

Court of Appeal No. COA-23-CV-0288  
Court File No. BK-21-02734090-0031

**COURT OF APPEAL FOR ONTARIO**

IN THE MATTER OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985,  
C. B- 3 AS AMENDED

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A  
PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC.  
OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

---

**RESPONDING FACTUM OF THE PROPOSAL TRUSTEE  
KSV RESTRUCTURING INC.**

---

May 19, 2023

**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Robin B. Schwill** (LSO# 384521)  
Tel.: 416.863.5502  
Email: rschwill@dwpv.com

**Matthew Milne-Smith** (LSO# 44266P)  
Tel: 416.863.5595  
Email: mmilne-smith@dwpv.com

Lawyers for the Respondents,  
the Proposal Trustee, KSV Restructuring Inc.

## TABLE OF CONTENTS

<b>PART I – OVERVIEW</b> .....	<b>1</b>
<b>PART II – THE FACTS</b> .....	<b>3</b>
A.    THE PARTIES .....	3
(i)    The Debtor .....	3
(ii)   The YongeSL LPs .....	3
(iii)  The Sponsor.....	4
(iv)   CBRE .....	5
(v)   The Athanasoulis Claim.....	5
B.    DIRECTIONS DECISION OF JUSTICE KIMMEL.....	10
<b>PART III – ISSUES</b> .....	<b>11</b>
<b>PART IV – LAW &amp; ARGUMENTS</b> .....	<b>11</b>
A.    STANDARD OF REVIEW .....	11
B.    HORIZONTAL JUDICIAL COMITY .....	12
C.    A MERE ECONOMIC INTEREST DOES NOT CONFER STANDING.....	13
D.    THE YONGESL LPs MISCHARACTERIZE THE DIRECTIONS DECISION AS AN IMPROPER EXERCISE OF DISCRETION .....	16
<b>PART V – CONCLUSION AND ORDER REQUESTED</b> .....	<b>18</b>

## PART I – OVERVIEW

1. This appeal concerns the standing of investors to participate in a creditor’s appeal of a potential disallowance of a claim in an insolvent estate. The Appellants (the “**YongeSL LPs**”) demand to participate fully in the appeal because their economic interest in the estate will be impacted by the determination of the appeal. Such an outcome would be fundamentally inconsistent with established insolvency practice, and interfere with the efficient administration of insolvent estates. This appeal should be dismissed.

2. Capitalized terms used herein and not otherwise defined shall have the meanings ascribed to them in the report dated September 12, 2022 (the “**Seventh Report**”)<sup>1</sup> and the report dated December 30, 2022 (the “**Eighth Report**”)<sup>2</sup> prepared by KSV Restructuring Inc., in its capacity as the proposal trustee of YG Limited Partnership (the “**Partnership**”) and YSL Residences Inc. (together, “**YSL**” or the “**Debtors**”) (the “**Proposal Trustee**”).

3. This appeal by the YongeSL LPs concerns the February 10, 2023 Endorsement rendered by Justice Kimmel (the “**Directions Decision**”)<sup>3</sup> regarding the procedure for determining the claim of Maria Athanasoulis (the “**Athanasoulis Claim**”).

4. None of the YongeSL LPs’ grounds of appeal have any merit: (a) Justice Dunphy’s prior decision about the standing of the YongeSL LPs at a sanction hearing has no bearing on their standing in a claims determination process; (b) the YongeSL LPs do not

---

<sup>1</sup> [Seventh Report](#) of the Proposal Trustee dated September 12, 2022.

<sup>2</sup> [Eighth Report](#) of the Proposal Trustee dated December 30, 2022.

<sup>3</sup> [In the matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc of the City of Toronto, in the Province of Ontario](#) (February 10, 2023), Toronto BK-21-2734090-0031 (ONSC Commercial List).

have standing simply because they may be impacted by the adjudication of the Athanasoulis Claim; and (c) Justice Kimmel did not improperly exercise her discretion or prevent a Court in a future appeal of the Athanasoulis Claim from controlling its own process.

5. The *Bankruptcy and Insolvency Act* (the “**BIA**”) is, of course, a commercial statute and the scheme for administration of claims set out thereunder is summary in nature. Section 135 of the BIA gives the Proposal Trustee a broad mandate to administer claims in such a manner as to promote the intended purposes of the BIA, including expediency and efficiency. This avoids time consuming and costly litigation for each and every claim.

6. Justice Kimmel correctly recognized that claims adjudication in a proposal proceeding under the BIA is, by design, a summary process between the trustee, the creditor claimant and the debtor. Every party whose recovery is potentially affected by a claim determination cannot have standing to intervene in an appeal of that determination. To hold otherwise would threaten to have claims processes overwhelmed with litigation. This would dramatically increase estate administration costs and delay distributions to creditors, thereby undermining the very expediency and efficiency contemplated by the statutory provisions and intent of the BIA.

