Court File No. CV-22000674810-00CL
Court of Appeal File No. C70638

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant
(Respondent)

- and –

30 ROE INVESTMENTS CORP.

Respondent
(Appellant)

IN THE MATTER OF AN 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

FACTUM OF THE RESPONDENT (APPELLANT)

RESPONSE TO THE MOTION TO QUASH

MOTION FOR LEAVE TO APPEAL, IF NECESSARY

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FACTUM OF THE APPELLANT
RESPONDING PARTY ON THE MOTION TO QUASH

PART I - NATURE OF THE MOTION, ORDER APPEALLED FROM AND RESULT

1. The Appellant/Responding Party on this motion, 30 Roe Investments Corp. (the "Appellant") responds to this motion to quash brought by the Respondent/Moving Party on this motion, KingSett Mortgage Corporation (the "Respondent").

2. This Appeal arises out of an Application commenced by the Appellant on January 7, 2022 (the "Application"). The Application sought the appointment of a Receiver over the real property and operations of the Appellant. The Application was heard before the Honourable Justice Cavanagh (the "Learned Judge") on May 6, 2022.

3. The Learned Judge denied the Appellant's request for an adjournment (by Endorsement) and then ordered the appointment of KSV Restructuring Inc. as Receiver (the "Receiver") by Order dated May 9, 2022 (the "Receivership Order").

4. The Appellant served a Notice of Appeal on May 10, 2022. An Amended Notice of Appeal was served on May 19, 2022 (collectively, the "Appeal").

5. The Respondent served a motion to quash the Appeal. In an abundance of caution, the Appellant has also served a Motion for Leave to Appeal.

PART II – OVERVIEW OF THE APPELLANT'S POSITION

6. It is the position of the Appellant that the motion to quash should be dismissed and the Appeal proceed in the ordinary course[1]. The Appellant states that this Appeal falls into section 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 (the *"BIA"*).

7. In support of that position, the Appellant relies upon *2615333 Ontario Inc. v. Central Park Ajax Developments Phase I Inc., et al* (unreported) and *Comfort Capital Inc. v. Yeretsian* **2019 ONCA 1017**, together with paragraphs 3(k) of the Receivership Order, to state that the Appeal is as of right.[2] With respect to the latter argument, it is the Appellant's position that because the Receiver has the right to sell without the approval of the Court up to $250,000 of the Property, as defined therein, which includes the Real Property. One of the 9 condominium units could be sold, or alternatively, a parking spot or lockers, which are separate units as described on Schedule "A" to the Receivership Order could be sold.[3] The evidence demonstrates that a parking unit is worth $50,000.[4] This places the appeal in to the wording of, and the judicial interpretation of, section 193(c) of the *BIA*.

8. In the alternative, in the event that this Honourable Court finds that Leave to Appeal is required pursuant to section 193(e) of the *BIA*, the Appellant requests that Leave to Appeal be granted or that the motion for Leave to Appeal proceed as expeditiously as possible. The appeal is

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[1] The Appellant consents to any order expediting the appeal and is in the hands of this Honourable Court.
[2] ABC Tab 2 – Receivership Order, at para 3(k).
[3] ABC Tab 2 – Receivership Order, Schedule "A".
[4] ABC, Tab 11, Affidavit of Raymond Zar sworn May 5, 2022, Ex. C, Appraisal

prima facie meritorious, and involves an issue of general importance to the practice in insolvency matters, and to the administration of justice as a whole.[5]

9. Specifically, on Appeal and, if necessary on the motion for Leave to Appeal, the crux of the Appellant's position is that the appointment of a Receiver was premature, not proportional and so not just and convenient. This is a situation where the asset in question, which is real property comprised of 9 condominium units, are being operated and there is no allegation of any difficulty in the operations.

10. Further, the Appellant is fully secured and its interest is fully paid. There is only one other creditor, the Canadian Imperial Bank of Commerce ("CIBC"), who agreed to defer and forbear from taking any enforcement steps from May 6, 2022 for 30 days.

11. The appointment of a Receiver was a drastic remedy taken by the Respondent over three months before the extension period had expired. It is submitted that this Honourable Court should provide guidance to the profession with respect to when the appointment of a Receiver is an extreme remedy that should not be granted in all of the circumstances.

