Court of Appeal File No. M50303
File Numbers: 35-2395487 and 35-2395481

ONTARIO
SUPERIOR COURT OF JUSTICE
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

BRIEF OF AUTHORITIES

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BRIEF OF AUTHORITIES
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CONSOLIDATION

CODIFICATION

Bankruptcy and Insolvency General Rules

Règles générales sur la faillite et l'insolvabilité

C.R.C., c. 368

C.R.C., ch. 368

Current to March 12, 2019

Last amended on March 25, 2011

À jour au 12 mars 2019

Dernière modification le 25 mars 2011

Published by the Minister of Justice at the following address:
http://laws-lois.justice.gc.ca

Publié par le ministre de la Justice à l'adresse suivante :
http://lois-laws.justice.gc.ca

or decision appealed from, or within such further time as the judge stipulates.

(3) The notice of motion or the motion must set out the grounds of the appeal.

SOR/98-240, s. 1.

Appeal to Court of Appeal

31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

32 The registrar of the court appealed from shall transmit to the court of appeal the notice of appeal and the file.

SOR/98-240, s. 1.

Official Receiver

33 The official receiver may request instructions from the registrar or, if the official receiver is the registrar, from the judge, in case of doubt respecting any matter arising out of the Act, these Rules or a directive.

SOR/98-240, s. 1.

Code of Ethics for Trustees

34 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.

SOR/98-240, s. 1.

35 For the purposes of sections 39 to 52, ***professional engagement*** means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act.

SOR/98-240, s. 1.

36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.

SOR/98-240, s. 1.

date de l'ordonnance ou de la décision faisant l'objet de l'appel, ou dans tel autre délai fixé par le juge.

(3) L'avis de requête ou de motion ou la requête ou la motion énonce les motifs de l'appel.

DORS/98-240, art. 1.

Appels devant la cour d'appel

31 (1) Un appel est formé devant une cour d'appel visée au paragraphe 183(2) de la Loi par le dépôt d'un avis d'appel au bureau du registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel, dans les 10 jours qui suivent le jour de l'ordonnance ou de la décision, ou dans tel autre délai fixé par un juge de la cour d'appel.

(2) En cas d'application de l'alinéa 193e) de la Loi, l'avis d'appel est accompagné de la demande d'autorisation d'appel.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

32 Le registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel transmet à la cour d'appel l'avis d'appel et le dossier.

DORS/98-240, art. 1.

Séquestre officiel

33 Le séquestre officiel peut demander des consignes au registraire ou, s'il agit en qualité de registraire, au juge, en cas de doute au sujet de toute question relevant de la Loi, des présentes règles ou des instructions.

DORS/98-240, art. 1.

Code de déontologie des syndics

34 Le syndic se conforme à des normes élevées de déontologie, lesquelles sont d'une importance primordiale pour le maintien de la confiance du public dans la mise en application de la Loi.

DORS/98-240, art. 1.

35 Pour l'application des articles 39 à 52, ***activité professionnelle*** s'entend de toute affaire de faillite ou d'insolvabilité dans laquelle le syndic est nommé ou désigné pour exercer ses fonctions dans le cadre de la Loi.

DORS/98-240, art. 1.

36 Le syndic s'acquitte de ses obligations dans les meilleurs délais et exerce ses fonctions avec compétence, honnêteté, intégrité, prudence et diligence.

DORS/98-240, art. 1.

COURT OF APPEAL FOR ONTARIO

CITATION: Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited, 2012 ONCA 569
DATE: 20120905
DOCKET: M40742 & M40925 (C54560)

Weiler, Blair and Rouleau JJ.A.

In the Matter of the Bankruptcy of Matthew David Moore, of the City of Brampton in the Regional Municipality of Peel, Province of Ontario

BETWEEN

The Superintendent of Bankruptcy

Respondent/
Applicant (Appellant)

and

407 ETR Concession Company Limited and Matthew David Moore

Moving Party/
Respondent (Respondents)

J.T. Curry and Andrew Parley, for the respondent 407 ETR Concession Company Limited

Liz Tinker, for the appellant

Heard: May 16, 2012

Rouleau J.A.:

Introduction

[1] The court is being called upon to rule on two motions. The first is a motion by 407 ETR Concession Company Limited (407 ETR) to quash the notice of appeal delivered by the Superintendent of Bankruptcy (Superintendent) on the basis that the Superintendent does not have the standing necessary to appeal the decision.

