is very doubtful that the Debtor has standing to advance on appeal an argument based on the duty to consult. As the Supreme Court of Canada explained in *Moulton Contracting Ltd. v. British Columbia*,[11] at para. 30:

> The duty to consult exists to protect the collective rights of Aboriginal peoples. For this reason, it is owed to the Aboriginal group that holds the s. 35 rights, which are collective in nature... But an Aboriginal group can authorize an individual or an organization to represent it for the purpose of asserting its s. 35 rights.
>
> [Citations omitted.]

39 No evidence was led on this motion to suggest that any Aboriginal group had authorized the Debtor to represent it for the purpose of asserting rights under s. 35 of the *Constitution Act, 1982*.

40 Third, s. 193(b) of the *BIA* requires that the order sought to be appealed is likely to affect "other cases of a similar nature in the bankruptcy proceedings." Here, the Approval and Vesting Order disposed of all the property of the Debtor.

Consequently, there will not be any other case dealing with the disposition of the Debtor's property in this receivership.

41 The final hurdle is that only after the Debtor received the January 8, 2016 reasons of the motion judge granting the Approval and Vesting Order did it launch its motion for leave to sue the Receiver for its alleged breach of the duty to consult. That sequence of events strongly suggests that, having unsuccessfully opposed the Receiver's sale, the Debtor looked for some procedural device to fit itself into s. 193(b). Its motion for leave to sue the Receiver was the result. In my view, a party cannot create a "case" after the impugned order was made in order to invoke s. 193(b). Consequently, the Debtor's pending motion for leave to sue does not qualify as a case of a similar nature in the receivership.

42 For those reasons, the Approval and Vesting Order does not fall within s. 193(b) of the *BIA*.

VI. Section 193(C): Does the Property Involved in the Appeal Exceed in Value $10,000?

A. Positions of the parties

43 The Debtor submits that the Approval and Vesting Order will transfer property in excess of $10,000 and, therefore, falls within s. 193(c) of the *BIA* because "the property involved in the appeal exceeds in value ten thousand dollars."

44 While the actual sale price is subject to a confidentiality order pending the closing of the transaction, there is no dispute that the sale price significantly exceeds $10,000. Nor is there any dispute that if the transaction closes, the Debtor's secured lenders will suffer a significant shortfall.[12]

45 On its part, the Receiver submits that an approval and vesting order forms part of the methods a receiver employs to dispose of a debtor's assets and, as such, is a matter of procedure that does not fall within s. 193(c).

B. Analysis

46 The history of the interpretation of s. 193(c) is an unusual one. Under the modern approach to statutory interpretation, the words in a statute must be read in their entire context, in their grammatical and ordinary sense, and in keeping with the scheme and object of the Act.[13] By contrast, as the Manitoba Court of Appeal observed at para. 9 in *Dominion Foundry Co., Re*,[14] the interpretation of the phrase "the property involved in the appeal" found in s. 193(c) historically has proceeded in a different fashion, drawing heavily upon cases interpreting a similar provision in the federal *Winding-Up Act*,[15] as well as on the jurisprudence considering former provisions in the *Supreme Court of Canada Act* which linked the right to appeal to "the amount or value of the matter in controversy."[16]

47 Courts have observed that the availability under s. 193(e) of a right to seek leave to appeal in circumstances falling outside those captured by automatic rights of appeal in ss. 193(a) to (d) signals the need for appeal courts to control bankruptcy proceedings in order to promote the efficient and expeditious resolution of the bankruptcy, one of the principal objectives of bankruptcy legislation.[17] However, courts across the country tend to part company on whether securing those objectives of the *BIA* is fostered by a "broad, generous and wide-reaching" interpretation of the appeal rights contained in *BIA* ss. 193(a) to (d) - with the bar set low to fall within s. 193(c)[18] - or by interpretations conducted within the context of the demands of "real time litigation" characteristic of contemporary insolvency and restructuring proceedings.[19]

48 In my view, two contextual factors should inform any application of the subsection.

49 First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.*, the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.

50 Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that

Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

51 For example, if one were to accept the Debtor's argument that whenever the value of the property transferred by a sales approval and vesting order exceeded $10,000 an appeal as of right to this court exists, then, as the Manitoba Court of Appeal noted, at para. 7, in *Re Dominion Foundry Co.*, an appeal as of right would exist in almost every case because very few insolvency cases would involve property that did not exceed the statutory threshold. Blair J.A. repeated that concern in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, at para. 17. By contrast, a challenge to a sales approval and vesting order obtained by a debtor company under the *CCAA* would require obtaining leave to appeal under s. 13 of that Act.

52 In my view, no principled basis exists to distinguish the treatment of a sale by a receiver or trustee, from that by a *CCAA* debtor company. In each case, approval of the sale would require consideration of the types of principles articulated in *Royal Bank v. Soundair Corp.*.[20] A need for the legislative harmonization of appeal rights in insolvencies is apparent.

53 In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.

Is the order procedural in nature?

54 The caselaw holds that s. 193(c) of the *BIA* does not apply to decisions or orders that are procedural in nature, including orders concerning the methods by which receivers or trustees realize an estate's assets.

55 In *Re Dominion Foundry Co.*, the motion judge had dismissed a request to set aside a sale of assets by a trustee in bankruptcy on the grounds that the sale was improvident and the trustee had acted improperly. The Manitoba Court of Appeal held, at para. 20, that although the sale involved assets whose value exceeded the statutory threshold, an order concerning the method by which the trustee disposed of assets did not fall within s. 193(c). Consequently, where a person seeks to challenge an order on appeal by calling into question the methods employed by a trustee to dispose of the assets of the bankrupt, the order involves a matter of procedure which does not fall within s. 193(c).

56 The Alberta Court of Appeal reached a similar result in *Alternative Fuel Systems Inc. v. Edo (Canada) Ltd. (Trustee of)*.[21] There, the trustee had invited tenders for the purchase of the bankrupt's equipment. When tenders closed, the trustee determined that Alternative's tender was the highest. Once another tenderer, Impco Technologies Inc., found out that it was not the highest bidder, it submitted a second tender offering substantially more than Alternative. The trustee sought directions from the court. The bankruptcy judge directed the trustee to accept Impco's second, higher tender. Alternative filed a notice of appeal and moved before the Alberta Court of Appeal for a determination that it could appeal as of right under s. 193(c) because the value of the property involved exceeded the statutory threshold.

57 O'Leary J.A., following *Re Dominion Foundry Co.*, held that Alternative had no right of appeal under s. 193(c). He reasoned, at para. 12, that the bankruptcy judge's order was essentially a procedural direction to the trustee in the face of Alternative's challenge to the method by which the equipment was sold, by-passing the tender process.

58 In the present case, the overwhelming majority of the Debtor's grounds of appeal are process-related, involving issues concerning the Debtor's dealings with Legacy Hill following the Receivership Order, the Receiver's disclosure of information about the Sale Agreement, the negotiation process it followed with Legacy Hill, its treatment of persons affected by the Sale Agreement, and the adequacy of notice it gave to "affected Aboriginal communities." Those grounds of appeal are procedural in nature and do not fall within s. 193(c).

Does the order put into play the value of the Debtor's property?

59 The second principle emerging from the caselaw is that s. 193(c) is not engaged where the decision or order does not

call into play the value of the debtor's property. In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, Blair J.A. considered whether an order appointing a receiver over assets of debtor corporations that exceeded $10,000 in value fell within s. 193(c). He concluded that it did not stating, at para. 17, that "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."

60 In the present case, the Approval and Vesting Order marked the final step in the Receiver's monetization of the Debtor's assets. The property of the Debtor is to be converted through the Sale Agreement into a pool of cash and, as stated in the Approval and Vesting Order, "the net proceeds from the sale of the Purchased Assets shall stand in the place and stead of the Purchased Assets." The ground of appeal advanced by the Debtor to the effect that the sale process should be postponed to let shareholders re-finance the company does not bring into play the value of the Debtor's property, so s. 193(c) does not apply.

Does the order result in a gain or loss?

61 Finally, for s. 193(c) to apply, the order in question must contain some element of a final determination of the economic interests of a claimant in the debtor. In *Trimor Mortgage Investment Corp. v. Fox*,[22] Paperny J.A. described this aspect of s. 193(c) at para. 8:

> The test to be applied under this section was originally articulated in *Orpen v Roberts*, [1925] SCR 364 at 367, [1925] 1 DLR 1101, and confirmed in *Fallis and Deacon v United Fuel Investments Ltd.*, [1962] SCR 771, 4 CBR (NS) 209, which set out that the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail.

62 The Approval and Vesting Order did not determine the entitlement of any party with an economic interest in the Debtor to the sale proceeds. In that sense, no interested party gained or lost as a result of the order.

63 However, one ground of appeal set out in the Debtor's notice of appeal is that the motion judge erred in law in finding that the Receiver had not acted improvidently. In its factum, the Debtor contends that the Receiver's sale of its property is improvident because it would result in a loss of $125 million to its shareholders. In support of that ground of appeal, on this motion the Debtor relied on a memo prepared by Broad Oak Associates dated February 3, 2014, half a year before the Receivership Order was made. Using an iron ore pellet price of US$100 per tonne, Board Oak placed the value of a fully-developed Bending Lake iron ore project in the range of US$100 million to $300 million. This, the Debtor argues, shows that the Approval and Vesting Order selling its undeveloped mine site assets resulted in a loss to shareholders of an amount exceeding $10,000 in value, giving it a right to appeal under s. 193(c).

64 I do not accept the Debtor's submission. The determination of whether "the property involved in the appeal exceeds ten thousand dollars" is a fact-specific one. In order to bring itself within s. 193(c), the Debtor must do more than make a bald allegation of improvident sale. This is real-time insolvency litigation in which delays in the proceeding can prejudice the amounts fetched by a receiver on the realization process. The Debtor must demonstrate some basis in the evidentiary record considered by the motion judge that the property involved in the appeal would exceed in value $10,000, in the sense that the granting of the Approval and Vesting Order resulted in a loss of more than $10,000 because the Receiver could have obtained a higher sales price for the Debtor's property. Bald assertion is not sufficient, otherwise a mere bald allegation of improvident sale in a notice of appeal could result in an automatic stay of a sale approval order under *BIA* s. 195 as the appellant pursues its appeal.[23]

65 In the present case, the evidentiary record discloses that there were no competing bids for the Debtor's property for the motion judge to consider; only Legacy Hill expressed a serious enough interest to lead to a Sale Agreement with the Receiver.

66 Neither the Debtor nor its shareholders put before the motion judge a valuation of the Debtor made near in time to the execution of the Sale Agreement. Mr. Wetelainen did not attach the pre-receivership Broad Oak memo to the affidavit he placed before the motion judge. By contrast, the Receiver reported to the motion judge that the market price of iron ore had

declined to the mid-US$50 per tonne range, making a court sanctioned sales process "very challenging in the current market conditions." The market price for iron ore reported by the Receiver was far below the pre-receivership assumptions used by Broad Oak.

67 Nor did Mr. Wetelainen depose on the sale approval motion that the Debtor's property was worth over $100 million. Instead, in his affidavit he stressed the need to postpone the sale to allow the Debtor's shareholders time to negotiate a compromise of the secured debt and then pay off the compromised debt.

68 Finally, the Debtor's secured lenders supported the Sale Agreement, notwithstanding that they would suffer a significant shortfall on the sale.