12. As it relates to both the Appeal and, more specifically, the leave to appeal if necessary, the primary question is:

> Is it an error in law just and convenient to resort to the extraordinary equitable remedy, even where the security documents permit, of a Receiver (with the attendant cost) where the debt is fully secured, there is no evidence of deterioration of security, no need to stabilize and preserve the business, no objective loss of confidence and the interest of other creditors are not impacted?

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[5] With respect to the administration of justice as a whole, the Learned Judge denied the adjournment and proceeded with the motion in breach of Rule 15.04 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg 194 (the *"Rules"*), which provided the Appellant with 30 days to obtain new counsel following the April 11, 2022 Order removing its counsel, and it did not have 30 days as the Application was heard before the expiry of that period. See ABC Tab 8 – Endorsement of Justice Penny.

13. Here, the Learned Judge ordered a Receiver in the face of none of those criteria being met.

PART II - SUMMARY OF FACTS

14. The Appellant is incorporated under the Canada Business Corporations Act. Roe Hampton Capital is a parent company of the Appellant. Roe Hampton Capital and its subsidiaries, including the Appellant, employ 25 employees, and assorted independent contractors. The net worth of those companies is nearly $8,000,000.00.

ABC Tab 11 - Affidavit of Raymond Zar, sworn May 5, 2022 (the "May 5 Zar Affidavit"), at para 3.

15. The real property upon which the Receiver was appointed is the entire top floor of 30 Roehampton Avenue in Toronto, which is comprised of nine (9) residential penthouse condominiums, which includes lockers and parking spots (the "Real Property"). There is a $4,100,000 mortgage registered in first position in favour of the CIBC. A second mortgage in the in favour of the Respondent is also registered and is the subject matter of the Application and this appeal (the "Second Mortgage").

16. The Second Mortgage was originally in the principal amount of $1,500,000 based on the Original Commitment Letter dated March 29, 2019; however it was increased to $1,875,000.00 through a series of amendments. To the time of the events in issue in this Appeal, the Maturity Date was December 1, 2021.

17. Importantly, in November 2021, the Real Property was appraised for $9,125,000. Based on the appraised value, the Respondent's mortgage stands at only a 65% loan to value. It is fully secured with the Real Property.

ABC Tab 11- May 5 Zar Affidavit, at para 5.

18. In September of 2021, the Appellant sought to refinance both the first and second mortgage, given that the property had increased in value from $8,000,000 to conservatively well over $10,000,000. This increase in value was based upon higher rents being achieved as a result of active management.

ABC Tab 11, - May 5 Zar Affidavit, at para 6.

19. Specifically, in September of 2021, the Appellant confirmed with the Respondent that:

a) The Respondent was satisfied with the security;

b) The loan from the Respondent was open and had no firm repayment date;

c) The Respondent was aware that based on income received, the valuation could be as high as $13,500,000; and,

d) That there was no concern about extensions.

ABC Tab 11 & 11B - May 5 Zar Affidavit, at para 6 and Exhibit "B".

20. Notwithstanding, in November of 2021, the Respondent attempted to increase the interest rate payable to 9.5%. The Appellant through its CEO, Raymond Zar, was frustrated by what he viewed to be their attempt to raise the rate without speaking to him about that increase. Without agreement or notice, the Respondent then attempted to debit the December interest payment and take an extension fee at the same time. The payment to the Respondent was declined by the Appellant's bank simply because the funds had not been transferred for this unexpected debit at that time.

21. On December 16, 2021, the Appellant rejected the request to pay a higher interest rate. However, and significant to this Appeal, states that it extended the loan with the Respondent until April 1, 2022 at the same interest rate of 9%.

ABC Tab 11 - May 5 Zar Affidavit, at para 8.

22. The Respondent's contemporaneous actions evidenced implicit agreement with an extension of the loan until April 1, 2022.

23. Specifically, the Respondent:

(a) debited the extension fee from the Appellant's account on January 4, 2022 and left the interest rate at 9%. This was reflected on a billing statement; and,

(b) the Respondent continued to debit the extension fee in January and again in February, 2022.

24. Between December 16, 2021, when the loan was extended until April 1, 2022, and the issuance of this Application, the Respondent did not take the position, nor advise the Appellant that the loan had not been extended.

ABC Tab 11 - May 5 Zar Affidavit, at para 8.