[2] In the event that 407 ETR's motion to quash is successful, the Superintendent seeks leave to appeal and an extension of time to bring the motion for leave.

[3] 407 ETR opposes leave being granted on the basis that the Superintendent was not a party to the underlying dispute, a dispute that has since settled, and there is no basis in law for granting such leave.

[4] The outcome of these motions turns on the proper interpretation of ss. 5(4)(a) and 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

Facts

[5] Matthew David Moore (Moore) made an assignment in bankruptcy in November 2007. At the time he had accumulated a debt to 407 ETR of approximately $35,000 in unpaid toll charges.

[6] On June 21, 2011, Deputy Registrar Donaldson made an order granting Moore an absolute discharge from bankruptcy. Moore then sought to obtain valid vehicle permits for two cars. Section 22(4) of the *Highway 407 Act, 1998*, S.O. 1998, c. 28, prevents the Registrar from validating or issuing permits where 407 tolls remain unpaid. Accordingly, the Registrar of Motor Vehicles refused to validate or issue the permits because of the unpaid tolls

[7] Moore brought a motion returnable before a registrar in bankruptcy seeking a declaration that his debt to 407 ETR was released pursuant to his absolute discharge from bankruptcy. Both 407 ETR and the Superintendent were served with notice of the motion.

[8] Registrar Mills heard the motion on September 8, 2011. Through inadvertence 407 ETR did not appear. Nor did the Superintendent. The Superintendent explained that, based on past experience, such motions were usually granted or settled.

[9] The registrar allowed Moore's motion granting an order that: (i) Moore's discharge on June 21, 2011 released him from all claims provable in bankruptcy, including the debt of 407 ETR; and (ii) directing the Ministry of Transportation to issue licence plates to Moore upon payment of the usual licensing fees.

[10] Upon becoming aware of the registrar's order, 407 ETR took steps to have it set aside. It brought a motion in the Superior Court, rather than before a

registrar in bankruptcy.[1] 407 ETR did not give the Superintendent notice of its motion. Moore consented to the motion, which was granted by the motion judge on October 6, 2011.

[11] Moore subsequently amended his motion and filed it with the Superior Court. He moved for the same relief he had sought before the registrar. He also sought a declaration to prevent 407 ETR from using s. 22(4) of the *Highway 407 Act* to stop him from obtaining a vehicle permit.

[12] Additionally, he served 407 ETR and the Attorneys General of Canada and Ontario with a notice of constitutional question. He maintained that the refusal to validate or issue a vehicle permit under the provincial legislation engaged four conflicts with the *BIA* and that s. 178(2) of the *BIA* provides that an order of discharge releases the bankrupt from all claims provable in bankruptcy.

[13] On October 25, 2011, the motion judge dismissed Moore's motion. He concluded that there was no operational conflict between s. 22 of the *407 Highway Act* and s. 178(2) of the *BIA*. As a result, he declined to grant the relief sought by Moore.

---

[1] The Superintendent suggested that 407 ETR made a deliberate choice to move before a judge of the Superior Court instead of a registrar in bankruptcy. It referred to the bankruptcy of Dean Robert Oliver where 407 ETR failed to appear on a similar motion through inadvertence. In response to a later consent motion brought by 407 ETR to set aside the order obtained, Registrar Nettie advised 407 ETR that although he would allow the consent motion to set aside the order, "such an inadvertence will not be excused in the future".

[14] The Superintendent did not receive notice of any of the proceedings before the motion judge, including the constitutional question. It learned of these proceedings after the motion judge's decision dismissing Moore's motion on its merits.