69 Taken together, those facts do not disclose any basis in the evidentiary record for the Debtor's assertion that the sale would result in a loss of rights greater than $10,000 because the Receiver could have obtained a higher price for the Debtor's property. Accordingly, I am not persuaded that there is any evidentiary basis to the Debtor's bald assertion in its notice of appeal that the Approval and Vesting Order sanctioned an improvident sales transaction which resulted in a loss to the Debtor within the meaning of s. 193(c).

70 I conclude that the Approval and Vesting Order does not fall within s. 193(c) of the *BIA*.

VII. Disposition

71 For these reasons, I granted the Receiver's motion and ordered that the Debtor requires leave to appeal from the Approval and Vesting Order. The Debtor's notice of appeal dated January 13, 2016 is quashed.

72 The parties agreed to the following timetable for the filing of materials on the Debtor's leave to appeal motion:

(i) The Debtor would file its leave materials by March 28, 2016;

(ii) The Receiver would file any responding materials by April 4, 2016;

(iii) The Debtor would file reply materials, if any, by April 11, 2016.

73 I directed that the leave materials be placed before a panel for consideration on April 12, 2016. I did so, in part, to obviate the need for Debtor's counsel to travel down to Toronto for an oral Chambers leave motion.

74 The parties may serve their leave materials electronically. Although the parties will need to file the appropriate number of hard copies of their materials in accordance with the *Rules of Civil Procedure*, they may file with the court an electronic copy either by email or by USB key. The date of electronic filing will be deemed the date of the filing of the materials with the court.

75 The parties agreed that the costs of this motion would be reserved to the panel hearing the leave to appeal motion.

Motion granted.

Footnotes

1 Now, the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11, s. 103. See *Clarke v. Union Fire Insurance Co.* (1886), 13 O.A.R. 268 (Ont. C.A.) at pp. 294-295.

2 (1981), 14 Alta. L.R. (2d) 268, 121 D.L.R. (3d) 95, [1981] A.J. No. 896 (Alta. C.A.).

3 (2005), 24 C.B.R. (5th) 256 (Ont. C.A.)

4 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.).

5 See *Ditchburn Boats & Aircraft (1936) Ltd., Re* (1938), 19 C.B.R. 240 (Ont. C.A.), at p. 242 quoting with approval *Kern Agencies Ltd., Re* (1931), 12 C.B.R. 279 (Sask. C.A.), at p. 281.

6 *Wong v. Luu*, 2013 BCCA 547 (B.C. C.A.), at para. 21.

7 See *Wong v. Luu*, at para. 21, and the Quebec jurisprudence summarized in *Norbourg Gestion d'actifs inc., Re*, 2006 QCCA 752, 33 C.B.R. (5th) 144 (C.A. Que.) at paras. 9-11.

8 *Global Royalties Ltd. v. Brook*, 2016 ONCA 50 (Ont. C.A.), at para. 19.

9 *Perez v. Salvation Army in Canada* (1998), 42 O.R. (3d) 229, 171 D.L.R. (4th) 520 (Ont. C.A.), at para. 11.

10 *Kaiman v. Graham*, 2009 ONCA 77, 245 O.A.C. 130 (Ont. C.A.), at para. 18.

11 2013 SCC 26, [2013] 2 S.C.R. 227 (S.C.C.).

12 In its Third Report dated November 30, 2015, the Receiver informed the court that the Debtor's liabilities totaled approximately $12.4 million consisting of (i) secured loans from the applicant in excess of $3.5 million, (ii) payroll deduction and HST claims by the Canada Revenue Agency of approximately $405,000, and (iii) unsecured liabilities of close to $8.5 million.

13 *Rizzo & Rizzo Shoes Ltd., Re* (1998), 154 D.L.R. (4th) 193 (S.C.C.) at para. 21; *Bell ExpressVu Ltd. Partnership v. Rex*, 2002 SCC 42, 212 D.L.R. (4th) 1 (S.C.C.) at para. 26.

14 (1965), 51 W.W.R. 679 (Man. C.A.).

15 Such as *United Fuel Investments Ltd., Re*, [1962] S.C.R. 771 (S.C.C.), at p. 774.

16 *Trimor Mortgage Investment Corp. v. Fox*, 2015 ABCA 44 (Alta. C.A.), at para. 8; *Galaxy Sports Inc. v. Galaxy Sports Inc. (Trustee of)*, 2003 BCCA 322, 44 C.B.R. (4th) 218 (B.C. C.A. [In Chambers]) at para. 12; *Newfoundland & Labrador Refining Corp. v. IJK Consortium*, 2009 NLCA 23, 52 C.B.R. (5th) 8 (N.L. C.A.) at para. 18.

17 *Wong v. Luu*, at para. 23; *Re Norbourg Gestion d'actifs inc*, at para. 9.

18 *Wong v. Luu*, at para. 23.

19 *Stelco Inc., Re* (2005), 8 C.B.R. (5th) 150 (Ont. C.A. [In Chambers]), at para. 4.

20 (1991), 4 O.R. (3d) 1 (Ont. C.A.).

21 1997 ABCA 273 (Alta. C.A. [In Chambers]).

22 2015 ABCA 44 (Alta. C.A.).

23 See, for example, *Faillis and Deacon v. United Fuel Investments Ltd.* where, at pp. 773-774 the Supreme Court of Canada described the specific evidence of loss contained in the record.

End of Document

TAB 7

CITATION: Royal Bank of Canada v. CFNDRS Inc., 2017 ONSC 7661
COURT FILE NO.: CV-17-587341-00CL
DATE: 20171220

ONTARIO SUPERIOR COURT OF JUSTICE

B E T W E E N:

ROYAL BANK OF CANADA
Applicant

-and-

CFNDRS INC.,
formerly known as DESIGN COFOUNDERS INC.,
formerly known as TAILORED UX INC.
Respondent

BEFORE: F.L. Myers J.

COUNSEL: *James Satin,* counsel for Royal Bank of Canada
Mustafa Redha in person

HEARD: December 20, 2017

ENDORSEMENT

[1] On November 28, 2017, the bank commenced a summary application seeking the appointment of a receiver over the property, assets, and undertaking of the respondent. The relief claimed in the notice of application does not include the appointment of a manager of the business. Neither does it include a claim for judgment on the respondent's indebtedness. The appointment of a receiver alone is the sole substantive relief sought in this application.

[2] The grounds relied upon in the application and the bank's evidence are that: the bank holds security under a general security agreement and a lease; the terms of the security documents provide for the appointment of a receiver on default; the respondent is indebted to the bank; it defaulted; and the bank has made demand.

[3] The bank relies upon s. 101 of the *Courts of Justice Act,* RSO 1990, c. C-43 and s. 243 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B.3.

[4] Section 101 of the *Courts of Justice Act* does not apply in this application. The section involves only interlocutory orders. Here, the appointment is sought on a final basis. This is allowed under s. 243 of the *BIA* and therefore under Rule 14.05 (2) of the *Rules of Civil*

Procedure, RRO 1990, Reg. 194. However, nothing in that statute describes what happens after the receiver is appointed by way of application. An application is made and the court issues a final order appointing the receiver – presumably defining the goals of the process in that final order.

[5] By contrast, when an action is commenced to enforce a debt and the plaintiff seeks the interim appointment of a receiver and manager under s. 101 of the CJA and Rule 41, the appointment is interlocutory. The receiver preserves and protects the assets pending proof of the debt. If the plaintiff obtains judgment on its debt, the receiver and manager then will enforce the plaintiff's judgment by way of equitable execution akin to an appointment under Rule 60.02 (1)(d). The receiver and manager will liquidate assets or engage in other processes to realize cash to pay to the plaintiff who is then a judgment creditor. Before the receiver and manager can pay a judgment creditor however, the receiver and manager, of necessity, will have to consider whether there are other claims that must, by law, be paid in priority to the claim of the judgment creditor. In that process an orderly liquidation and payment scheme is mandated and carried out.

[6] While there is much similarity between the provincial and federal regimes, it should be borne in mind that s. 243 (7) of the BIA prohibits the court from providing a super-priority charge to the receiver to indemnify it for disbursements it incurs in the operation of a business of the insolvent person. I am unaware of any case law that provides for the appointment of a receiver under s. 243 of the BIA by way of originating application in which the receiver has been ruled to be entitled to a super-priority charge to protect its right to indemnity for business disbursements.

[7] Although the notice of application in this case sought only the appointment of a receiver, the draft order submitted by the bank followed the Commercial List model form of order. It provided for the appointment of a receiver and manager under both s. 101 of the *CJA* and s. 243 of the *BIA*. It provided a super-priority charge for all fees and disbursement of the receiver and manager and its counsel on all disbursements although that is available only under the former statute and not under the latter. Where both statutes apply, that is permissible. But here, since s. 101 is not engaged in an interlocutory appointment process, the receiver would not be entitled to indemnity for business disbursements in a s. 243 receivership.

[8] The test for the appointment of an interlocutory receiver is well understood. In para. 10 of *Bank of Nova Scotia v. Freure Village of Clair Creek*, 1996 CanLII 8258 (ON SC) Blair J. (as he then was) set out several propositions that remain applicable today:

a. The Court has the power to appoint a receiver or receiver and manager where it is "just or convenient" to do so;

b. In deciding whether or not to do so, 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;

c. The fact that the moving party has a right under its security to appoint a receiver is an important factor to be considered but so, in such circumstances, is the

question of whether or not an appointment by the Court is necessary to enable the receiver-manager to carry out its work and duties more efficiently;

d. It is not essential that the moving party, a secured creditor, establish that it will suffer irreparable harm if a receiver-manager is not appointed.

[9] Justice Blair also noted that while the appointment of a receiver may be seen to be extraordinary, it is much less extraordinary when the plaintiff has a contractual right to appoint a receiver on its own. The question of whether a court appointment then is just and convenient when there is a contractual power of appointment will turn on an assessment of, "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." *Freure Village* at para. [12].

[10] In my view, the issue that usually tips the balance is whether there is a reason to incur the expense and procedural formality of appointing a third party to exercise neutral, transparent, accountable stewardship of the assets of the debtor while interested parties jostle on the merits of whatever their dispute may be. If the parties' dispute puts the business assets at risk or where realization options may be impaired by leaving the business in the debtor's hands or requiring the secured creditor to bear the risk of indemnifying a privately appointed receiver, the court will usually intervene. Often, simple default on secured debt will be sufficient to attract a receivership where the risk to the business is implicit in the nature of the business or the dispute between the creditor(s) and the debtor(s). However, as with all equitable remedies, context is everything and each case turns on its own facts.

[11] In this case, there is absolutely no evidence before the court as to why a court appointed receiver is just or convenient. All that follows was told to me on an unsworn basis by counsel and Mr. Redha personally.

[12] As best as I can tell, the respondent runs a high tech startup that is in an early development stage. It is creating software that will help lead a business through the steps of a problem solving exercise. Like many startups, the business operates through its principal, Mr. Redha, and a number of independent contractor/consultants. There are no other employees. There is no bricks and mortar. There is Mr. Redha, his computer, and perhaps some IP. I did not ask if the business has an office or if the bank proposed to take possession of Mr. Redha's residence under the order as drafted.

[13] The bank says that it is interested in collecting the respondent's accounts receivable and its entitlement to Scientific Research and Experimental Development Tax Incentive payments. Mr. Redha estimates conservatively that the business has approximately $75,000 in outstanding receivables. It may have entitlement to SR&ED payments for 2016 and 2017 that may be significant. The applications for these payments are complex and require Mr. Redha's involvement with a professional consultant who charges a 7% fee. Mr. Redha is bullish on his prospects to obtain new receivables, i.e. new revenue, in the New Year. I doubt he would have been so bullish had he understood that a receivership would have seen him working for a salary

to be negotiated with the receiver while the receiver obtains the receivables generated by his efforts.