7. The prior decision of Justice Dunphy is not to the contrary. Justice Dunphy’s decision simply allowed the YongeSL LPs to be heard on a motion to approve a proposal, in circumstances where they had already brought applications attacking the proposal. Justice Dunphy directed that those particular and directly related assertions should be dealt with in conjunction with the motion seeking the sanction of the proposal.

8. Finally, Justice Kimmel did not improperly curtail the YongeSL LPs' standing by an exercise of the Court's discretion to control its own process. Rather, Justice Kimmel correctly applied the law on standing under section 135 of the BIA in deciding that the YongeSL LPs had no automatic right to be heard on Ms. Athanasoulis' appeal simply because their economic interest as equity stakeholders could be affected.

## **PART II – THE FACTS**

### **A. THE PARTIES**

9. On April 30, 2021, the Debtors filed Notices of Intention to Make a Proposal under the BIA, which were procedurally consolidated pursuant to an Order of the Court on May 14, 2021.<sup>4</sup>

#### **(i) The Debtor**

10. The Debtor companies are special purpose entities that were established to hold the assets of a large real estate development in downtown Toronto known as the “**YSL Project**”. The Debtors intended to build the YSL Project, which consisted of an 85+ floor tower with residential and commercial space (the “**Real Property**”).<sup>5</sup> The Debtors are part of the Cresford group of companies. Cresford is a real estate development company.<sup>6</sup> To the knowledge of the Proposal Trustee, Cresford no longer has any active projects.

#### **(ii) The YongeSL LPs**

11. The Debtors issued \$14.8 million in Class A Preferred Units. These units have a right to return on that capital equivalent to an annual 12.25% rate of return, capped at a

---

<sup>4</sup> [Eighth Report](#), at para 1.0(2). YSL Residences Inc. held the YSL Project (defined below) as bare trustee for the Partnership.

<sup>5</sup> [Seventh Report](#), at para 2.0(3).

<sup>6</sup> [Seventh Report](#), at para 2.0(1) to 2.0(5).

total 100% rate of return. The Class B Preferred Units of the Partnership, by contrast, are entitled to receive all of the residual profits from the YSL Project without limit after the Class A units receive their full 100% return on investment.<sup>7</sup> The Cresford group controls the owner of the Class B units and the General Partner.<sup>8</sup>

**(iii) The Sponsor**

12. On July 16, 2021, the Court approved the Proposal, the effect of which was to transfer ownership of the YSL Project to Concord Properties Development Corp. (the “**Sponsor**”), a large real estate development company that has completed projects across Canada and internationally.<sup>9</sup>

13. As part of the Proposal, the Sponsor funded the “**Affected Creditors Cash Pool**” in the amount of \$30.9 million on July 22, 2021.<sup>10</sup> The proven claims of creditors of the Debtor are to be paid from the Affected Creditors Cash Pool, with the status of the claims in the proceeding summarized in section 8 of the Eighth Report. Once all proven claims are paid in full, the remaining cash in the Affected Creditors Cash Pool, if any, is to be distributed to the holders of the Class A Preferred Units of the Partnership (the “**Limited Partners**”), including the YongeSL LPs.<sup>11</sup>

14. Of the 66 proofs of claim filed against the Debtor, three claims remain unresolved (the “**Disputed Claims**”): the claims of Maria Athanasoulis (\$19 million), CBRE Limited (“**CBRE**”) (approximately \$1.2 million; accepted by the Proposal Trustee), and Henry

---

<sup>7</sup> [YG Limited Partnership and YSL Residences \(Re\)](#), 2021 ONSC 4178 at paras [6](#) and [7](#).

<sup>8</sup> *Ibid.*

<sup>9</sup> [Eighth Report](#) at para 1.0(11).

<sup>10</sup> [Eighth Report](#) at para 3.0 (2).

<sup>11</sup> [Eighth Report](#), at para 3.0(1).

Zhang (approximately \$1.1 million; accepted by the Proposal Trustee).<sup>12</sup> The YongeSL LPs brought an application pursuant to section 37 of the BIA to challenge the Proposal Trustee's decision to allow Mr. Zhang's claim. That application has been held in abeyance pending the final determination of CBRE's claim. CBRE's claim is subject to the CBRE Decision Appeal (defined below).