[15] On November 4, 2011, the day before the end of the appeal period, the Superintendent intervened in this proceeding by serving and filing a notice of appeal. It relied on ss. 5(4)(a) and 193(c) of the *BIA* as its authority to do so. Later that day, Moore advised the Superintendent that he no longer intended to appeal the decision as he had received a "very, very attractive offer" to settle from 407 ETR.

[16] On November 17, 2011, 407 ETR brought a motion to quash the Superintendent's notice of appeal. It took the position that the Superintendent lacks standing to bring an appeal as it was not a party to the proceeding below. Further, if the Superintendent were to request leave, leave should not be granted.

[17] The Superintendent took the position that leave was not required to appeal the motion judge's decision. However, out of an abundance of caution, it brought a motion requesting leave pursuant to s. 193(e) of the *BIA* and/or the court's inherent jurisdiction and sought an extension of time to do so.

Issues

[18] The issues raised by these motions are as follows:

1. Does the Superintendent have standing to appeal the order of the motion judge as of right?; and
2. If the Superintendent does not have standing as of right:

   (a) Can the Superintendent appeal the motion judge's decision with leave of the court?

   (b) Should an extension of time for serving and filing a notice of motion requesting leave to appeal be granted?; and

   (c) Should leave to appeal be granted?

Analysis

(1) Does the Superintendent have standing to appeal the order of the motion judge as of right?

[19] An appeal from a decision or order made in proceedings instituted under the *BIA* is governed by the *BIA* and the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (*BIA* rules), not by the *Courts of Justice Act*, R.S.O. 1990, c. C-43, and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[20] *BIA* rule 31(1) provides that an appeal to a court of appeal referred to in s. 183(2) of the *BIA* (which includes the Court of Appeal for Ontario) must be made by filing a notice of appeal at the office of the Registrar of the court appealed

from. In the case of Ontario, the court appealed from is the Superior Court of Justice. The appeal must be filed within ten days of the order or decision appealed from.

[21] The Superintendent relies on the broad power granted by s. 5(4)(a) of the *BIA*, as providing it with a right of appeal to this court even where it did not participate in the proceedings at the first instance and none of the original parties are appealing. I do not agree that s. 5(4)(a) grants the Superintendent that right.

[22] The section allows the Superintendent to "intervene in any matter or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto". Although the section gives the Superintendent a broad power to intervene, the ability to do so is restricted to a proceeding in "court".

[23] "Court" is defined in s. 2 of the *BIA*. Except in certain noted sections, it "means a court referred to in subsection 183(1) or (1.1)". Sections. 183(1) and (1.1) list the provincial and territorial trial courts, including the Superior Court of Ontario. The Court of Appeal for Ontario, or any other appellate court for that matter, is notably absent from the list. The scope of intervention by the Superintendent contemplated by s. 5(4)(a)is thus limited to the trial courts, and not the courts of appeal.

[24] The Superintendent further argues that even if s. 5(4)(a) only allows interventions in the Superior Court, technically, its intervention in this proceeding was filed in the Superior Court within the requisite ten day appeal period. Pursuant to *BIA* rule 31(1), the notice of appeal is to be filed with the Superior Court, not the Court of Appeal. After filing it is transmitted to the Court of Appeal. As a result, the Superintendent contends that the intervention was made before the matter had left the Superior Court.

[25] I would not give effect to this submission. Although *BIA* rule 31(1) provides for the filing of the notice of appeal in the Superior Court, the appeal is taken to the Court of Appeal for Ontario. For all intents and purposes, it is a proceeding taken in the Court of Appeal. It is the Court of Appeal and not the Superior Court that has authority over the proceeding, including the appropriate parties and any proposed interveners.

[26] The Superintendent, therefore, has no standing to bring an appeal to this court as of right. However, that does not dispose of the matter. The Superintendent argues that it has standing to appeal the motion judge's decision with leave of the court.

(2)(a) Can the Superintendent appeal the motion judge's decision with leave of the court?

[27] Section 193 of the *BIA* provides for statutory rights of appeal and reads as follows:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
>
> (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.