[14] Mr. Redha submits that the IP of the business has value that exceeds the amount of his debt. I have no way to assess the correctness of this statement. Moreover, the bank is not required to keep funding the respondent through a sales process of its own making. However, this much is clear to me (based on experience and common sense absent any evidence one way or the other) – if a receiver is appointed, it has no wherewithal to run the business without Mr. Redha's voluntary and ongoing commitment. Trying to sell partially developed software disembodied from an operating business and without Mr. Redha's ongoing support seems unlikely to be value-maximizing and probably is impossible. In fact, there really is no business for a third party to manage. There is just Mr. Redha and his computer and incomplete software.

[15] Mr. Satin submits that the bank is entitled to a receiver under its loan and security documents. The proposed receiver, he says, is not willing to undertake the appointment without the protection of the court. There is no indication of why that may be so.

[16] The total debt of about $450,000 is very small for a court ordered receivership process. There is no indication as to how a court-based process can be expected to be value-maximizing or why it is more desirable than a private appointment in this case. There is nothing inherent in the relationship between these parties that makes the mere existence of a default on a debt require a neutral third party to assume stewardship of the business such as it may be. The bank has delivered a notice under s. 63 (4) of the PPSA that it intends to realize on collateral of the respondent. Collecting $75,000 in outstanding receivables is not made more convenient by a court appointed receiver. Putting in place a trust or lockbox process for receipt of SR&ED payments may require some negotiation or, perhaps, appointment of a very limited true receiver empowered simply to receive this specific property of the debtor and perhaps to oversee completion of SR&ED applications. With some negotiation, a sale process for the respondent's IP might be agreed upon. It will take evidence however to establish that a professional accountant/trustee can come in and sell the IP in a value-maximizing process without Mr. Redha's voluntary, active engagement.

[17] The respondent should not take from this that it is at all freed from its legal obligations to pay its debt. The bank has many paths open to it to seize and sell the respondent's assets, take its loss, and bring a swift end to the business. That strikes me as a lose-lose proposition, but that is not my decision to make. As usual, if there is to be a win-win, there will need to be a discussion in which each party tries to accommodate the other's interests to some degree at least.

[18] In view of the procedural issues, the complete lack of evidence, and the inapt order sought, I am not prepared to appoint a receiver as sought in this case at this time. If the bank wishes, it may arrange a case conference before me, on notice to the respondent, at which I can assist the parties work towards a consensual outcome or restructured court proceedings. Alternatively, the applicant may file a draft order dismissing this application for signing. Mr. Redha's approval of the form and content of the draft order is not required. Nothing in this

outcome precludes the applicant from commencing an action against the respondent to sue on its debt.

F.L. Myers J.

Date: December 20, 2017

TAB 8

Most Negative Treatment: Distinguished
Most Recent Distinguished: Québécor Média inc. c. Centre hospitalier de l'Université de Montréal | 2016 QCCQ 1503, 2016 CarswellQue 2579, EYB 2016-263953, J.E. 2016-826 | (C.Q., Mar 10, 2016)

 Original
2002 SCC 33, 2002 CSC 33
Supreme Court of Canada

Housen v. Nikolaisen

2002 CarswellSask 178, 2002 CarswellSask 179, 2002 SCC 33, 2002 CSC 33, [2002] 2 S.C.R. 235, [2002] 7 W.W.R. 1, [2002] S.C.J. No. 31, 10 C.C.L.T. (3d) 157, 112 A.C.W.S. (3d) 991, 211 D.L.R. (4th) 577, 219 Sask. R. 1, 272 W.A.C. 1, 286 N.R. 1, 30 M.P.L.R. (3d) 1, J.E. 2002-617, REJB 2002-29758

Paul Housen, Appellant v. Rural Municipality of Shellbrook No. 493, Respondent

McLachlin C.J.C., L'Heureux-Dubé, Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel JJ.

Heard: October 2, 2001
Judgment: March 28, 2002 *
Docket: 27826

Proceedings: reversing [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126 (Sask. C.A.); reversed in part (1997), 161 Sask. R. 241, [1998] 5 W.W.R. 523, 44 M.P.L.R. (2d) 203 (Sask. Q.B.)

Counsel: *Gary D. Young, Q.C.*, *Denis I. Quon*, *M. Kim Anderson*, for Appellant
Michael Morris, *G.L. Gerrand, Q.C.*, for Respondent

Subject: Public; Civil Practice and Procedure; Torts; Tax — Miscellaneous; Municipal
Related Abridgment Classifications
Civil practice and procedure
VII Limitation of actions
VII.9 Actions involving municipal corporations
VII.9.a Non-repair of highways and streets
VII.9.a.i Notice of claim and injury
VII.9.a.i.C Failure to give notice
VII.9.a.i.C.1 Reasonable excuse
Municipal law
XII Municipal liability
XII.1 Negligence
XII.1.a General principles
Municipal law
XII Municipal liability
XII.4 Practice and procedure
XII.4.a Actions
XII.4.a.iii Notice of action
Transportation

VI Highways and streets
VI.6 Maintenance and repair
VI.6.b Duty to repair
VI.6.b.iii To what duty extends
VI.6.b.iii.D Traffic signs and signals

Headnote

Highways and streets --- Maintenance and repair — Duty to repair — To what duty extends — Traffic signs and signals

Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Even though impaired, driver was not driving recklessly such that he would have missed or ignored sign, if erected.

Municipal law --- Municipal liability — Negligence — General principles

Plaintiff's appeal from order dismissing action against municipality was allowed — Road must be kept in such reasonable state of repair that users exercising ordinary care might travel upon it with safety — Municipality knew or should have known of disrepair of road and was liable under s. 192 of Rural Municipality Act, 1989 — Accident occurred at dangerous part of road where sign warning motorists should have been placed — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

Rues et autoroutes --- Entretien et remise en état — Obligation de remettre en état — Étendue de l'obligation — Panneaux de signalisation et signaux

Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Accident a eu lieu sur une portion dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Même si le conducteur avait les facultés affaiblies, il ne conduisait pas d'une façon téméraire qui l'aurait empêché de voir, ou qui lui aurait permis de faire abstraction, d'un panneau, s'il y en avait eu un.

Droit municipal --- Responsabilité municipale — Négligence — Principes généraux

Accueil du pourvoi interjeté par le demandeur à l'encontre de l'ordonnance rejetant son action contre la municipalité — Chemin doit être tenu dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité — Municipalité connaissait ou aurait dû connaître le mauvais état du chemin; elle était donc responsable en vertu de l'art. 192 de The Rural Municipality Act, 1989 — Accident a eu lieu sur une partie dangereuse d'un chemin où il aurait dû y avoir un panneau avertissant les automobilistes du danger — Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1, s. 192.

The plaintiff was a passenger in a motor vehicle driven by N. The vehicle was involved in an accident, which rendered the plaintiff a quadriplegic. At trial, N was found negligent in taking the curve in the rural road at an excessive rate of speed while impaired. The evidence established that N had travelled the road three times in the same direction in the preceding 18 to 20 hours. The municipality was also found to be at fault for breaching its duty to keep the road in a reasonable state of repair as required by s. 192 of *The Rural Municipality Act, 1989*. The trial judge held that it was reasonable to expect the municipality to erect and maintain a sign warning motorists of the hazard. The trial judge found that the plaintiff was 15 per cent contributorily negligent, the driver was 50 per cent liable and the municipality was 35 per cent liable. The Court of Appeal overturned the trial judge's finding that the municipality was negligent and dismissed the plaintiff's action against it. The plaintiff appealed.

Held: The appeal was allowed.

Per Iacobucci and Major JJ. (McLachlin C.J.C., L'Heureux-Dubé and Arbour JJ. concurring): The standard of review to be applied by an appellate court to the decision of the trial judge is that of palpable and overriding error. Palpable means "plainly seen". The standard of review for questions of law is that of correctness and for findings of fact is that of palpable and overriding error. There is a presumption of fitness

in favour of the trial judge. The bases for deferring to the findings of fact of the trial judge are to limit the number, length and cost of appeals, to promote the autonomy and integrity of trial proceedings and to recognize the expertise of the trial judge and his or her advantageous position. The standard of palpable and overriding error also applies to the inferences of fact drawn by the trial judge. Questions of mixed fact and law which are findings of negligence should also be accorded great deference, except those which amount to an incorrect statement of the legal standard.

The municipality has a statutory obligation to keep the road in such a reasonable state of repair that those requiring to use it might, exercising ordinary care, travel upon it with safety. The trial judge considered the conduct of an ordinary or reasonable motorist approaching the curve in the road. The trial judge's reliance on the evidence of some witnesses as opposed to others was insufficient proof that she forgot, ignored or misconceived the evidence. The trial judge apportioned negligence between the driver and the municipality in a way that entailed a consideration of the ordinary driver. The trial judge did not adopt the de facto speed limit of 80 km/h as the speed of the ordinary motorist approaching the curve. The trial judge implicitly found that the curve could not be taken safely at greater than 60 km/h on a dry road and 50 km/h on a wet road. She did not commit a palpable and overriding error.

Section 192(3) of *The Rural Municipality Act, 1989* required the plaintiff to show that the municipality knew or should have known of the disrepair of the road before it could be found to have breached its duty of care under the Act. The issue was one of mixed fact and law. The existence of the prior accidents was simply a factor in finding that the municipality should have been put on notice with respect to the condition of the road. The trial judge based her conclusion on the perspective of a prudent municipal councillor and drew the inference that the municipality should have been aware of the permanent feature of the road which presented a hazard. The burden of proof was not shifted to the municipality. The municipality did not rebut the inference that it ought to have been aware of the danger. The trial judge's findings of fact on causation were reasonable and did not reach the level of a palpable and overriding error. The accident occurred at a dangerous part of the road where a warning sign should have been erected; driver N's degree of impairment increased his risk of not reacting even if there had been a sign; even so, N was not driving so recklessly that he would have been expected to miss or ignore a warning sign. The trial judge's judgment should be restored.

Per Bastarache J. (dissenting) (Gonthier, Binnie and LeBel JJ. concurring): The trial judge erred in law by failing to apply the correct standard of care to the municipality. The appellate court was entitled to conclude that inferences of fact made by the trial judge were clearly wrong. There is no difference between concluding that it was "unreasonable" or "palpably wrong" for a trial judge to draw an inference from the facts as found by her and concluding that the inference was not reasonably supported by those facts. A trial judge's conclusions on questions of mixed fact and law in negligence actions need not be accorded deference in every case. The municipality's duty of care is limited to a duty to repair to a standard which permits drivers exercising ordinary care to proceed with safety. The mere existence of a hazard does not give rise to a duty to erect a sign. The fact that the hazard was hidden did not automatically give rise to the conclusion that it would pose a risk to a reasonable driver, nor did the expert testimony relied on support that finding. The trial judge's factual findings did not support the conclusion that the municipality was in breach of its duty. A more in-depth analysis of the state of the road was required. The Court of Appeal was correct in finding that the road was obviously not designed to accommodate travel at a general speed of 80 km/h or that drivers would be somehow fooled by the dual nature of the road. The trial judge made both errors of law and palpable and overriding errors of fact in determining that the municipality should have known of the alleged state of disrepair of the road. The trial judge failed to determine whether knowledge should be imputed to the municipality from the perspective of what a prudent municipal councillor should have known. The municipality did not have actual knowledge of prior accidents, which had occurred on different portions of the road than the subject location. The mere occurrence of an accident did not indicate a duty to post a sign. The evidence indicated that the accident occurred as a result of N's level of impairment and not from any failure on the municipality's part. As the legislature had clearly imposed a statutory duty of care on the municipality, it was not necessary to find a common law duty of care. It was only reasonable to

expect a municipality to foresee accidents which occurred as a result of the conditions of the road, not the conditions of the driver. The appeal should be dismissed.