25. The Application was commenced on January 7, 2022, but was not personally served upon Mr. Zar.

26. Once Mr. Zar learned of the Application and the hearing date of January 17, 2022, the Appellant sought to engage counsel. Between January 7 and January 17, 2022, the Appellant contacted three counsel, who all had conflicts. The Learned Judge adjourned the hearing of the

Application from January 17, 2022 to February 22, 2022.

ABC Tab 5 - Endorsement of Cavanagh, J. dated January 17, 2022.

27. Between January 18 and February 22, 2022, after the second hearing, the Appellant contacted four counsel, three on whom were not able to act. The fourth, Mr. Kenneth Rosenberg, was able to act, however, because he had just been retained the Application was adjourned to March 28, 2022.

ABC Tab 6 - Endorsement of Cavanagh, J. dated February 22, 2022.

28. Unfortunately, a conflict arose, and the Learned Judge scheduled a hearing for a motion to remove Mr. Rosenberg from the record for April 11, 2022, and the March 28, 2022 hearing date for the application was vacated.

ABC Tab 7 – Endorsement of Cavanagh, J. dated March 8, 2022.

29. The motion to remove was heard by Justice Penny, in part, *in camera*. In His Endorsement, Justice Penny stated:

> "The basis for Paliare Roland's decision to withdraw as counsel for the Client involves highly confidential matters which are no one else's business but the firm and the Client. As a result, the motion was conducted in camera without the participation of other parties to the litigation. Further, I will not be outlining the details of any of the grounds presented or the disagreements discussed during the submissions of both sides. Suffice it to say that, considering the evidence as a whole, I am satisfied that the relationship between the Client, Mr. Zar and Paliare Roland has been irreparably damaged, lacks the fundamental requirements of trust and confidence and cannot continue. Indeed, Mr. Zar went so far as to say the Paliare Roland (as well as possibly Bennett Jones) may need to testify at the receivership application. On this basis alone, Paliare Roland could not possibly continue to act and Mr. Zar recognized and accepted that."

ABC, Tab 8 – Endorsement of Penny, J. dated April 11, 2022.

30. Mr. Rosenberg was then removed as counsel of record on or about April 11, 2022 as a result of a conflict of interest after the hearing by Justice Penny.

31. The Appellant was not served with the Order removing Mr. Rosenberg as counsel until April 20, 2022. The Appellant made every effort to do that as evidenced by the list, and was finally successful, but out of time to properly prepare responding materials. Mr. Zar emailed Mr. Zucker on Saturday night, April 30th. He met with Mr. Zar on Monday, May 2nd and retained him. He immediately reached out to Mr. Swan.

ABC Tab 11 - May 5 Zar Affidavit, at para 12.

32. Before retaining Mr. Zucker, Mr. Zar attempted to contact a number of other counsel, many of whom had conflicts.

Facts Relied Upon Demonstrating that it was not Just and Convenient to Appoint a Receiver

33. The Real Property encompasses nine (9) residential penthouse condominiums. They are all rentals and all fees except monthly maintenance and property taxes are covered by the tenants. All fees payable to the Appellant are in good standing. The Appellant has consistently maintained and upgraded the units. The Real Property is fully leased and in the last 36 months, there have not been a single incident of problems collecting rent as the Tenants are AAA. A Receiver would only frustrate those relationships and create unnecessary fees and offer no value to the creditors.

ABC Tab 11 - May 5 Zar Affidavit, at para 12.

34. In opposition to the Application, the Appellant tendered an Appraisal prepared by PVCI Inc. as of November 3, 2021 for each of the Units. Parking Units were valued at $50,000. The Parking Units are separate from the main unit and can be sold separately.

35. The Hearing for the Receiver was heard by the Learned Judge on May 6, 2022.

36. At the commencement of the Hearing, the Appellant requested that an adjournment of the Application be granted. The Learned Judge denied that request with written Reasons to follow, and the Application proceeded.