15. The resolution of the Disputed Claims will determine whether there will be any distributions to the Limited Partners, including the YongeSL LPs. If the CBRE, Zhang, and Athanasoulis claims are disallowed in full, the estimated distribution to the Limited Partners would be approximately \$16 million.<sup>13</sup>

16. The Sponsor is also the largest proven creditor of the estate, as it took an assignment of proven claims of 28 of 66 Affected Creditor claims, totaling approximately \$12.1 million.<sup>14</sup>

**(iv) CBRE**

17. CBRE is a commercial real estate brokerage. CBRE made a claim for approximately \$1.2 million for services rendered as exclusive listing broker for the YSL Project (the "**CBRE Claim**").<sup>15</sup> The determination of that claim is the subject of a separate appeal that is being heard together with this appeal.

**(v) The Athanasoulis Claim**

---

<sup>12</sup> [Eighth Report](#) at para 4.0(1).

<sup>13</sup> [Eighth Report](#) at para 4.0(9).

<sup>14</sup> [Eighth Report](#) at para 4.0(2). The Proposal Trustee made an interim distribution of 70 cents on the dollar to creditors with proven claims. The Sponsor, as assignee of \$12.1 million of proven claims, received \$8.4 million through the interim distribution.

<sup>15</sup> [Seventh Report](#), at para 5.0(1).

18. Ms. Athanasoulis, Cresford's former President and Chief Operating Officer, filed a proof of claim for \$19 million. Her claim relates to a Statement of Claim she filed on January 21, 2020 against the Debtors, other Cresford affiliates, and Dan Casey, Cresford's founder. The Athanasoulis Claim is in respect of, inter alia, allegations of: (a) wrongful dismissal damages in the amount of \$1 million; and (b) damages in the amount of \$18 million for breach of an oral agreement that the owner of each Cresford project, including the YSL Project, would pay Ms. Athanasoulis 20% of the profits earned on each project. The YSL Project is the only Cresford project that Ms. Athanasoulis alleges to have earned a profit.<sup>16</sup>

19. In order to determine whether an oral contract existed in a fair, expedient, and efficient manner, the Proposal Trustee and Ms. Athanasoulis agreed to arbitrate the determination of liability (*i.e.*, did an enforceable contract exist between Ms. Athanasoulis and Cresford, and was that contract breached?) in respect of her claim ("**Phase 1**") before William G. Horton (the "**Arbitrator**"), an experienced commercial litigator and arbitrator.<sup>17</sup> The Limited Partners and the Sponsor were aware of, but did not attempt to participate in, Phase 1.

20. If a contract was found to exist, the parties also agreed to have the Arbitrator determine the quantum of damages, if any, flowing from breach of the contract in the second phase of the arbitration ("**Phase 2**").<sup>18</sup> The Proposal Trustee knew that any material denial of the Athanasoulis Claim would be appealed by Ms. Athanasoulis. Given

---

<sup>16</sup> [Eighth Report](#) at para 5.0(1).

<sup>17</sup> [Eighth Report](#) at para 5.0(3).

<sup>18</sup> [Eighth Report](#) at para 5.0(4).



the complexity of the valuation issues and legal theories of damages involved, resolving such issues by arbitration seemed more expedient and less costly than consuming multiple days of court time with the same litigation.

21. On March 28, 2022, the Arbitrator rendered a decision in respect of Phase 1 of the arbitration. He held that Cresford had breached an oral agreement with Ms. Athanasoulis entitling her to 20% of any profits earned on each project (the “**Profit Sharing Agreement**”).<sup>19</sup> He left to Phase 2 the question of whether there were any such profits and if so, how to quantify them.

22. After Ms. Athanasoulis prevailed in Phase 1, both the Sponsor and the YongeSL LPs took the position that the Proposal Trustee acted without jurisdiction in arbitrating the Athanasoulis Claim rather than determining it itself and improperly delegated its authority to determine the Athanasoulis Claim to the Arbitrator.<sup>20</sup>

23. The Proposal Trustee and the Sponsor had differing views on: (a) the proper approach to determine the quantum of the Athanasoulis Claim; and (b) the Sponsor’s obligation to fund the fees and costs of the Proposal Trustee to complete these proceedings.

24. On October 17, 2022, Justice Kimmel heard a motion by the Proposal Trustee (the “**Funding Motion**”) for an Order, among other things, declaring that the Sponsor is required to fund the Administrative Fees and Expenses of the Proposal Trustee pursuant

---

<sup>19</sup> [Eighth Report](#) at para 5.0(5).