Le demandeur est devenu quadriplégique après avoir été passager dans un véhicule à moteur, conduit par N, impliqué dans un accident. Lors du procès, il a été décidé que N avait fait preuve de négligence en abordant la courbe du chemin rural à une vitesse excessive alors qu'il avait les facultés affaiblies. La preuve a démontré que N avait emprunté trois fois ce chemin dans la même direction durant les 18 à 20 heures précédant l'accident. Il a aussi été décidé que la municipalité était fautive parce qu'elle avait manqué à son obligation de tenir la route dans un état raisonnable d'entretien tel qu'il était exigé par l'art. 192 de *The Rural Municipality Act, 1989*. La juge de première instance a statué qu'il était raisonnable de s'attendre à ce que la municipalité pose et maintienne en place des panneaux avertissant les automobilistes du danger. La juge a attribué 15 pour cent de la responsabilité au demandeur en raison de sa négligence concourante, 50 pour cent au conducteur et 35 pour cent à la municipalité. La Cour d'appel a infirmé la conclusion de la juge de première instance selon laquelle la municipalité avait été négligente et elle a rejeté l'action intentée contre celle-ci par le demandeur. Ce dernier a interjeté appel.

Arrêt: Le pourvoi a été accueilli.

Iacobucci, Major, JJ. (McLachlin, J.C.C., L'Heureux-Dubé, Arbour, JJ., souscrivant): La norme de contrôle devant être appliquée par une cour d'appel à l'égard d'une décision du juge de première instance est celle de l'erreur manifeste et dominante. Manifeste signifie « évidente ». La norme de contrôle applicable aux questions de droit est la décision correcte; celle applicable aux conclusions de fait, l'erreur manifeste et dominante. Il existe en faveur du juge une présomption d'aptitude à juger. On doit faire preuve de retenue à l'égard des conclusions de fait tirées par la juge dans le but de: diminuer le nombre d'appels, leur durée et leur coût; favoriser l'autonomie et l'intégrité des procédures judiciaires; et reconnaître la compétence du juge de première instance ainsi que sa position avantageuse. La norme de l'erreur manifeste et dominante s'applique aussi aux inférences de fait tirées par le juge de première instance. Il faut aussi faire preuve d'une grande retenue à l'égard des questions mixtes de fait et de droit qui sont des conclusions de négligence, sauf à l'égard de celles qui sont équivalentes à une formulation incorrecte de la norme juridique.

La municipalité avait une obligation légale de tenir le chemin dans un état raisonnable d'entretien afin que les utilisateurs devant l'emprunter, en prenant des précautions normales, puissent y circuler en sécurité. La juge de première instance a examiné le comportement d'un automobiliste normal ou raisonnable qui s'approche de la courbe du chemin. Le fait qu'elle ait retenu le témoignage de certains témoins seulement n'était pas suffisant pour démontrer qu'elle avait oublié, négligé ou mal interprété la preuve. La juge de première instance a réparti la responsabilité entre le conducteur et la municipalité d'une façon qui tenait compte du conducteur normal. Elle n'a pas accepté la limite de vitesse de facto de 80 km/h comme la vitesse de l'automobiliste normal qui s'approche de la courbe. La juge a implicitement conclu que la courbe ne pouvait être empruntée de façon sécuritaire à une vitesse plus grande que 60 km/h sur une route sèche et 50 km/h sur une route mouillée. Elle n'a pas commis d'erreur manifeste et dominante.

Selon l'art. 192(3) de *The Rural Municipality Act, 1989*, le demandeur devait prouver que la municipalité connaissait ou devait connaître le mauvais état de la route pour qu'il soit décidé que celle-ci avait manqué à son obligation de diligence prévue à la Loi. Il s'agissait d'une question mixte de fait et de droit. L'existence d'accidents antérieurs ne constituait qu'un des facteurs ayant mené à la conclusion que la municipalité aurait dû être avertie de l'état de la route. La conclusion de la juge de première instance était fondée sur le point de vue d'un conseiller municipal prudent et la juge a tiré l'inférence que la municipalité aurait dû connaître la caractéristique permanente du chemin qui était dangereuse. Le fardeau de preuve n'est pas devenu celui de la municipalité. La municipalité n'a pas réussi à repousser l'inférence qu'elle aurait dû connaître le danger. Les conclusions de fait de la juge de première instance relativement au lien de causalité étaient raisonnables et ne constituaient pas une erreur manifeste et dominante. L'accident a eu lieu sur une partie dangereuse du chemin, à un endroit où il aurait dû y avoir un panneau d'avertissement; le niveau de facultés affaiblies du conducteur, N, a augmenté le risque qu'il ne puisse réagir même s'il y avait eu un panneau; et, encore

là, N ne conduisait pas de façon si téméraire que l'on aurait pu s'attendre à ce qu'il ne voie pas le panneau d'avertissement ou à ce qu'il l'ignore. Le jugement rendu par la juge de première instance devrait être rétabli. Bastarache, J. (dissident) (Gonthier, Binnie, LeBel, JJ., souscrivant): La juge de première instance a commis une erreur de droit lorsqu'elle n'a pas appliqué la bonne norme de diligence raisonnable à l'égard de la municipalité. Le tribunal d'appel avait le droit de conclure que les inférences de fait tirées par la juge de première instance était évidemment erronées. Il n'y avait aucune différence entre conclure qu'il était « déraisonnable » ou « manifestement erroné » pour un juge de tirer une inférence des faits qu'il a retenus et conclure que l'inférence n'était pas raisonnablement appuyée par ces faits-là. Il n'est pas nécessaire de faire preuve de retenue, dans tous les cas, à l'égard des conclusions du juge de première instance relatives aux questions mixtes de fait et de droit dans le cadre d'actions en négligence. L'obligation de diligence de la municipalité ne se limite qu'à un devoir de réparer, qui lui-même se limite à une norme permettant aux conducteurs faisant preuve de précautions normales de voyager en sécurité. La simple existence d'un danger ne donne pas lieu à une obligation de poser un panneau. Le fait qu'il s'agissait d'un danger caché ne soulevait pas automatiquement la conclusion qu'il poserait un risque pour le conducteur raisonnable et cette conclusion n'était pas non plus soulevée par le témoignage d'expert qui l'appuyait. Les conclusions de fait de la juge de première instance n'appuyaient pas la conclusion que la municipalité avait manqué à son obligation. Il aurait été nécessaire de faire une analyse plus poussée de l'état du chemin. La Cour d'appel a conclu à bon droit que le chemin n'était évidemment pas conçu pour y voyager à une vitesse générale de 80 km/h ou que les conducteurs seraient induits en erreur par la nature hybride du chemin. La juge de première instance a fait des erreurs de droit et des erreurs de fait manifestes et dominantes lorsqu'elle a décidé que la municipalité aurait dû connaître le mauvais état allégué du chemin. La juge n'a pas décidé s'il fallait prêter à la municipalité la connaissance requise en considérant cette question du point de vue d'un conseiller municipal prudent. La municipalité n'avait pas une connaissance réelle des accidents antérieurs, lesquels avaient eu lieu à des endroits différents sur le chemin de celui concerné. Le simple fait qu'un accident ait eu lieu n'établissait pas qu'il y avait une obligation de poser un panneau. La preuve démontrait que l'accident avait eu lieu à cause du niveau de facultés affaiblies de N et non à cause d'un manquement de la municipalité. Puisque le législateur avait clairement imposé dans la loi une obligation de diligence à la municipalité, il n'était pas nécessaire de conclure à l'existence d'une telle obligation en vertu de la common law. Il était raisonnable de s'attendre à ce qu'une municipalité prévoie les accidents qui peuvent avoir lieu à cause des conditions de la route et non à cause de l'état du chauffeur. Le pourvoi devrait être rejeté.

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Goodman Estate v. Geffen, [1991] 5 W.W.R. 389, 42 E.T.R. 97, (sub nom. *Geffen v. Goodman Estate)* [1991] 2 S.C.R. 353, 125 A.R. 81, 14 W.A.C. 81, 80 Alta. L.R. (2d) 293, (sub nom. *Geffen v. Goodman*

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Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital, [1994] 2 W.W.R. 609, 87 B.C.L.R. (2d) 1, 18 C.C.L.T. (2d) 209, [1994] 1 S.C.R. 114, 110 D.L.R. (4th) 289, (sub nom. *Toneguzzo-Norvell v. Savein)* 162 N.R. 161, (sub nom. *Toneguzzo-Norvell v. Savein)* 38 B.C.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* 62 W.A.C. 193, (sub nom. *Toneguzzo-Norvell v. Savein)* [1994] R.R.A. 1, 1994 CarswellBC 101, 1994 CarswellBC 1232, [1994] S.C.J. No. 4 (S.C.C.) — followed

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Williams v. North Battleford (Town) (1911), 16 W.L.R. 301, 4 Sask. L.R. 75 (Sask. C.A.) — considered

Statutes considered by *Iacobucci, Major JJ.*:

Highway Traffic Act, S.S. 1986, c. H-3.1

Generally — referred to

Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1

Generally — considered

s. 192 — considered

s. 192(3) — considered

Statutes considered by *Bastarache J.*:

Criminal Code, R.S.C. 1985, c. C-46
Generally — referred to
Highway Traffic Act, S.S. 1986, c. H-3.1
Generally — referred to

s. 33(1) — considered

s. 33(2) — considered

s. 44(1) — considered
Highway Traffic Act, R.S.O. 1960, c. 172
Generally — referred to
Rural Municipality Act, 1989, S.S. 1989-90, c. R-26.1
Generally — considered

s. 192 — considered

s. 192(1) — considered

s. 192(2) — considered

s. 192(3) — considered

Words and phrases considered

PALPABLE

What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

The common element in each of these definitions is that palpable is plainly seen.

Termes et locutions cités

MANIFESTE

Qu'est-ce qu'une erreur manifeste? Le *Trésor de la langue française* (1985) définit ainsi le mot « manifeste » : « ... Qui est tout à fait évident, qui ne peut-être contesté dans sa nature ou son existence. [...] *erreur manifeste* ». *Le Grand Robert de la langue française* (2e éd. 2001) définit ce mot ainsi : « Dont l'existence ou la nature est évident [...] Qui est clairement, évidemment tel [...] *Erreur, injustice manifeste* ». Enfin, le *Grand Larousse de la langue française* (1975) donne la définition suivante de « manifeste » : « ... Se dit d'une chose que l'on ne peut contester, qui est tout à fait évidente : *Une erreur manifeste* ».

L'élément commun de ces définitions est qu'une chose « manifeste » est une chose qui est « évidente ».

APPEAL by plaintiff from judgment reported at 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), allowing appeal by municipality from finding of liability for negligence.

POURVOI du demandeur à l'encontre du jugement publié à 2000 SKCA 12, 2000 CarswellSask 50, [2000] 4 W.W.R. 173, 50 M.V.R. (3d) 70, 189 Sask. R. 51, 216 W.A.C. 51, 9 M.P.L.R. (3d) 126, [2000] S.J. No. 58 (Sask. C.A.), qui a accueilli le pourvoi de la municipalité à l'encontre de la conclusion l'ayant déclarée responsable vu sa négligence.