37. His Honour released Reasons on May 9, 2022 and signed the Receivership Order the same day.

38. In His Reason, the Learned Judge stated:

With Respect to the Adjournment at Paragraph 15:

> "In my view, the Respondent has not acted reasonably and in accordance with my February 22 and March 8, 2022 endorsements by not seeking to identify counsel who could represent the Respondent after February 22, 2022 and waiting until April 11, 2022 to contact new counsel who would be available to replace former counsel for the Respondent, if the motion by former counsel to be removed were to succeed. I made it clear in my March 8, 2022 Endorsement that May 6, 2022 was a firm date, and that the Respondent was expected to act diligently to ensure that counsel was retained and able to meet this hearing date. In my view, there was ample time for the Respondent to do so if efforts to contact counsel who could act on this matter were made between February 22 and April 11, 2022."

With Respect to the Application at Paragraphs 31 and 32:

> "On this application, there is no evidence that the second mortgage against the Real Property is at risk of deteriorating. The evidence is that the condominium units are rented and rents are being paid. The Respondent is continuing to pay interest on the mortgage debt. The first mortgagee, CIBC, is willing to continue to defer and forbear from taking any enforcement steps in connection with its mortgages for a period of thirty days commencing May 6, 2022, in order to allow the Respondent an opportunity to complete its refinancing with Firm Capital Corporation. CIBC does not take a position in opposition to the application. [32] Mr. Pollack has stated in his affidavit that the Applicant has lost confidence in the Respondent's management to continue to satisfy the Respondent's obligations, obtain refinancing and manage the Real Property. I do not regard this to be a statement in the air and without objective evidentiary support, as the Respondent submits. The Applicant's mortgage loan matured on December 1, 2021 and the Respondent has had five months to refinance but has not done so. The Respondent submits that the appointment of a receiver is an extreme remedy that is not needed when "less aggressive" remedies are available, but the only alternative course of action the Respondent submits should have been taken was for the Applicant to have commenced private power of sale proceedings. The Applicant was under no obligation to do so, and has brought this application to seek a remedy to which the Respondent has contractually agreed."

ABC Tab 3 – Reasons of Cavanagh J., dated May 9, 2022.

39. The Appellant delivered its Notice of Appeal on May 10, 2022, with an Amended Notice of Appeal thereafter. A Notice of Motion for Leave to Appeal was also served, in an abundance of caution, on May 19, 2022.

ABC Tab 1 – Amended Notice of Appeal.
Zar Responding Motion Record, Tab 1 – Notice of Motion for Leave to Appeal.

PART III - STATEMENT OF ISSUES, LAW & AUTHORITIES

Issue One: The Appeal is as of Right Pursuant to Section 193(c) of the BIA such that the motion to quash should be dismissed

40. In *2615333 Ontario Inc. v. Central Park Ajax Developments Phase I Inc., et al*, Justice Cavanagh recognized a stay from an Order made pursuant to section 243(1) of the *BIA*, and section 101 of the *Courts of Justice Act*, also appointing RSM Canada Limited as Receiver after an Appeal was brought pursuant to subsection 193(c) of the *BIA*.

***2615333 Ontario Inc. v. Central Park Ajax Developments Phase I Inc., et al*, (unreported, Court File No. CV-20-00651299-OOCL, reasons released May 26, 2021).**

41. In that decision, Justice Cavanaugh, stated:

> [1] On April 15, 2021, I made an Order (the "Appointment Order") pursuant to section 243(1) of the BIA and section 101 of the Courts of Justice Act appointing RSM Canada Limited as receiver (the "Receiver") of certain properties (collectively, the "Property").
>
> [2] In April 26, 2021, the respondents served a Notice of Appeal in respect of the Appointment Order.
>
> [5] Section 193 of the BIA provides that 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 right; (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceeding; (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 $500; and (e) in any other case by leave of a judge of the Court of Appeal.
>
> [6] In their Notice of Appeal, the respondents state that the appeal is being brought under subsections 193 (a) to (c) of the BIA. As a result, the respondents contend that their appeal has been properly brought and leave of a judge of the Court of Appeal is not required.
>
> [7] Section 195 of the BIA provides:
>
> > Except to the extent that an order or judgment appeal from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appeal from shall

> be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

42. Section 193(c) of the *BIA* states:

> **193.** Unless otherwise expressly provided, an appeal lies to the Cour 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;

43. In ***Comfort Capital Inc. v. Yeretsian***, **2019 ONCA 1017**, the Ontario Court of Appeal addressed the issue of whether an appeal was as of right or required leave. At paragraphs 16 and 17, the Court stated:

> [16] In *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, three types of orders were identified from which s. 193(c) does not provide an appeal as of right: at para. 53. The first are orders that are procedural in nature including orders concerning the methods by which receivers or trustees realize an estate's assets: at para. 54. The second are orders that do not bring into play the value of the debtor's property such as an order appointing a receiver to monetize assets: at para. 59. The third are orders that do not result in a gain or loss, because they do not contain "some element of a final determination of the economic interests of a claimant in the debtor": at para. 61.
>
> [17] This case does not involve an order that is procedural in nature; it is not a case like *Bending Lake*, a case where the majority of the grounds of appeal concerned issues about the process for the sale of assets. And, on the topic of the value of the property in play, unlike *Bending Lake*, "in the case at bar the Court was called upon to consider more than the monetization of an asset": *Forjay Management Ltd. v. Peeverconn Properties Inc.*, 2018 BCCA 188, 61 C.B.R. (6th) 221, at para. 52. The real issue in this case is whether it comes within the third category, that is, whether the order results in a loss to CIC.

44. Then, at paragraph 25, the Court concluded:

> [25] In my view, whether the appeal is as of right must be judged by the nature of the order itself, without assuming it was correctly or incorrectly made. The nature of the order is to cause payment to the Stanbarr Claimants of an amount otherwise payable to CIC, and thus constitutes a loss to CIC. That the order was made to give effect to what was determined to be a pre-existing obligation relates to the correctness of the order and the strength of the grounds of appeal, but is not germane to whether there is an appeal as of right from the order.

45. Paragraph 3(k) of the Receivership Order states:

> [3] THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:…

> (k) to execute, assign, issue and endorse documents of whatever nature in respect of any of the Property, whether in the Receiver's name or in the name and on behalf of the Debtor, for any purpose pursuant to this Order.
>
> **ABC Tab 2 – Receivership Order of Cavanagh, J.**

46. Without determination of whether the Learned Judge was correct or incorrect in issuing the Receivership Order, paragraph 3(k) allows the Receiver, without Court order to sell assets of the Appellant in excess of $10,000.00, as such section 193(c) of the *BIA* applies and the appeal is of right.

47. Put another way, the Receivership goes beyond placing the Appellant's assets, including the Real Property, in the hands of the Receiver to preserve the assets. Rather, the Receivership Order expressly empowers the Receiver to monetize those assets, up to a certain value, without approval of the Court. This amounts to more than a preservation of the assets, but rather an explicit right in the Receiver to sell assets and utilize them. It is clear that assets up to a value of $250,000 have been taken out of the control of the Appellant and placed in the hands of the Receiver who has the right to sell without further approval of the Court.

48. Justice Nordheimer in ***Royal Bank of Canada v. Bodanis,*** 2020 ONCA 185 specifically dealt with this issue in the context of an appeal from bankruptcy orders made after a trial: the issue is whether section 193(c) of the *BIA* applied. In doing so, His Honour relied upon *Comfort Capital Inc*., **2019 ONCA 1017,** and held:

> [5] However, in my view, s. 193(c) does apply to this case. Clearly, the value of the property involved in this appeal exceeds $10,000. Indeed, there is no dispute that that is the case. However, the moving party submits that the bankruptcy orders, which appoint a Trustee in Bankruptcy, simply preserve the assets of the bankrupt and therefore do not "involved" property of more than $10,000. The moving party relies on observations made in certain other cases including Business Development Bank of Canada v. pine Tree Resorts Inc. 2013 ONCA 282, 115 O.R. (3d) 617, 2403117 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225, 369 D.L.R. (4th) 635, and Buduchnist Credit Union Limited v. 2321107 Ontario Inc., 2019 ONCA 588, 72 C.B.R. (6th) 245.