<sup>20</sup> [Eighth Report](#) at para 5.0(6).

to Section 11.01 of the Final Proposal and declaring that the commencement of arbitration to determine the Athanasoulis Claim by the Proposal Trustee was a valid exercise of the power conferred upon the Proposal Trustee under the Final Proposal and/or the BIA.<sup>21</sup>

25. The scheduling of Phase 2 of the arbitration was deferred pending the outcome of the Funding Motion.

26. On November 1, 2022, Justice Kimmel released her decision (the “**Funding Decision**”) requiring the Sponsor to fund the costs of the Proposal Trustee incurred to that date and in respect of the process to determine the claim filed by Ms. Athanasoulis, but holding that it was not in the Proposal Trustee’s powers to have an arbitrator determine the value of Ms. Athanasoulis’ claim.<sup>22</sup>

27. Following the Funding Decision, the Proposal Trustee considered the process to determine the Athanasoulis Claim and sought input from Ms. Athanasoulis, the YongeSL LPs, the Debtors, and the Sponsor regarding this process. Based on the feedback received, the Proposal Trustee presented its proposed approach to Ms. Athanasoulis, the YongeSL LPs, the Debtors, and the Sponsor for comments.<sup>23</sup>

28. On December 7, 2022, the Proposal Trustee’s counsel sent an email with the recommended process (the “**Athanasoulis Claims Process**”) to counsel representing Ms. Athanasoulis, the YongeSL LPs, the Companies, and the Sponsor.<sup>24</sup> This process contemplated that the Proposal Trustee would issue a notice of disallowance of the

---

<sup>21</sup> [Eighth Report](#) at para 1.0(15).

<sup>22</sup> [YG Limited Partnership \(Re\)](#), 2022 ONSC 6138.

<sup>23</sup> [Eighth Report](#) at 5.1(2).

<sup>24</sup> [Eighth Report](#) at para 5.1(3).

Athanasoulis Claim and Ms. Athanasoulis would appeal it, if she chose to do so, pursuant to section 135(4) of the BIA. A draft of such notice of disallowance setting out the Proposal Trustee's grounds for same was provided to the parties.

29. As Ms. Athanasoulis and the YongeSL LPs disagreed with certain aspects of the process suggested by the Proposal Trustee, and given the litigious history of these proceedings, the Proposal Trustee brought the motion on appeal for advice and directions regarding the Athanasoulis Claim Process.<sup>25</sup>

30. The factual context and circumstances of the Athanasoulis Claims Process is unusual. Notably, the YongeSL LPs allege:

- (a) Entering into the Profit Sharing Agreement was in breach of the limited partnership agreement for the Project (the "**LP Agreement**") and, therefore, the Profit Sharing Agreement is unenforceable; and
- (b) Ms. Athanasoulis made representations to the YongeSL LPs that the YongeSL LPs would be fully repaid prior to any profits being paid to Cresford and Ms. Athanasoulis, and that the YongeSL LPs relied upon such representations when investing in the Partnership.

31. While the Proposal Trustee was not prepared to contest the Athanasoulis Claim on ground (a), and lacked sufficient evidence to contest the Athanasoulis Claim on ground (b), the Proposal Trustee was willing to permit the YongeSL LPs to do so at the hearing of Ms. Athanasoulis' appeal of her disallowance as part of the Athanasoulis Claims Process given that the YongeSL LPs were a party to the LP Agreement and the recipients of the alleged representations.

---

<sup>25</sup> [Eighth Report](#) at para 5.1(4).

32. Justice Kimmel released her Endorsement on the Motion for Directions on February 10, 2023.<sup>26</sup>

**B. DIRECTIONS DECISION OF JUSTICE KIMMEL**

33. Justice Kimmel decided the YongeSL LP's standing on the anticipated appeal of the disallowance of Ms. Athanasoulis' claim as follows in the Directions Decision:

[59] For all these reasons, it is anticipated that the LPs will be afforded an opportunity to participate on the appeal to the extent of any unique or added perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on. In contrast, the LPs should not expect to be permitted to make submissions on points already being addressed by the Proposal Trustee, such as, the argument that the Profit Share Claim is a claim in equity, not a debt owing by the Debtor.

[60] The LPs asked to be afforded the opportunity to make further submissions in response to Ms. Athanasoulis' further evidence and submissions. I do not consider that to be necessary or appropriate. However, if the Proposal Trustee asks them for further information or documents after receiving the further evidence and submissions from Ms. Athanasoulis, whatever the LPs provide must be given to Ms. Athanasoulis as well.<sup>27</sup>

34. The YongeSL LPs appeal from the Directions Decision and seek an order: (a) declaring that the YongeSL LPs have standing to participate, without restrictions, in any appeal by Ms. Athanasoulis from the disallowance of her claim in this proceeding; (b) awarding the YongeSL LPs their costs on this appeal; and (c) granting such further and other relief as this Court deems just.

---

<sup>26</sup> [Directions Decision.](#)

<sup>27</sup> [Directions Decision](#) at paras [59-60](#).