Iacobucci, Major JJ.:

I. Introduction

1 A proposition that should be unnecessary to state is that a court of appeal should not interfere with a trial judge's reasons unless there is a palpable and overriding error. The same proposition is sometimes stated as prohibiting an appellate court from reviewing a trial judge's decision if there was some evidence upon which he or she could have relied to reach that conclusion.

2 Authority for this abounds particularly in appellate courts in Canada and abroad (see *Gottardo Properties (Dome) Inc. v. Toronto (City)* (1998), 162 D.L.R. (4th) 574 (Ont. C.A.); *Schwartz v. R.*, [1996] 1 S.C.R. 254 (S.C.C.); *Toneguzzo-Norvell (Guardian ad litem of) v. Burnaby Hospital*, [1994] 1 S.C.R. 114 (S.C.C.); *Van de Perre v. Edwards*, [2001] 2 S.C.R. 1014, 2001 SCC 60 (S.C.C.)). In addition scholars, national and international, endorse it (see C. A. Wright in "The Doubtful Omniscience of Appellate Courts" (1957), 41 *Minn. L. Rev.* 751, at p. 780; and the Honourable R. P. Kerans in *Standards of Review Employed by Appellate Courts* (1994); and American Bar Association, Judicial Administration Division, *Standards Relating to Appellate Courts* (1995), at pp. 24-25).

3 The role of the appellate court was aptly defined in *Underwood v. Ocean City Realty Ltd.* (1987), 12 B.C.L.R. (2d) 199 (B.C. C.A.), at p. 204, where it was stated:

> The appellate court must not retry a case and must not substitute its views for the views of the trial judge according to what the appellate court thinks the evidence establishes on its view of the balance of probabilities.

4 While the theory has acceptance, consistency in its application is missing. The foundation of the principle is as sound today as 100 years ago. It is premised on the notion that finality is an important aim of litigation. There is no suggestion that appellate court judges are somehow smarter and thus capable of reaching a better result. Their role is not to write better judgments but to review the reasons in light of the arguments of the parties and the relevant evidence, and then to uphold the decision unless a palpable error leading to a wrong result has been made by the trial judge.

5 What is palpable error? The *New Oxford Dictionary of English* (1998) defines "palpable" as "clear to the mind or plain to see" (p. 1337). The *Cambridge International Dictionary of English* (1996) describes it as "so obvious that it can easily be seen or known" (p. 1020). *Random House Dictionary of the English Language* (2nd ed. 1987) defines it as "readily or plainly seen" (p. 1399).

6 The common element in each of these definitions is that palpable is plainly seen. Applying that to this appeal, in order for the Saskatchewan Court of Appeal to reverse the trial judge the "palpable and overriding" error of fact found by Cameron J.A. must be plainly seen. As we will discuss, we do not think that test has been met.

II. The Role of the Appellate Court in the Case at Bar

7 Given that an appeal is not a retrial of a case, consideration must be given to the applicable standard of review of an appellate court on the various issues which arise on this appeal. We therefore find it helpful to discuss briefly the standards of review relevant to the following types of questions: (1) questions of law; (2) questions of fact; (3) inferences of fact; and (4) questions of mixed fact and law.

A. Standard of Review for Questions of Law

8 On a pure question of law, the basic rule with respect to the review of a trial judge's findings is that an appellate court is free to replace the opinion of the trial judge with its own. Thus the standard of review on a question of law is that of correctness: *Kerans*, *supra*, at p. 90.

9 There are at least two underlying reasons for employing a correctness standard to matters of law. First, the principle of universality requires appellate courts to ensure that the same legal rules are applied in similar situations. The importance of this principle was recognized by this Court in *Woods Manufacturing Co. v. R.*, [1951] S.C.R. 504 (S.C.C.), at p. 515:

> It is fundamental to the due administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all judges are liable, we must maintain the complete integrity of relationship between the courts.

A second and related reason for applying a correctness standard to matters of law is the recognized law-making role of appellate courts which is pointed out by *Kerans*, *supra*, at p. 5:

> The call for universality, and the law-settling role it imposes, makes a considerable demand on a reviewing court. It expects from that authority a measure of expertise about the art of just and practical rule-making, an expertise that is not so critical for the first court. Reviewing courts, in cases where the law requires settlement, make law for future cases as well as the case under review.

Thus, while the primary role of trial courts is to resolve individual disputes based on the facts before them and settled law, the primary role of appellate courts is to delineate and refine legal rules and ensure their universal application. In order to fulfill the above functions, appellate courts require a broad scope of review with respect to matters of law.

B. Standard of Review for Findings of Fact

10 The standard of review for findings of fact is that such findings are not to be reversed unless it can be established that the trial judge made a "palpable and overriding error": *Stein v. "Kathy K" (The)* (1975), [1976] 2 S.C.R. 802 (S.C.C.), at p. 808; *Ingles v. Tutkaluk Construction Ltd.*, [2000] 1 S.C.R. 298, 2000 SCC 12 (S.C.C.), at para. 42; *Ryan v. Victoria (City)*, [1999] 1 S.C.R. 201 (S.C.C.) , at para. 57. While this standard is often cited, the principles underlying this high degree of deference rarely receive mention. We find it useful, for the purposes of this appeal, to review briefly the various policy reasons for employing a high level of appellate deference to findings of fact.

11 A fundamental reason for *general* deference to the trial judge is the presumption of fitness — a presumption that trial judges are just as competent as appellate judges to ensure that disputes are resolved justly. Kerans, *supra*, at pp. 10-11, states that:

> If we have confidence in these systems for the resolution of disputes, we should assume that those decisions are just. The appeal process is part of the decisional process, then, only because we recognize that, despite all effort, errors occur. An appeal should be the exception rather than the rule, as indeed it is in Canada.

12 With respect to findings of fact in *particular*, in *Gottardo Properties*, *supra*, Laskin J.A. summarized the purposes underlying a deferential stance as follows (at para. 48):

> Deference is desirable for several reasons: to limit the number and length of appeals, to promote the autonomy and integrity of the trial or motion court proceedings on which substantial resources have been expended, to preserve the confidence of litigants in those proceedings, to recognize the competence of the trial judge or motion judge and to reduce needless duplication of judicial effort with no corresponding improvement in the quality of justice.

Similar concerns were expressed by La Forest J. in *Schwartz*, *supra*, at para. 32:

> It has long been settled that appellate courts must treat a trial judge's findings of fact with great deference. The rule is principally based on the assumption that the trier of fact is in a privileged position to assess the credibility of witnesses' testimony at trial. ... Others have also pointed out additional judicial policy concerns to justify the rule. Unlimited intervention by appellate courts would greatly increase the number and the length of appeals generally. Substantial resources are allocated to trial courts to go through the process of assessing facts. The autonomy and integrity of the trial process must be preserved by exercising deference towards the trial courts' findings of fact; see R. D. Gibbens, "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at pp. 445-48; *Fletcher v. Manitoba Public Insurance Co.*, [1990] 3 S.C.R. 191, at p. 204.

See also in the context of patent litigation, *Consolboard Inc. v. MacMillan Bloedel (Sask.) Ltd.*, [1981] 1 S.C.R. 504 (S.C.C.), at p. 537.

13 In *Anderson v. Bessemer (City)*, 470 U.S. 564 (U.S. N.C. 1985), at pp. 574 -75, the United States Supreme Court also listed numerous reasons for deferring to the factual findings of the trial judge:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources. In addition, the parties to a case on appeal have already been forced to concentrate their energies and resources on persuading the trial judge that their account of the facts is the correct one; requiring them to persuade three more judges at the appellate level is requiring too much. As the Court has stated in a different context, the trial on the merits should be "the 'main event' ... rather than a 'tryout on the road.'" ... For these reasons, review of factual findings under the clearly-erroneous standard — with its deference to the trier of fact — is the rule, not the exception.

14 Further comments regarding the advantages possessed by the trial judge have been made by R. D. Gibbens in "Appellate Review of Findings of Fact" (1992), 13 *Adv. Q.* 445, at p. 446:

> The trial judge is said to have an expertise in assessing and weighing the facts developed at trial. Similarly, the trial judge has also been exposed to the entire case. The trial judge has sat through the entire case and his ultimate judgment reflects this total familiarity with the evidence. The insight gained by the trial judge who has lived with the case for several days, weeks or even months may be far deeper than that of the Court of Appeal whose view of the case is much more limited and narrow, often being shaped and distorted by the various orders or rulings being challenged.

The corollary to this recognized advantage of trial courts and judges is that appellate courts are *not* in a favourable position to assess and determine factual matters. Appellate court judges are restricted to reviewing written transcripts of testimony. As well, appeals are unsuited to reviewing voluminous amounts of evidence. Finally, appeals are telescopic in nature, focussing narrowly on particular issues as opposed to viewing the case as a whole.

15 In our view, the numerous bases for deferring to the findings of fact of the trial judge which are discussed in the above authorities can be grouped into the following three basic principles.

(1) Limiting the Number, Length and Cost of Appeals

16 Given the scarcity of judicial resources, setting limits on the scope of judicial review is to be encouraged. Deferring to a trial judge's findings of fact not only serves this end, but does so on a principled basis. Substantial resources are allocated to trial courts for the purpose of assessing facts. To allow for wide-ranging review of the trial judge's factual findings results in needless duplication of judicial proceedings with little, if any improvement in the result. In addition, lengthy appeals prejudice litigants with fewer resources, and frustrate the goal of providing an efficient and effective remedy for the parties.

(2) Promoting the Autonomy and Integrity of Trial Proceedings

17 The presumption underlying the structure of our court system is that a trial judge is competent to decide the case before him or her, and that a just and fair outcome will result from the trial process. Frequent and unlimited appeals would undermine this presumption and weaken public confidence in the trial process. An appeal is the exception rather than the rule.

(3) Recognizing the Expertise of the Trial Judge and His or Her Advantageous Position

18 The trial judge is better situated to make factual findings owing to his or her extensive exposure to the evidence, the advantage of hearing testimony *viva voce*, and the judge's familiarity with the case as a whole. Because the primary role of the trial judge is to weigh and assess voluminous quantities of evidence, the expertise and insight of the trial judge in this area should be respected.

C. Standard of Review for Inferences of Fact

19 We find it necessary to address the appropriate standard of review for factual inferences because the reasons of our colleague suggest that a lower standard of review may be applied to the inferences of fact drawn by a trial judge. With respect, it is our view, that to apply a lower standard of review to inferences of fact would be to depart from established jurisprudence of this Court, and would be contrary to the principles supporting a deferential stance to matters of fact.

20 Our colleague acknowledges that, in *Goodman Estate v. Geffen*, [1991] 2 S.C.R. 353 (S.C.C.), this Court determined that a trial judge's inferences of fact and findings of fact should be accorded a similar degree of deference. The relevant passage from *Geffen* is the following (*per* Wilson J., at pp. 388-89):

> It is by now well established that findings of fact made at trial based on the credibility of witnesses are not to be reversed on appeal unless it is established that the trial judge made some palpable and overriding error which affected his assessment of the facts. ... Even where a finding of fact is not contingent upon credibility, this Court has maintained a non-interventionist approach to the review of trial court findings. ...
>
> And even in those cases where a finding of fact is neither inextricably linked to the credibility of the testifying witness nor based on a misapprehension of the evidence, the rule remains that appellate review should be limited to those instances where a manifest error has been made. Hence, in *Schreiber Brothers Ltd. v. Currie Products Ltd.*, [1980] 2 S.C.R. 78, this Court refused to overturn a trial judge's finding that certain goods were defective, stating at pp. 84-85 that it is wrong for an appellate court to set aside a trial judgment where the only point at issue is the interpretation of the evidence as a whole (citing *Métivier v. Cadorette*, [1977] 1 S.C.R. 371).