[28] The Superintendent argues that s. 193(e) is a catch all provision allowing for the possibility of an appeal in any case that does not otherwise fall under s. 193(a) to (d). Section 193(e) is, therefore, broad enough to permit this court to grant leave and allow the Superintendent to appeal from the motion judge's decision even though it was not a party thereto.

[29] 407 ETR argues that absent a statutory right of appeal, there is no inherent jurisdiction in this court to hear the appeal. 407 ETR submits that s. 193(e) of the *BIA*, does not give this court jurisdiction to grant the leave to appeal sought and has no application in this case.

[30] I agree with the Superintendent's submission. Subsections 193(a-d) grant automatic rights of appeal. Subsection (e), however, is distinct from the preceding sections in that it is discretionary. The wording gives the court broad

discretion. It provides that in any case where leave is granted, other than those listed in (a-d), "an appeal lies to the Court of Appeal from any order or decision of a judge of the court".

[31] Although we have not been referred to a reported case where a court of appeal granted leave to the Superintendent where it was not a party in the lower court proceedings, I see nothing in the section that prevents us from doing so. Indeed, reading the provision in the context of the statutory scheme and, in particular, the unique position of the Superintendent, necessitates this conclusion.

[32] Even where the Superintendent does not intervene as a party in the Superior Court, its statutory position is such that it is not a true stranger to the proceedings. The Superintendent holds a unique position with respect to bankruptcy proceedings. It is the chief government official appointed by the Governor in Council charged with supervising the administration of "all estates and matters to which this Act [the *BIA*] applies": *BIA*, s. 5(2).

[33] To allow the Superintendent to fulfill this role, the *BIA* gives it the power to intervene in any *BIA* proceedings in the Superior Court as if it were a party: *BIA*, s. 5(4). To guide the exercise of that authority, the Superintendent has established an intervention program that has, as its objective:

> identify[ing] those situations in which the Superintendent or a representative of the Superintendent should

> intervene in the administration of certain cases by applying to the courts *to ensure that the integrity of the insolvency process is maintained.* This may involve cases ... where matters of public policy are concerned: Frank Bennett, *Bennett on Bankruptcy*, 14th ed. (Toronto: CCH, 2009), at p. 1471. [Emphasis added.]

[34] Intervention at first instance is therefore crucial to the important role of the Superintendent in maintaining the integrity of the bankruptcy and insolvency system. It follows that in certain exceptional circumstances, for example, where a decision is made to which the Superintendent was not a party, Parliament must have intended that it be permitted to seek the leave of this court to appeal from that decision.

[35] That said, where the Superintendent relies on s. 193(e) to appeal a decision to which it was not a party at first instance, leave to appeal should only be granted in exceptional circumstances and in accordance with the factors the court relies on when exercising its inherent jurisdiction to grant leave to a non-party, as set out in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, at p. 594. That is, the applicant should be able to show:

(a) that its interest was not represented at the proceeding;

(b) that it has an interest which will be adversely affected by the decision;

(c) that it is, or can be, bound by the order;

(d) that it has a reasonably arguable case; and

(e) that the interests of justice in avoiding a multiplicity of proceedings would be served by the grant of leave.

[36] In my view, these factors provide a helpful guide to determine when the Superintendent has established exceptional circumstances justifying the granting of leave under s. 193(e) where it has not intervened in the proceedings below.

[37] I therefore conclude that s. 193(e) of the *BIA* permits this court to grant the Superintendent leave to appeal from a lower court decision to which it was not a party where it can establish exceptional circumstances, and meet the standard test that any party must meet to obtain leave of the court.

(2)(b) Should an extension of time for serving and filing a notice of motion requesting leave to appeal be granted?

[38] Before deciding whether the Superintendent should be granted leave in this case, there is the question of the timing of its motion. The decision the Superintendent seeks to appeal was issued October 25, 2011. The Superintendent's notice of appeal was served and filed November 4, 2011. The notice of motion seeking leave to appeal, however, was not filed until January 17, 2012, after the Superintendent became concerned that leave may in fact be required. By this time, the motion was out of time.