35. For the reasons that follow, the Proposal Trustee believes this appeal should be dismissed in its entirety.

### **PART III – ISSUES**

36. There are three issues on this appeal relating to the standing of the YongeSL LPs on Ms. Athanasoulis' anticipated appeal from the disallowance of her claim under section 135(4) of the BIA:

- (a) Does the principle of horizontal judicial comity require granting the YongeSL LPs unlimited standing in light of Justice Dunphy's earlier decision in this proceeding?;
- (b) Did Justice Kimmel incorrectly consider the impact of the relief sought on the YongeSL LPs in her decision on standing?; and
- (c) Did Justice Kimmel incorrectly curtail the Court's discretion to control its own process in respect of the YongeSL LPs' standing?

37. The Proposal Trustee submits that the answer to all three issues is "no".

### **PART IV – LAW & ARGUMENTS**

#### **A. STANDARD OF REVIEW**

38. The standard of review on an appeal from a motion judge's decision based on a determination of law is correctness.<sup>28</sup>

39. Accordingly, the three legal issues raised on this appeal are to be assessed on a correctness standard and the appellate court should only intervene if it concludes that the Directions Decision failed to apply correct legal principles.

---

<sup>28</sup> [Housen v. Nikolaisen](#), 2022 SCC 33 at [para 8](#).

40. The Trustee's submissions on the test for standing under section 135 of the BIA are set out at paragraphs 35-48 of its factum in Court File No. COA-22-CV-0451, which is being heard concurrently with this appeal, and will not be repeated here.

## **B. HORIZONTAL JUDICIAL COMITY**

41. The YongeSP LPs reference Justice Dunphy's June 1, 2021 decision on a motion seeking to declare that the stay of proceedings did not apply to them, or in the alternative to lift the stay.<sup>29</sup> The purpose of the YongeSL LPs' motions before Justice Dunphy was to give them a venue to challenge the proposal that the Debtors had put forward for approval. Justice Dunphy's decision allowing them to oppose the proposal tells us nothing about the standing of the YongeSL LPs to participate in claims adjudication matters following an approved proposal. On its face, Justice Dunphy's decision simply does not apply to the Motion for Directions.

42. Justice Dunphy did conclude at paragraph 6 that the YongeSL LPs "ought to be heard in the context of the sanction hearing"<sup>30</sup> because they were applicants in a separate civil proceeding against Cresford and YSL (heard in part at the same time). In that proceeding the YongeSL LPs had claimed, in part, that YSL had no authority under the LP Agreement to have initiated the proposal proceedings in the first place. In effect, the YongeSL LPs were already challenging the validity of the original proposal, which was the precise issue in the sanction motion.

---

<sup>29</sup> [In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc](#) (June 1, 2021), Toronto 31-2734090 (ONSC Commercial List) ("**Stay Motion**").

<sup>30</sup> [Stay Motion](#) at para [6](#).

43. The circumstances in the case at bar are very different. This is a claims proceeding, not a sanction hearing. Whereas it is commonplace for multiple creditors or other interested stakeholders to have an interest and make submissions at a sanction motion, a claims proceeding is very different. As will be explained below, to allow any party that will be affected by a claims determination to intervene in that process would undermine the entire purpose and intent of the BIA to provide for efficient and expedient claims adjudication.

### **C. A MERE ECONOMIC INTEREST DOES NOT CONFER STANDING**

44. The BIA case law makes clear that “[t]he Act puts day-to-day administration into the hands of trustees in bankruptcy and inspectors as business people and professionals; it is intended that the administration should be practical not legalistic, and the Act should be interpreted to give effect to this intent”.<sup>31</sup>

45. Claim adjudication in a proposal proceeding under the BIA is, by design, a process between the trustee, the creditor claimant and the debtor. In order to safeguard the efficiency and expediency of this process, if others wish to intervene, then the statutory jurisdiction to do so must exist under the BIA. The Appellants have identified no such statutory jurisdiction.

46. Accordingly, Justice Kimmel did not err in deciding that the YongeSL LPs had no automatic right to be heard on Ms. Athanasoulis’ appeal pursuant to section 135(4) of the BIA simply because their economic interest could be affected.<sup>32</sup> If an economic interest

---

<sup>31</sup> Houlden, Morawetz, and Sarra, *Bankruptcy and Insolvency Law of Canada*, 4th Edition, Release No. 2022-8, August 2022, §1:8.

<sup>32</sup> [Royal Bank of Canada v. Insley](#), 2010 SKQB 17 at [para 26](#).

alone were enough to grant standing, then every creditor would have standing in every insolvency claims determination given the zero-sum nature of most insolvencies.