This view has been reiterated by this Court on numerous occasions: see *Palsky v. Humphrey*, [1964] S.C.R. 580 (S.C.C.), at p. 583; *Schwartz*, *supra*, at para. 32; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377 (S.C.C.), at p. 426, *per* La Forest J.; *Toneguzzo-Norvell*, *supra*. The United States Supreme Court has taken a similar position: see *Anderson*, *supra*, at p. 577.

21 In discussing the standard of review of the trial judge's inferences of fact, our colleague states, at para. 103, that:

> In reviewing the making of an inference, the appeal court will verify whether it can reasonably be supported by the findings of fact that the trial judge reached and whether the judge proceeded on proper legal principles. ... While the standard of review is identical for both findings of fact and inferences of fact, it is nonetheless important to draw an analytical distinction between the two. If the reviewing court were to review only for errors of fact, then the decision of the trial judge would necessarily be upheld in every case where evidence existed to support his or her factual findings. In my view, this Court is entitled to conclude that inferences made by the trial judge were clearly wrong, just as it is entitled to reach this conclusion in respect to findings of fact. [Emphasis added.]

With respect, we find two problems with this passage. First, in our view, the standard of review is not to verify that the inference can be *reasonably supported* by the findings of fact of the trial judge, but whether the trial judge made a *palpable and overriding* error in coming to a factual conclusion based on accepted facts, which implies a stricter standard.

22 Second, with respect, we find that by drawing an analytical distinction between factual findings and factual inferences, the above passage may lead appellate courts to involve themselves in an unjustified reweighing of the evidence. Although we agree that it is open to an appellate court to find that an inference of fact made by the trial judge is clearly wrong, we would add the caution that where evidence exists to support this inference, an appellate court will be hard pressed to find a palpable and overriding error. As stated above, trial courts are in an advantageous position when it comes to assessing and weighing vast quantities of evidence. In making a factual inference, the trial judge must sift through the relevant facts, decide on their weight, and draw a factual conclusion. Thus, where evidence exists which supports this conclusion, interference with this conclusion entails interference with the weight assigned by the trial judge to the pieces of evidence.

23 We reiterate that it is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. If there is no palpable and overriding error with respect to the underlying facts that the trial judge relies on to draw the inference, then it is only where the *inference-drawing process itself* is palpably in error that an appellate court can interfere with the factual conclusion. The appellate court is not free to interfere with a factual conclusion that it disagrees with where such disagreement stems from a difference of opinion over the weight to be assigned to the underlying facts. As we discuss below, it is our respectful view that our colleague's finding that the trial judge erred by imputing knowledge of the hazard to the municipality in this case is an example of this type of impermissible interference with the factual inference drawn by the trial judge.

24 In addition, in distinguishing inferences of fact from findings of fact, our colleague states, at para. 102, that deference to findings of fact is "principally grounded in the recognition that only the trial judge enjoys the opportunity to observe witnesses and to hear testimony first-hand", a rationale which does not bear on factual inferences. With respect, we disagree with this view. As we state above, there are numerous reasons for showing deference to the factual findings of a trial judge, many of which are equally applicable to all factual conclusions of the trial judge. This was pointed out in *Schwartz*, *supra*. After listing numerous policy concerns justifying a deferential approach to findings of fact, at para. 32 La Forest J. goes on to state:

> This explains why the rule [that appellate courts must treat a trial judge's findings of fact with great deference] applies not only when the credibility of witnesses is at issue, although in such a case it may be more strictly applied, but also to all conclusions of fact made by the trial judge. [Emphasis added.]

Recent support for deferring to all factual conclusions of the trial judge is found in *Toneguzzo-Norvell, supra.* McLachlin J. (as she then was) for a unanimous Court stated, at pp. 121-22:

> A Court of Appeal is clearly not entitled to interfere merely because it takes a different view of the evidence. The finding of facts and the drawing of evidentiary conclusions from facts is the province of the trial judge, not the Court of Appeal.
>
> . . . . .
>
> I agree that the principle of non-intervention of a Court of Appeal in a trial judge's findings of facts does not apply with the same force to inferences drawn from conflicting testimony of expert witnesses where the credibility of these witnesses is not in issue. This does not however change the fact that the weight to be assigned to the various pieces of evidence is under our trial system essentially the province of the trier of fact, in this case the trial judge. [Emphasis added.]

We take the above comments of McLachlin J. to mean that, although the same high standard of deference applies to the entire range of factual determinations made by the trial judge, where a factual finding is grounded in an assessment of credibility of a witness, the overwhelming advantage of the trial judge in this area must be acknowledged. This does not, however, imply that there is a lower standard of review where witness credibility is not in issue, or that there are not numerous policy reasons supporting deference to all factual conclusions of the trial judge. In our view, this is made clear by the underlined portion of the above passage. The essential point is that making a factual conclusion, of any kind, is inextricably linked with assigning weight to evidence, and thus attracts a deferential standard of review.

25 Although the trial judge will always be in a distinctly privileged position when it comes to assessing the credibility of witnesses, this is not the *only* area where the trial judge has an advantage over appellate judges. Advantages enjoyed by the trial judge with respect to the drawing of factual inferences include the trial judge's relative expertise with respect to the weighing and assessing of evidence, and the trial judge's inimitable familiarity with the often vast quantities of evidence. This extensive exposure to the entire factual nexus of a case will be of invaluable assistance when it comes to drawing factual conclusions. In addition, concerns with respect to cost, number and length of appeals apply equally to inferences of fact and findings of fact, and support a deferential approach towards both. As such, we respectfully disagree with our colleague's view that the *principal* rationale for showing deference to findings of fact is the opportunity to observe witnesses first-hand. It is our view that the trial judge enjoys numerous advantages over appellate judges which bear on *all* conclusions of fact, and, even in the absence of these advantages, there are other compelling policy reasons supporting a deferential approach to inferences of fact. We conclude, therefore, by emphasizing that there is one, and only one, standard of review applicable to all factual conclusions made by the trial judge — that of palpable and overriding error.

D. Standard of Review for Questions of Mixed Fact and Law

26 At the outset, it is important to distinguish questions of mixed fact and law from factual findings (whether direct findings or inferences). Questions of mixed fact and law involve applying a legal standard to a set of facts: *Canada (Director of Investigation & Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 (S.C.C.), at para. 35. On the other hand, factual findings or inferences require making a conclusion of fact based on a set of facts. Both mixed fact and law and fact findings often involve drawing inferences; the difference lies in whether the inference drawn is legal or factual. Because of this similarity, the two types of questions are

sometimes confounded. This confusion was pointed out by A. L. Goodhart in "Appeals on Questions of Fact" (1955), 71 *L.Q.R.* 402, at p. 405:

> The distinction between [the perception of facts and the evaluation of facts] tends to be obfuscated because we use such a phrase as "the judge found as a fact that the defendant had been negligent," when what we mean to say is that "the judge found as a fact that the defendant had done acts A and B, and as a matter of opinion he reached the conclusion that it was not reasonable for the defendant to have acted in that way."

In the case at bar, there are examples of both types of questions. The issue of whether the municipality ought to have known of the hazard in the road involves weighing the underlying facts and making factual findings as to the knowledge of the municipality. It also involves applying a legal standard, which in this case is provided by s. 192(3), to these factual findings. Similarly, the finding of negligence involves weighing the underlying facts, making factual conclusions therefrom, and drawing an inference as to whether or not the municipality failed to exercise the legal standard of reasonable care and therefore was negligent.

27 Once it has been determined that a matter being reviewed involves the application of a legal standard to a set of facts, and is thus a question of mixed fact and law, then the appropriate standard of review must be determined and applied. Given the different standards of review applicable to questions of law and questions of fact, it is often difficult to determine what the applicable standard of review is. In *Southam*, *supra*, at para. 39, this Court illustrated how an error on a question of mixed fact and law can amount to a pure error of law subject to the correctness standard:

> ... if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Therefore, what appears to be a question of mixed fact and law, upon further reflection, can actually be an error of pure law.

28 However, where the error does not amount to an error of law, a higher standard is mandated. Where the trier of fact has considered all the evidence that the law requires him or her to consider and still comes to the wrong conclusion, then this amounts to an error of mixed law and fact and is subject to a more stringent standard of review: *Southam*, *supra*, at paras. 41 and 45. While easy to state, this distinction can be difficult in practice because matters of mixed law and fact fall along a spectrum of particularity. This difficulty was pointed out in *Southam*, *supra*, at para. 37:

> ... the matrices of facts at issue in some cases are so particular, indeed so unique, that decisions about whether they satisfy legal tests do not have any great precedential value. If a court were to decide that driving at a certain speed on a certain road under certain conditions was negligent, its decision would not have any great value as a precedent. In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. See R. P. Kerans, *Standards of Review Employed by Appellate Courts* (1994), at pp. 103-108. Of course, it is not easy to say precisely where the line should be drawn; though in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

29 When the question of mixed fact and law at issue is a finding of negligence, this Court has held that a finding of negligence by the trial judge should be deferred to by appellate courts. In *Jaegli Enterprises Ltd. v.*

TAB 9

2016 ONCA 485
Ontario Court of Appeal

2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.

2016 CarswellOnt 9527, 2016 ONCA 485, 267 A.C.W.S. (3d) 768, 37 C.B.R. (6th) 173

2403177 Ontario Inc., Applicant (Respondent) and Bending Lake Iron Group Limited, Respondent (Appellant/Moving Party)

K.M. Weiler, E.A. Cronk, M.L. Benotto JJ.A.

Judgment: June 16, 2016
Docket: CA M46301 (C61637)

Proceedings: refusing leave to appeal *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* (2016), 34 C.B.R. (6th) 125, 2016 CarswellOnt 2673, 2016 ONSC 199, D.C. Shaw J. (Ont. S.C.J.)

Counsel: Robert MacRae, for Moving Party, Bending Lake Iron Group Limited
Kenneth Kraft, John Salmas, Jordan Schultz, for Responding Party, A. Farber & Partners Inc., in its capacity as court-appointed receiver of Bending Lake Iron Group Limited

Subject: Civil Practice and Procedure; Insolvency

Related Abridgment Classifications

Bankruptcy and insolvency
IV Receivers
IV.3 Powers, duties and liabilities

Headnote

Bankruptcy and insolvency --- Receivers — Powers, duties and liabilities
In 2014, company went into receivership, and court approved Sales and Investor Solicitation Process (SISP order) for company's property — In 2015, receiver brought successful motion for court approval of sale of substantially all of company's assets — Company filed notice of appeal, and court ruled that company required leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act — Company brought application for leave to appeal — Application dismissed — Company did not raise arguable points that created reasonable prospect of success on appeal — First two proposed grounds of appeal, which concerned findings that company contravened receivership order, were fact driven and did not require court consideration — Company did not have authority to negotiate directly with purchaser, as this power was specifically assigned to receiver — Proposed appeal would unduly hinder insolvency proceedings — Company did not raise receiver's alleged failure to consult with affected Aboriginal communities at stage of SISP order, and issue was not raised before motions judge.