> [6] Each of those decisions is distinguishable from the case at hand. In all three of those cases, the order being appealed was an order appointing a Receiver over certain properties. It was no a bankruptcy order as is the case here. There are distinctions between orders appointing a Receiver and bankruptcy orders appointing a Trustee in Bankruptcy. Among those distinctions is the fat that, unlike a Receiver, the Trustee in Bankruptcy does not require court approval in order to monetize the bankrupt's assets (except in limited circumstances). Instead, the Trustee has a duty to dispose of the bankrupt's assets and distribute the proceeds amongst the creditors, subject to the inspectors' approval.
>
> [7] In relying on these decisions, the moving party points out the commentary that has been made in them that s.193(c) ought to be narrowly construed in order to avoid conflict with other statutes, particularly the Companies' Creditors Arrangement Act, R.S.C. 1985, c.C-36. As laudable a goal as that may be, it cannot be used to, in effect, read the subsection out of the statue. On that point, counsel for the moving party fairly concedes that, if the interpretation of s. 193(c) that she urges in this case were to be adopted, the subsection would not apply to any bankruptcy proceeding, since all of them will realistically involve assets totalling more than $10,000.
>
> [8] While I appreciate the concerns that are used to justify the narrow approach, I do not see how a court can invoke those concerns in order to avoid the plain wording of the statue. The basic principle of statutory interpretation is that "the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of he Act, the object of the Act, and the intention of Parliament": Rizzo & Rizzo Shoes Ltd. (Re), 1998 CanLII 837 (SCC), [1998] 1 S.C.R. 27, at para. 21. If there is a pressing concern on this issue, it is one that Parliament must address.
>
> [9] While the facts of each case may determine whether s. 193(c) properly applies, in my view, it clearly applies here where the appellant's entire property have been taken out of their control and placed into the hands of a Trustee in Bankruptcy, who has the right to disposes of that property and distribute it among the creditors, without further court intervention. The orders here are more akin to the type of orders that were considered in Crate Marine Sales Ltd. (Re), 2016 ONCA 140, 33 C.B.R. (6th) 169, and Comfort Capital Inc. v. Yeretsian, 2019 ONCA 1017, where an appeal as of right was found to exist. Consequently, I conclude that the appellants have an appeal as of right."

***Royal Bank of Canada v. Bodanis,* 2020 ONCA 185, at paras 5-9.**

49. Although not an appeal from the appointment of a receiver, this Honourable Court followed Justice Nordheimer's approach in *Royal Bank of Canada v. Bodanis* in *Shaver-Kudel Manufacturing Inc. v. Knight Manufacturing Inc*. finding that section 193(c) of the *BIA* applied where the debtor's property had been taken out of its control and could be sold without further approval of the Court.

***Shaver-Kudel Manufacturing Inc. v. Knight Manufacturing Inc.* 2021 ONCA 202 at para. 22**

50. In *MNP Ltd. v. Wilkes*, the Court of Appeal for Saskatchewan addressed the amendments of the BIA in 1949 that lead to section 193, the legislative approach and interpretation to section

193 and the interpretation of section 193(c) of the *BIA*. The Saskatchewan Court of Appeal followed *Royal Bank of Canada v. Bolaris* and found that section 193(c) applied where the debtor appealed the receiver's sale of two lawsuits which were property that exceeded $10,000.

***MNP Ltd. v. Wilkes*, 2020 SKCA 66**

51. Here the Real Property is clearly separately titled units, being condominium units, parking units and storage units. This is uncontroverted and is demonstrated by Schedule "A" to the Receivership Order which lists each unit separately with its own legal description. That Real Property is valued in excess of $10,000. The Receiver has the right to dispose of it, to the loss of the Appellant, without Court approval. This places the appeal within section 193(c).

52. Another way to look at the question, is as follows: there is no doubt that if the only Real Property was one condominium unit with a value of $100,000, the Receiver could sell under paragraph 3(k) of the Receivership Order and section 193(c) would clearly apply such that it would be an appeal as of right. It is paragraph 3(k) of the Receivership Order that mandates the nature of the appeal right, not the nature of the property itself once it is established that it is over $10,000 in value. Section 193(c) applies.

53. Further, there can be no question that the Receivership Order is a final order. The only relief sought in the Notice of Application is the appointment of the Receiver – nothing more. The Application has been finally determined. If the appointment is considered under only section 101 of the *Courts of Justice Act*, then section 6 of the *Courts of Justice Act* applies, as does Rule 61 of the *Rules of Civil Procedur*e and the appeal is as of right.

Issue Two: In the Event that the Appeal is Not of Right, Leave to Appeal Ought to Be Granted

54. Section 193(e) of the *BIA* provides for an appeal from an order with leave. The principles respecting granting leave to appeal have been set out by Justice Blair in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, at para 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."