47. The Appellant relies on three unrelated, non-bankruptcy decisions in civil actions to support their argument that the YongeSL LPs have standing because their economic interests will be impacted by the outcome of the appeal. None of these cases have any bearing on this proceeding because insolvency law is different. As Professor Wood observes: “[i]nsolvency law, in large measure is procedural in nature....The mechanism provided by insolvency law for asserting, proving and enforcing a claim is radically different from the ordinary civil process that is used when the debtor is not insolvent.”<sup>33</sup>

48. None of the cases relied on by the Appellants is to the contrary. The Appellants first reference paragraph 27 of this Court’s decision in *Ivandaeva Total Image Salon Inc v. Hlemgizky*.<sup>34</sup> *Ivandaeva* concerned whether a litigant had standing to challenge a sealing order in a different piece of litigation under rule 37.14(1)(a) of the *Rules of Civil Procedure*. The Court in that case held that a party can only move to set aside or vary an order in a different proceeding where the order in question “directly affects the rights of the moving party in respect to the proprietary or economic interests of the party”.<sup>35</sup> This case has simply nothing to do with standing under section 135(4) of the BIA.

49. The Appellants next reference paragraph 21 in *Fontaine v Canada (Attorney General)*, which held that “[o]f the many principles underlying the Canadian judicial

---

<sup>33</sup> Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015) at pages 5-6.

<sup>34</sup> *Ivandaeva Total Image Salon Inc v Hlemgizky*, 2003 CanLII 43168 at para 27 (ONCA).

<sup>35</sup> To similar effect was *Stanley Canada Inc. v. 683481 Ontario Ltd.*(1990), 1990 CanLII 8098 (ON SC), 74 D.L.R. (4th) 528 (Ont. Gen. Div.), cited by the court in *Ivandaeva*. In *Stanley Canada*, the issue was whether



system, generally those who will be subject to an order of the court are to be given notice of the legal proceeding and afforded the opportunity to adduce evidence and make submissions.”<sup>36</sup> In that case the appellant was an adjudicator of claims under the Indian Residential School Settlement Agreement. The judge administering the settlement had issued directions prohibiting the adjudicator from participating in three appeals under the settlement. This Court held that the judge had denied the appellant adjudicator natural justice by issuing these directions without notice or an opportunity to be heard. That appeal, again, has no bearing on these insolvency proceedings. The factual circumstances and legal issue in that appeal are entirely distinguishable from and inapplicable to the instant case.

50. The third decision the Appellants provide in support of their position is *Blake v. Blake*, citing the above paragraph from *Fontaine v Canada*.<sup>37</sup> In that case a solicitor was granted leave to intervene in an appeal that had been rendered moot by settlement because the decision on appeal had impugned the solicitor’s integrity without allowing him an opportunity to respond. This case, once again, was decided outside the insolvency context, turned on unique facts, and has no bearing on the case at bar.

51. These three decisions concerning standing at large simply have nothing to do with section 135(4) of the BIA specifically, or more generally with the bankruptcy or insolvency law context. Nor do the YongeSL LPs provide any law to support the notion that the law

---

a union and its members had standing as persons "affected by an order obtained on motion made without notice".

<sup>36</sup> [Fontaine v Canada \(Attorney General\)](#), 2018 ONCA 1023 at para [21](#).

<sup>37</sup> [Blake v Blake](#), 2021 ONSC 7189 at paras [59-60](#) (Div Ct).

of standing in general civil litigation has any bearing on standing in a claims dispute under the BIA.

52. The only actual insolvency case cited by the YongeSL LPs is also of no assistance. *Re Ethier* is a 1991 decision concerning an application by a bankrupt to remove a trustee for cause. In *obiter*, the court addressed whether a bankrupt was considered an “aggrieved person” for the purposes of replacing the trustee pursuant to former section 14(4) of the BIA. This decision does not apply to the question of standing in an appeal of a claim disallowance under section 135(4) of the BIA.<sup>38</sup> There is no reasonable parallel between the standing of the YongeSL LPs in a commercial proposal proceeding, and the rights of a consumer bankrupt as against the bankruptcy trustee.

**D. THE YONGESL LPs MISCHARACTERIZE THE DIRECTIONS DECISION AS AN IMPROPER EXERCISE OF DISCRETION**

53. The Appellants have mischaracterized the Directions Decision on the YongeSL LPs’ standing as a discretionary decision to curtail the YongeSL LPs’ right to be heard. Further, the Appellants have mischaracterized and decontextualized the Motion Judge’s comments regarding the YongeSL LPs “unique perspective.”