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s. 193(b) — considered

s. 193(c) — considered

s. 193(e) — considered

s. 243(1) — considered

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
s. 35 — considered

s. 35(1) — considered

APPLICATION by company for leave to appeal judgment reported at *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.* (2016), 2016 ONSC 199, 2016 CarswellOnt 2673, 34 C.B.R. (6th) 125 (Ont. S.C.J.), concerning receiver's proposed sale of assets.

***Per curiam*:**

A. Overview

1 On September 11, 2014, Bending Lake Iron Group Limited ("BLIG") went into receivership (the "Receivership Order"). A. Farber & Partners Inc. was appointed receiver over BLIG's property (the "Receiver") pursuant to s. 243(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). On November 27, 2014, the court approved a Sales and Investor Solicitation Process for BLIG's property (the "SISP Order"). BLIG consented to the SISP Order.

2 In December 2015, the Receiver moved for court approval of an asset purchase agreement with Legacy Hill Resources Ltd. ("Legacy Hill") for the sale to Legacy Hill of substantially all BLIG's assets (the "Sale Agreement"). BLIG opposed the motion and brought its own cross-motion seeking various relief, including the postponement of the sale. On January 8, 2016, the motions judge approved the Sale Agreement and ordered the vesting of BLIG's property in Legacy Hill upon the filing of a receiver's certificate (the "Approval and Vesting Order").

3 BLIG filed a notice of appeal dated January 13, 2016, seeking to set aside the Approval and Vesting Order. By order of this court dated March 22, 2016, Brown J.A. (In Chambers) ruled that BLIG required leave to appeal under s. 193(e) of the *BIA*. Accordingly, he quashed BLIG's notice of appeal and set a timetable for the filing of BLIG's leave materials.

4 BLIG now seeks leave to appeal the Approval and Vesting Order. Should leave be granted, it proposes to argue on appeal that the motions judge erred: i) in finding that the Receiver had acted reasonably and fairly in negotiating the sale of BLIG's property, and that the actions of BLIG in undertaking parallel negotiations with Legacy Hill contravened the Receivership and the SISP Orders; and ii) in failing to consider whether the Receiver discharged its obligation to consult with "affected Aboriginal communities" in approving the Sale Agreement. BLIG submits that the proposed appeal is of general significance to insolvency practice, is *prima facie* meritorious and would not unduly delay the insolvency proceedings.

5 For the reasons that follow, we are not satisfied that the test for granting leave to appeal has been met. Accordingly, the leave application is dismissed.

B. Facts

6 BLIG is an iron ore mining development company with its major asset being a mine site in Thunder Bay, Ontario. While BLIG was initially successful in raising equity financing to develop the mine site, it was unable to arrange any major financing in 2011 and 2012. In 2012, BLIG engaged in negotiations with a foreign company to raise significant debt and equity financing. In anticipation of successful financing, 2403177 Ontario Inc. advanced a series of loans to BLIG to fund development of the mine. Unfortunately, the financing fell through and development of the mine was suspended in 2013.

7 At the date of its receivership in September 2014, BLIG owed in excess of $3.5 million to secured creditors, more than $8 million to unsecured creditors and approximately $450,000 to the Canada Revenue Agency. Pursuant to the SISP Order, the Receiver compiled a list of interested parties, through consultation with BLIG and the Receiver's network of investors in the mining and investment communities. In excess of 120 interested parties were contacted by the Receiver and 12 signed

confidentiality agreements. However, no offers or proposals for purchasing, refinancing or restructuring BLIG were received by the extended deadline of March 27, 2015.

8 While the SISP was underway, and without informing the Receiver, the President and CEO of BLIG, Henry Wetelainen, commenced separate discussions with an interested party, Legacy Hill. Mr. Wetelainen claimed in a subsequent affidavit that he pursued these discussions as part of his "continued effort on behalf of BLIG and its creditors, stakeholders, shareholders and affected Aboriginal communities" to rescue BLIG from receivership. On March 12, 2015, BLIG and Legacy Hill entered into a Confidentiality Agreement and BLIG subsequently provided confidential documents to Legacy Hill. The Receiver was unaware that the parties had signed a Confidentiality Agreement, and of the existence of many of the confidential documents BLIG provided to Legacy Hill.

9 When the Receiver learned of the discussions between Mr. Wetelainen and Legacy Hill, it notified Mr. Wetelainen that all negotiations with Legacy Hill would be conducted by the Receiver pursuant to the Receivership and the SISP Orders. The Receiver then commenced its own discussions with Legacy Hill and entered into a Confidentiality Agreement with it. It also undertook due diligence on Legacy Hill and provided the results of that due diligence in its Third Report, filed with the court in the insolvency proceedings.

10 From April to September 2015, the Receiver received no firm proposals or expressions of interest for the restructuring of BLIG or the purchase of its assets. However, on September 30, 2015, Legacy Hill executed a non-binding letter of intent to purchase the assets of BLIG. The sale concluded on November 27, 2015, with the Receiver and Legacy Hill signing the Sale Agreement.

11 On December 10, 2015, the Receiver moved for approval of the Sale Agreement. It argued that the purchase price represented the best and highest offer for BLIG's assets in a depressed iron ore market. It further argued that the actions of Mr. Wetelainen and BLIG, in undertaking a parallel sales process, failing to provide confidential documents to the Receiver, and negotiating agreements with Legacy Hill directly, contravened the Receivership Order.

12 BLIG's secured creditors approved the proposed sale.

13 BLIG opposed approval of the sale, arguing that the Receiver had shown a lack of impartiality in its conduct with Legacy Hill, that the Receiver had become an advocate for Legacy Hill, and that the Receiver should have made inquiries as to why there had been a parting of the ways between Legacy Hill and BLIG (in a movement away from refinancing/restructuring and toward sale of the assets). BLIG also maintained that, by agreeing to purchase BLIG's assets, Legacy Hill had breached its fiduciary duty to BLIG, its shareholders, stakeholders and Aboriginal communities under the Confidentiality Agreement.

14 In defence of its conduct, BLIG further argued that, because the Receiver had not been appointed manager of BLIG and did not take possession or control of BLIG's property, Mr. Wetelainen was entitled, on behalf of BLIG, to enter into the Confidentiality Agreement with Legacy Hill and provide the confidential documents in furtherance of a joint venture/restructuring and refinancing of BLIG.

15 Before the motions judge, BLIG did not pursue its argument that the Receiver had breached its duty to consult with "affected Aboriginal communities". Rather, it argued that the sale should be postponed and that the Receiver should be required to develop a process to inform creditors, shareholders, stakeholders and "affected Aboriginal communities" of opportunities to participate in the funding of the amount set out in the Sale Agreement.

16 All parties agreed on the principles to be applied when reviewing a proposed sale by a court-appointed receiver, as set out in *Royal Bank v. Soundair Corp.*, [1991] O.J. No. 1137 (Ont. C.A.). Those principles require that a reviewing court should consider:

(a) whether the receiver made a sufficient effort to obtain the best price and has not acted improvidently;

(b) the interests of all parties;

(c) the efficacy and integrity of the process by which the offers are obtained; and

(d) whether there has been unfairness in the working out of the process.

17 Applying this framework to the facts of this case, the motions judge granted the Approval and Vesting Order. He made the following critical findings:

(a) the Receiver had made adequate effort at marketing the property and continued to market the property after the expiry of the bid deadline. The Receiver received no concrete proposals or expressions of interest for a restructuring or sale of BLIG, in what continued to be very depressed market conditions for the mining sector. Legacy Hill's offer was the only offer made on the property;

(b) although the Receiver owed a duty to all stakeholders, its primary duty was to maximize the return for the secured creditors. Even with the sale, the secured creditors stood to incur a shortfall on their security. Nevertheless, they supported the sale and did not want to hold out in the hopes of attracting a better offer. While the interest of the debtor must be taken into account, approval of the sale should not be denied, and the modest recovery by the secured lenders jeopardized, on the mere possibility that BLIG could match the Legacy Hill offer. BLIG presented no evidence on the motions that it was able to refinance or restructure the company;

(c) the Receiver negotiated in good faith and had no reason to reject the only offer it received for the property. The court will not lightly interfere with the commercial judgment of a receiver or examine the minutiae of the circumstances leading up to the sale. Provided the Receiver has acted reasonably, prudently and fairly, its decision should be given deference. The speculative nature of BLIG's proposal to be given time to match or better the Legacy Hill offer would adversely affect the integrity of the process undertaken by the Receiver; and

(d) the Receivership Order gave the Receiver broad powers, to the express exclusion of the debtor. Under paragraph 3(g), the Receiver alone had the right to market any and all of the assets, undertakings and properties of BLIG. Under the SISP Order, the Receiver was empowered to solicit offers to purchase, or to invest in, the debtor and/or the property. The SISP Order also contemplated confidentiality agreements between the Receiver and prospective purchasers. Even if the Receiver had been aware of the discussions between BLIG and Legacy Hill about possible refinancing or restructuring, the Receiver was not required to work toward restructuring or refinancing rather than an asset purchase. The SISP Order did not require the Receiver to consult with BLIG before finalizing the agreement, nor did any provision of the Receivership Order. Moreover, the Receiver was never presented with a refinancing/restructuring proposal from either BLIG or Legacy Hill, nor did BLIG present any evidence that it was able to refinance the company.

18 The motions judge also concluded that BLIG's pursuit of refinancing or restructuring without the knowledge or consent of the Receiver was contrary to the provisions of the Receivership and the SISP Orders. He rejected BLIG's submission that, because the Receiver was not appointed manager of BLIG and was not operating the business, Mr. Wetelainen had licence to engage in parallel negotiations with Legacy Hill. In his view, if this submission was accepted, it would result in BLIG working at cross-purposes with the Receiver.

C. Proposed Issues on Appeal

19 BLIG identifies three proposed issues for argument on appeal:

(1) Did the motions judge err in law in finding that representatives of BLIG acted in contravention of the Receivership Order?

(2) Does the Receivership Order, which left the management of the company in the hands of existing management, deprive the existing management of the right to seek refinancing and/or restructuring of the company?

(3) Did the motions judge err in approving the Sale Agreement by failing to address the rights of "affected Aboriginal communities"?

D. Test for Leave to Appeal in BIA Proceedings

20 Granting leave to appeal under s. 193(e) of the *BIA* is discretionary and must be approached in a flexible and contextual way. The threshold criterion for granting leave is whether the moving party has raised arguable points that create a reasonable prospect of success on appeal. As Doherty J.A. of this court explained in *Ravelston Corp., Re* [2005 CarswellOnt 9058 (Ont. C.A.)], 2005 CanLII 63802, at paras. 28-29:

> The inquiry into whether leave to appeal should be granted must [...] begin with some consideration of the merits of the proposed appeal. If the appeal cannot possibly succeed, there is no point in granting leave to appeal regardless of how many factors might support the granting of leave to appeal.
>
> A leave to appeal application is not the time to assess, much less decide, ultimate merits of a proposed appeal. However, the applicant must be able to convince the court that there are legitimately arguable points raised so as to create a realistic possibility of success on the appeal. Granting leave to appeal if the merits fall short of even that relatively low bar would be a waste of court resources and would needlessly delay and complicate insolvency proceedings.

21 In *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 (Ont. C.A.), at para. 29, Blair J.A. (In Chambers) incorporated this consideration in proposing a unified approach to granting leave to appeal:

> 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.

22 At para. 31 of *Pine Tree Resorts*, Blair J.A. explained that, although the "*prima facie* meritorious" criterion is different than the "arguable point" notion referred to in some other decisions of this court, the somewhat higher standard of a *prima facie* meritorious case on appeal is more in keeping with the evolution of the case law in this area.