55. The third prong, unduly hinder the progress of the bankruptcy/insolvency proceedings, is not relevant. The appointment of a Receiver is a remedy of last resort in circumstances where the Respondent is fully secured (to in excess of its debt). There is no relief sought in the Application after the appointment of the Receiver. The Application is spent; it is finally determined.

56. The first and second prong are intertwined, given the issues on appeal.

57. As set out by the Learned Judge, the factors to be addressed when considering whether a receiver should be appointed where set out in paragraph 29 of the Reasons.

ABC Tab 3 – Reasons for Decision of Cavanagh, J. at para 29.

58. Those factors, with the corresponding position of the Appellant are set out below:

(a) The lenders' security is at risk of deteriorating:

(i) *Reasons*: At paragraph 31 of the Reasons, the Learned Judge confirms that there is no evidence that the second mortgage against the Real Property is at the risk of deteriorating;

(b) There is a need to stabilize and preserve the debtor's business:

(i) *Reasons*: Again, at paragraph 31 of the Reasons, the Learned Judge confirms that the condominium units are rented and rents are being paid. Importantly, the Learned Judge finds that the Appellant is continuing to pay interest on the mortgage debt.

(c) The positions and interest of other creditors:

(i) *Reasons*: Again, at paragraph 31 of the Reasons, the Learned Judge found that the CIBC, the first mortgagee is continuing to defer and forbear from taking any enforcement steps.

ABC Tab 3 – Reasons for Decision of Cavanagh, J. at para 29.

59. On the basis that three of the four prongs of the test are not satisfied or engaged, it is submitted that the decision to appoint a Receiver based only on the fourth: loss of confidence in the debtor's management, must be viewed critically for the reasons set out below, but in any event, is *prima facie* meritorious.

60. This fourth prong, loss of confidence, raises a prima facie meritorious appeal and also, it is submitted engages the first part of the test that is the public importance of the proposed appeal.

61. The Learned Judge relied upon, with conflicting evidence that had not been cross-examined upon, that the Respondent "had lost confidence in the Respondent's management

to continue to satisfy the Respondent's [Appellant's] obligations, obtain refinancing and manage the Real Property".

62. There are two important points. First, the factual basis upon which this finding was made, it is submitted is a processing error, or put another way, a palpable and overriding error reviewable on appeal. The evidence before the Court was that:

(a) The Appellant was fulfilling its obligations;

(b) The Appellant was seeking re-financing;

(c) The Appellant had credible reasons for believing that there was an extension to April 1, 2022 given that the Respondent had taken the extension fee and interest payments for **three months** past the alleged expiry date of December 31, 2021; and,

(d) The Respondent admits it did take those payments.

63. Thus, the basis of the finding for loss of confidence is not consistent with the uncontradicted facts before the Court. The Learned Judge erred by making a finding that was in the absence of any evidence. As is well-established, that is a serious processing error, reviewable on appeal. This, together with the fact that the other three prongs were not satisfied or engaged, makes the appeal *prima facie* meritorious.

See *Housen v. Nikolaisen*, 2002 SCC 33, at para 6.

64. Second, the Learned Judge assessed this fourth prong, loss of confidence, subjectively, based on the Respondent's statement that it has lost confidence in the Appellant's management.

65. The clear and established trend in the jurisprudence is away from subjective statements of belief, to objective ones. This Honourable Court and the Supreme Court of Canada, time and again, have stated definitely that the interpretation of a contract, or other instrument, is to be viewed objectively, not subjectively.

See *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53, at para 57.

66. It is submitted that a secured creditor's loss of confidence must be viewed with some degree of objectivity. In other words, would a reasonable person in the secured creditor's position have lost confidence based on the facts as presented.

67. This objective assessment, it is submitted, is necessary as a check and balance on the extraordinary relief of the appointment of a Receiver. Otherwise, there would be nothing to prevent the test for a Receiver from being satisfied every time a secured creditor says that they have lost confidence.

68. The requirement for objectivity is not inconsistent with a test of just and convenient as the Court is required to have regard to all the circumstances and all the interests of the parties.

69. The standard of subjective versus objective assessment of the evidence of loss of confidence is a matter of public importance to the insolvency bar and one that should, it is respectfully submitted, be addressed by this Honourable Court. The review of the case law demonstrates that this issue has not been squarely addressed by this Honourable Court.