54. The Motion Judge expressly stated that her directions on the standing of the YongeSL LPs were “subject to the discretion and views of the judge hearing the appeal”, not that this was an exercise of *her* discretion.<sup>39</sup>

---

<sup>38</sup> [Ethier, Re, 1991 CarswellOnt 213](#) at paras 21-22 (Gen Div).

<sup>39</sup> [Directions Decision](#) at para [57](#).

55. The Motion Judge indicated that “[t]he LPs may also have a unique perspective on the preliminary question of whether the Profit Share Agreement can be enforced in the face of Ms. Athanasoulis’ admissions that she agreed with the LPs that they would be paid out before her. These unique perspectives have been placed before the Proposal Trustee; Ms. Athanasoulis will be permitted to respond to and challenge them, and they will be “in play” on any appeal.”<sup>40</sup> It was on these issues, subject to the discretion of the judge hearing the appeal, that she indicated she “would anticipate that the LPs will have at least some status at the appeal to address at least these points, but perhaps not beyond them.”<sup>41</sup>

56. At no time did Justice Kimmel assume that the positions of the Proposal Trustee and the YongeSL LPs would be aligned, as suggested by the Appellants. Rather, the Directions Decision leaves room for the YongeSL LPs to participate where this is not the case: “[i]t is anticipated that the LPs will be afforded an opportunity to participate on the appeal to the extent of any unique or added perspective or submissions that they have that are not advanced by the Proposal Trustee, or that the Proposal Trustee defers to the LPs on. In contrast, the LPs should not expect to be permitted to make submissions on points already being addressed by the Proposal Trustee, such as, the argument that the Profit Share Claim is a claim in equity, not a debt owing by the Debtor.”<sup>42</sup>

57. Further, the Motion Judge did not reach a conclusion that a matter may become *res judicata*, as suggested by the Appellants; rather she noted that this was a potential

---

<sup>40</sup> [Directions Decision](#) at para [56](#).

<sup>41</sup> [Directions Decision](#) at para [57](#).

<sup>42</sup> [Directions Decision](#) at para [59](#).

consequence that the YongeSL LPs were aware of based on the position they had taken with respect to the determination of their claims in these proceedings: “[t]he LPs maintain that the LP’s Claims cannot be determined in these bankruptcy proceedings. However, they acknowledge that there may be some overlap with the subordination/priority arguments that they seek to advance in relation to the determination of the Athanasoulis Claim and the LP’s Claims being prosecuted outside of these proceedings. To that extent, they recognize that there may be some issues that, if determined in this process, will become *res judicata* and subject to issue estoppel in the LP’s Claims civil proceeding. They are prepared to accept that outcome.”<sup>43</sup>

58. In summary, the Appellants have mischaracterized the Directions Decision for the purposes of asserting that Justice Kimmel made various errors in restricting standing through an exercise of the Court’s discretion. This is not the case.

## **PART V – CONCLUSION AND ORDER REQUESTED**

59. In conclusion, Justice Kimmel applied the correct tests under section 135(4) of the BIA in the Directions Decision on the standing of the YongeSL LPs in any future appeal of the disallowance of the Athanasoulis Claim. Standing in an appeal of a disallowance of a claim under section 135(4) is not a matter of right based on the ultimate economic interest in the proceeding. Were it otherwise, claims administration processes would frequently grind to a halt, or at a minimum, become more protracted and costly.

60. The Directions Decision is based on the largely procedural basis of insolvency law that places the day-to-day administration of the BIA in the hands of the trustee and is

---

<sup>43</sup> [Directions Decision](#) at para [26](#).

intended to proceed on an efficient basis. In this case, as recognized by Justice Kimmel, this means not duplicating positions that are already put forward by the Proposal Trustee.

61. Lastly, the Appellants have mischaracterized Justice Kimmel's decision as a misuse of her discretion based on whether they have a "unique perspective." Rather, the Directions Decision respects the discretion of the future court hearing the anticipated appeal of the disallowance of the claim on matters related to, among other things, submissions that the appellants may wish to make.

62. The Proposal Trustee requests an Order upholding the Endorsement made by Justice Kimmel on February 10, 2023, and dismissing this appeal. The Proposed Trustee seeks no costs and asks that no costs be awarded against it.

**ALL OF WHICH IS RESPECTFULLY SUBMITTED** this 19th day of May, 2023.



**DAVIES WARD PHILLIPS & VINEBERG LLP**  
155 Wellington Street West  
Toronto ON M5V 3J7

**Robin B. Schwill** (LSO# 384521)  
Tel.: 416.863.5502  
Email: rschwill@dwpv.com

**Matthew Milne-Smith** (LSO# 44266P)  
Tel: 416.863.5595  
Email: mmilne-smith@dwpv.com

Lawyers for the Respondents,  
The Proposal Trustee, KSV Restructuring Inc.