23 Finally, at para. 32, Blair J.A. noted that, given the evolution in the applicable jurisprudence, the test for leave to appeal is not simply merit-based. Rather, it requires a consideration of all the factors set out above.

24 This articulation of the test has been affirmed on numerous occasions by this and other courts: see *Enroute Imports Inc., Re*, 2016 ONCA 247 (Ont. C.A.), at para. 7; *Global Royalties Ltd. v. Brook*, 2016 ONCA 50 (Ont. C.A.), at para. 26; *Farm Credit Canada v. Gidda*, 2015 BCCA 236 (B.C. C.A.), at paras. 11-12; *Impact Tool & Mould Inc. (Receiver of) v. Impact Tool & Mould Inc. (Trustee of)*, 2013 ONCA 697 (Ont. C.A.), at para. 3.

E. Analysis

25 In our view, the first two proposed grounds of appeal identified by BLIG, which concern the motions judge's findings that BLIG contravened the Receivership Order, do not raise questions requiring consideration by this court. Both grounds involve highly fact-driven issues. The question whether particular conduct contravenes a Receivership Order will be determined by the particular facts of each case. In this case, the motions judge's interpretation and application of specific terms within the Receivership and the SISP Orders, leading him to conclude that BLIG's conduct contravened those terms, are not of general importance to bankruptcy/insolvency practice or the administration of justice as a whole. Rather, his

conclusions on this issue were highly fact — and case — specific.

26 Further, BLIG's materials provide no support for its contention that the motions judge erred in concluding that BLIG's disclosure of confidential information (without the Receiver's knowledge or consent) and withholding information from the Receiver, violated the clear provisions of the Receivership Order. In reaching his conclusion on this issue, the motions judge noted and applied the well-recognized principle that a debtor has a duty to make full and frank disclosure and production of information and documents to the Receiver. We see no merit to BLIG's challenge to the motion's judge's approach to or his conclusion and reasoning on this issue.

27 We also see little, if any, merit to BLIG's argument that Mr. Wetelainen had authority to negotiate directly with Legacy Hill. BLIG's reliance on the "indoor management rule" is misplaced. BLIG's actions, in negotiating directly with Legacy Hill and disclosing confidential information to it without first notifying the Receiver, did not reflect standard practices and procedures for a company in receivership. The power to engage in negotiations regarding the company's assets was specifically assigned to the Receiver under the Receivership and the SISP Orders. As the motions judge pointed out, at para. 83, "The fact that the Receiver did not operate the business does not derogate from the exclusivity of the powers that the Receiver was given under the Receivership Order and the SISP Order." We agree.

28 In any event, the motions judge's reasons reveal that he approved the Sale Agreement based on the totality of the circumstances and application of the factors set out in *Soundair*. His findings about BLIG's conduct had no bearing on those factors and were not part of his assessment whether the Receiver had negotiated fairly and in good faith.

29 Finally, the proposed appeal would unduly hinder the insolvency proceedings, as Legacy Hill is not prepared to close the Sale Agreement until BLIG has exhausted its appeal rights in this court.

30 We reach a similar conclusion regarding BLIG's final proposed ground of appeal, namely, that the Receiver breached its duty to consult with "affected Aboriginal communities". In our view, given the history of the proceedings, it is not open to BLIG to now raise this issue on appeal.

31 There is no question that the Crown (or a Crown agent) has a duty to consult with "affected Aboriginal communities" where the Crown's actions might adversely impact potential or established Aboriginal or treaty rights. In *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, [2004] 3 S.C.R. 511 (S.C.C.) and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, [2004] S.C.J. No. 69 (S.C.C.), the Supreme Court indicated that the Crown's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the Honor of the Crown, which derives from the Crown's assertion of sovereignty in the face of prior Aboriginal occupation.

32 The duty to consult arises when the Crown has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect it. The Supreme Court has also confirmed that the Honor of the Crown cannot be interpreted narrowly or technically, but must be given full effect in order to promote the process of reconciliation between the Crown and Aboriginal peoples mandated by s. 35(1) of the *Constitution Act, 1982*: *Taku*, at para. 24.

33 BLIG raised the issue of "affected Aboriginal communities" before Brown J.A. in the context of arguing that it was entitled to leave to appeal in this case as of right under ss. 193 (a), (b) and (c) of the *BIA*. In particular, BLIG argued that the proposed issues on appeal implicate the "future rights" of "affected Aboriginal communities" and other cases of a similar nature, namely, its motion seeking leave to commence an action against the Receiver for damages for the Receiver's alleged breach of its fiduciary duty to Aboriginal peoples.

34 In concluding that an appeal did not lie as of right under ss. 193(a), (b) or (c) of the *BIA*, and that leave to appeal was required, Brown J.A. comprehensively reviewed the evidence placed before the motions judge about "affected Aboriginal communities". He made a number of findings that bear on the issue of BLIG's ability to raise this issue on appeal.

35 First, and importantly, BLIG did not raise the issue of the Receiver's duty to consult in the context of the SISP proceeding and, in fact, consented to the order allowing the Receiver to proceed with the sale process. At para. 26, Brown J.A. found that the time to raise the issue of the "affected Aboriginal communities" was in the SISP process. We agree.

36 Second, Brown J.A. held, at para. 35, that BLIG did not advance the argument that the Receiver failed in its duty to consult "affected Aboriginal communities" before the motions judge on the motion to approve the sale. This finding is supported by the record.

37 Given that the issue was not raised before the motions judge, BLIG is faced with the burden of establishing that all the facts necessary to address this issue are before this court as fully as if the matter had been raised in the court below: *Kaiman v. Graham*, 2009 ONCA 77 (Ont. C.A.), at para. 18. BLIG has not discharged this burden.

38 Specifically, the record before this court does not clearly establish which Aboriginal communities, if any, have interests in the property affected by the sale, the extent and nature of those interests, and how the actions of the Receiver will negatively impact those interests. A clear articulation of the nature and extent of the asserted right is necessary, in the interest of balancing any Aboriginal rights at stake with the rights of others. As Binnie J. noted in *Lax Kw'alaams Indian Band v. Canada (Attorney General)*, 2011 SCC 56, [2011] S.C.J. No. 56 (S.C.C.), at para. 12:

> At this point in the evolution of Aboriginal rights litigation, the contending parties are generally well resourced and represented by experienced counsel. [...] It is true, of course, that Aboriginal law has as its fundamental objective the reconciliation of Canada's Aboriginal and non-Aboriginal communities, and that the special relationship that exists between the Crown and Aboriginal peoples has no equivalent to the usual courtroom antagonism of warring commercial entities. Nevertheless, Aboriginal rights litigation is of great importance to non-Aboriginal communities as well as to Aboriginal communities, and to the economic well-being of both. *The existence and scope of Aboriginal rights protected as they are under s. 35(1) [...] must be determined after a full hearing that is fair to all the stakeholders*.
>
> [Emphasis added.]

39 In our view, it would be prejudicial and unfair to the interests of BLIG's secured creditors, and contrary to the normal rules of procedure, to permit BLIG to raise this issue at this late stage, when it elected not to raise it in the SISP proceeding or before the motions judge on the motion to approve the sale. As a result of its failure to raise the matter on a timely basis, there is no adequate evidentiary record supporting the claim. Nor does this court have the benefit of the motions judge's consideration and ruling on the issue.

40 Third, and in any event, we agree with Brown J.A.'s observation that it is doubtful whether BLIG has standing to assert this claim on behalf of Aboriginal communities. As LeBel J. indicated in *Moulton Contracting Ltd. v. British Columbia*, 2013 SCC 26, [2013] S.C.J. No. 26 (S.C.C.), at para. 30, the Crown's duty to consult is intended to protect the s. 35 constitutional rights of Aboriginal peoples, which are collective in nature. While an Aboriginal group can authorize an individual or organization to represent it for the purpose of asserting its s. 35 rights, there is no evidence that this occurred in this case.

41 Moreover, regardless of the standing issue, as the record does not disclose the nature and extent of any Aboriginal community's interests, if any, in BLIG's property, we are unable to conclude that this proposed ground of appeal warrants the granting of leave to appeal.

F. Disposition

42 For the reasons given, the application for leave to appeal is dismissed. The Receiver is entitled to its costs of this motion and the motion for advice and directions before Brown J.A., fixed in the total amount of $3,000, inclusive of disbursements and all applicable taxes.

Application dismissed.

TAB 10

COURT OF APPEAL FOR ONTARIO

CITATION: Benarroch v. Abitbol, 2018 ONCA 203
DATE: 20180301
DOCKET: M48651 (C64319)

Doherty, MacFarland and Paciocco JJ.A.

BETWEEN

Alberto Benarroch

Applicant (Appellant)

and

Monique Abitbol, Carlos and Sara Abitbol, Jacob Benarroch, Louis R. Montello, HPI Administrative Services LLC, Hercules Products Inc., Turnberry Ts2 Corp., Miami Alone Products Corp. Plasticos Hercules CA, Productos Hercules, CA, Las Princesas Corp., and Rafael Benarroch

Respondent (Respondent)

Jaret Moldaver and Lindsay Konkol, for the moving party, Monique Abitbol

Daryl Gelgoot, for the responding party, Alberto Benarroch

Heard and released orally: February 22, 2018

REASONS FOR DECISION

[1] This a motion brought by the respondent to quash the appeal on the ground that the order under appeal is interlocutory and not final, meaning that this court has no jurisdiction to hear the appeal.

[2] The order under appeal was made in the course of ongoing family law proceedings. The order requires that the appellant make certain payments, including monthly spousal and child support payments to the respondent.

[3] Paragraph 7 of the order reads:

> In the event that the Husband fails to comply with paragraph 5 above, the Wife may move without further notice to the Husband to strike his pleadings involving all financial issues between the parties.

[4] The appellant appeals essentially on the ground that he genuinely cannot pay the amounts ordered and that the effect of para. 7 is to deny him any opportunity to participate any further in the ongoing proceedings. Counsel for the appellant refers to this as a "catch 22".

[5] The appellant's credibility in this litigation has been the subject of adverse comment. His asserted impecuniosity is strongly challenged by the respondent. In any event, even if the appellant is impecunious, that fact does not assist in determining the appropriate appellate forum. We agree with counsel for the moving party that the terms of the order requiring payments towards spousal and child support are interlocutory. A term like para. 7, directed at the consequence of non-compliance with the order, cannot alter the nature of the order: see *J.K. v. Ontario*, 2017 ONCA 332, at para. 18.

[6] The order is interlocutory. The appeal is quashed. We do not reach the motion for security for costs.

[7] In our view, it was plain and obvious on the authorities that this order was interlocutory and not appealable to this court. Counsel for the respondent put counsel for the appellant on notice of its position that this court had no jurisdiction shortly after the appeal was launched. This motion should not have been necessary. In our view, this is an appropriate case for costs on a substantial indemnity basis, both in respect of the motion and the appeal itself. We fix those costs at $22,000, inclusive of disbursements and relevant taxes.

"Doherty J.A."
"J. MacFarland J.A."
"D.M. Paciocco J.A."

Appeal File No.: C66503
Court File No: CV-18-00608356-00CL

BUDUCHNIST CREDIT UNION LIMITED	- and -	**2321197 ONTARIO INC., CARLO DEMARIA, SANDRA DEMARIA, 2321198 ONTARIO INC. SASI MACH LIMITED, VICAR HOMES LTD. and TRADE CAPITAL FINANCE CORP.**
Applicant (Respondent in Appeal)		Respondents (Appellants)

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT TORONTO

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