70. The appeal is also meritorious on the ground that the Learned Judge erred in law and made palpable and overriding errors of fact in failing to consider that:

a. This Application was commenced prematurely before there was any default; and,

b. The Respondent's actions interfered with the Appellant's ability to re-finance the Property.

71. The Learned Judge viewed the evidence with respect to the fact that the Respondent admittedly accepted the extension payments only from the perspective of the Respondent and that the Respondent had made a mistake. His Honour failed to consider the Appellant's perspective at all. The test of "just and convenient" requires that all the surrounding circumstances and the interests of all parties be taken into account. Whether it was a mistake or not, it was the Appellant's perspective that there was such an extension and the Application was premature, because there was no default.

72. There is also *prima facie* merit to the appeal with respect to the Appellant's request for an adjournment, in the somewhat unique circumstances of this case, and which engages an issue of public importance.

73. The Order removing Pailaire Rolland was received on April 20, 2022. Rule 15.04(6) of the *Rules* provides that:

> **Corporations**
>
> (6) A client that is a corporation shall, within 30 days after being served with the order removing the lawyer from the record,
>
> (a) appoint a new lawyer of record by serving a notice under subrule 15.03 (2); or
>
> (b) obtain and serve an order under subrule 15.01 (2) granting it leave to be represented by a person other than a lawyer.

74. The legislature has mandated that a corporation has 30 days in which to obtain new counsel.

75. With the hearing on May 6, 2022, and no adjournment, the Appellant had less than 30 days (and in fact, only 16 days) to obtain new counsel.

76. It is clear from the Reasons of Justice Penny that the Appellant did not want to lose its counsel and that it was the Court that removed Pailaire Roland for what it deemed to be compelling reasons. In those circumstances, the Appellant should have been afforded the full 30 days to retain counsel and the adjournment granted.

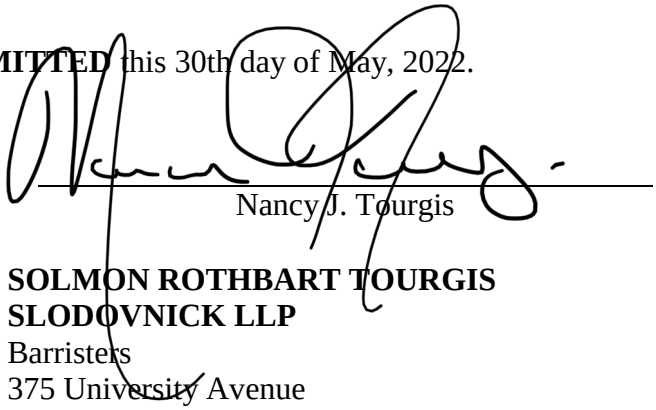
77. It is submitted that this engages the public importance requirement of the test for leave to appeal.

PART IV - ORDER REQUESTED

78. The Appellant/Responding Party respectfully requests that the motion to quash be dismissed, with costs.

79. In the alternative, the Appellant/Moving Party on the motion for leave to appeal be heard in the discretion of the Panel of this Honourable Court and granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 30th day of May, 2022.



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SCHEDULE "A"

1. *2615333 Ontario Inc. v. Central Park Ajax Developments Phase I Inc., et al* (unreported).
2. *Comfort Capital Inc. v. Yeretsian* 2019 ONCA 1017.
3. *Royal Bank of Canada v. Bodanis,* 2020 ONCA 185.
4. *Shaver-Kudel Manufacturing Inc. v. Knight Manufacturing Inc.* 2021 ONCA 202.
5. *MNP Ltd. v. Wilkes,* 2020 SKCA 66
6. *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282.
7. *Housen v. Nikolaisen,* 2002 SCC 33.
8. *Sattva Capital Corp. v. Creston Moly Corp*., 2014 SCC 53.

KINGSETT MORTGAGE CORPORATION
Applicant(Respondent)

-and-

30 ROE INVESTMENTS CORPORATION
Respondent(Appellant)

Court File No. CV-22000674810-00CL

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SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

PROCEEDING COMMENCED AT
TORONTO

FACTUM OF THE RESPONDENT(APPELLANT)
MOTION TO QUASH

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File Number: 18801

RCP-F 4C (September 1, 2020)