## SCHEDULE A AUTHORITIES

### Case Law

1. [Blake v Blake](#), 2021 ONSC 7189 (Div Ct)
2. [Ethier, Re, 1991 CarswellOnt 213](#) (Gen Div)
3. [Fontaine v Canada \(Attorney General\)](#), 2018 ONCA 1023
4. [Housen v. Nikolaisen](#), 2022 SCC 33
5. [In the Matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc](#) (June 1, 2021), Toronto 31-2734090 (ONSC Commercial List)
6. [In the matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc of the City of Toronto, in the Province of Ontario](#) (December 21, 2022), Toronto BK-21-2734090-0031 (ONSC Commercial List)
7. [In the matter of the Notices of Intention to Make a Proposal of YG Limited Partnership and YSL Residences Inc of the City of Toronto, in the Province of Ontario](#) (February 10, 2023), Toronto BK-21-2734090-0031 (ONSC Commercial List)
8. [Ivandaeva Total Image Salon Inc v Hlemgizky](#), 2003 CanLII 43168 (ONCA)
9. [Royal Bank of Canada v. Insley](#), 2010 SKQB 17
10. [YG Limited Partnership and YSL Residences \(Re\)](#), 2021 ONSC 4178
11. [YG Limited Partnership \(Re\)](#), 2022 ONSC 6138
12. [YG Limited Partnership and YSL Residence Inc.](#), 2022 ONSC 6548

### Secondary Sources

13. Houlden, Morawetz, and Sarra, Bankruptcy and Insolvency Law of Canada, 4th Edition, Release No. 2022-8, August 2022, §1:8
14. Roderick Wood, *Bankruptcy and Insolvency Law*, 2nd ed. (Toronto: Irwin Law, 2015)

**SCHEDULE B  
STATUTES AND REGULATIONS**

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

**Trustee shall examine proof**

**135 (1)** The trustee shall examine every proof of claim or proof of security and the grounds therefor and may require further evidence in support of the claim or security.

**Determination of provable claims**

**(1.1)** The trustee shall determine whether any contingent claim or unliquidated claim is a provable claim, and, if a provable claim, the trustee shall value it, and the claim is thereafter, subject to this section, deemed a proved claim to the amount of its valuation.

**Disallowance by trustee**

**(2)** The trustee may disallow, in whole or in part,

- (a)** any claim;
- (b)** any right to a priority under the applicable order of priority set out in this Act; or
- (c)** any security.

**Notice of determination or disallowance**

**(3)** Where the trustee makes a determination under subsection (1.1) or, pursuant to subsection (2), disallows, in whole or in part, any claim, any right to a priority or any security, the trustee shall forthwith provide, in the prescribed manner, to the person whose claim was subject to a determination under subsection (1.1) or whose claim, right to a priority or security was disallowed under subsection (2), a notice in the prescribed form setting out the reasons for the determination or disallowance.

**Determination or disallowance final and conclusive**

**(4)** A determination under subsection (1.1) or a disallowance referred to in subsection (2) is final and conclusive unless, within a thirty day period after the service of the notice referred to in subsection (3) or such further time as the court may on application made

within that period allow, the person to whom the notice was provided appeals from the trustee's decision to the court in accordance with the [General Rules](#).

**Expunge or reduce a proof**

**(5)** The court may expunge or reduce a proof of claim or a proof of security on the application of a creditor or of the debtor if the trustee declines to interfere in the matter. [...]



IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF YG LIMITED PARTNERSHIP AND YSL RESIDENCES INC. OF THE CITY OF TORONTO, IN THE PROVINCE OF ONTARIO

Court File No.: BK-21-02734090-0031  
Court of Appeal No. COA-23-CV-0288

**COURT OF APPEAL FOR ONTARIO**

IN THE MATTER OF THE BANKRUPTCY AND  
INSOLVENCY ACT, R.S.C. 1985, C. B-3 AS  
AMENDED

**RESPONDING FACTUM OF THE  
PROPOSAL TRUSTEE**

**DAVIES WARD PHILLIPS & VINEBERG LLP**

155 Wellington Street West  
Toronto ON M5V 3J7

**Robin B. Schwill** (LSO# 384521)

Tel.: 416.863.5502

Email: [rschwill@dwpv.com](mailto:rschwill@dwpv.com)

**Matthew Milne-Smith** (LSO# 44266P)

Tel: 416.863.0900

Email: [mmilne-smith@dwpv.com](mailto:mmilne-smith@dwpv.com)

Lawyers for the Respondents,  
the Proposal Trustee, KSV Restructuring Inc.