[39] In my view, the extension of time ought to be granted. It is well established that in deciding whether to extend the time to appeal or seek leave, the court will consider:

a) whether the person formed an intention to appeal within the relevant period;

b) the length of the delay and the explanation for the delay;

c) any prejudice to the respondent;

d) the merits of the appeal; and

e) whether the justice of the case requires it.

See *Rizzi v. Mavros*, 2007 ONCA 350, 85 O.R. (3d) 401, at para. 16.

[40] In this case, the Superintendent formed the intention to appeal within the relevant ten day appeal period, as demonstrated by the timely service and filing of its notice of appeal. It has also provided a satisfactory explanation for the delay in bringing the motion for leave. The Superintendent originally believed, and still believes, that it had the right to intervene pursuant to ss. 5(4)(a) and 193(c) of the *BIA* and did not require leave to appeal After reviewing the respondent's factum, it determined that it was prudent to request leave as an alternative argument and did so in a timely fashion.

[41] There is no indication of any prejudice to 407 ETR as a result of the timing of this motion. 407 ETR knew early on that the Superintendent was appealing and knew the basis of that appeal. Further, since 407 ETR and Moore have settled their dispute, the timing of the appeal does not delay any receipt of funds.

[42] As to the merits of the appeal and the justice of the case, there are a number of alleged errors of law raised by the Superintendent.

[43] The Superintendent submits that the motion judge mischaracterized key elements of the bankruptcy and insolvency system, and the interplay between section 22(4) of the *Highway 407 Act* and s. 178(2) of the *BIA*. It further argues that the motion judge's statement that the first goal of the bankruptcy system is the equitable distribution of the assets of a bankrupt among the estate's creditors runs contrary to the Supreme Court of Canada's decision in *Husky Oil Operations Ltd. v. Minister of National Revenue,* [1995] 3 S.C.R. 453, at para. 7.

[44] Additionally, the Superintendent has an interest that may be adversely affected in the sense that the decision has the potential to seriously impact the bankruptcy and insolvency system. Arguably, it creates a new class of debts that can be enforced after bankruptcy over and above those set out in s. 178(1) of the *BIA*. With respect to the impact on 407 ETR alone, the Superintendent explains that since 2007, the number of bankrupts and proposals debtors in Ontario who list 407 ETR as a creditor exceeds 6,000.

[45] These issues are significant and at the very least constitute arguable grounds for an appeal. There is, therefore, good reason to grant the extension sought by the Superintendent.

(2)(c) Should leave to appeal be granted?

[46] The remaining question then, is whether this is an appropriate case in which to grant leave to appeal. In my view, even though it was not a party to the proceedings below, the Superintendent has demonstrated that the answer must be yes.

[47] Generally speaking, the factors to be considered on an application for leave to appeal are:

a) whether the point of appeal is of significance to the practice;

b) whether the point raised is of significance to the action itself;

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

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

See *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.); *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279, (B.C.C.A.); *Norbourg Groupe financier inc. (Syndic de)*, 2006 QCCA 752, 33 C.B.R. (5th) 144; *Medical International Technologies (MIT Canada) Inc. v. V. & G. International Licensing Corp.*, 2010 QCCA 1826, [2010] Q.J. No. 10209; *Re Pope & Talbot Ltd.*, 2011 BCCA 326, 21 B.C.L.R. (5th) 270.

[48] However, as Armstrong J.A. noted in *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005), 198 O.A.C. 27, at paras. 19-20, there is no stringent test for determining whether to grant leave to appeal pursuant to s. 193(e) of the *BIA*. There is a variety of factors to consider depending on the circumstances of the case. Armstrong J.A. highlighted the prominence of two such factors: the existence of arguable grounds of appeal and issues of significance to the bankruptcy practice that ought to be considered and addressed by the Court of Appeal.

[49] As previously discussed, the Superintendent has established that the appeal is not without merit and the issues raised are significant to the bankruptcy practice. It has therefore satisfied the standard test for obtaining leave applicable to all parties. The second part of the equation is whether the Superintendent has demonstrated that this is an exceptional case so as to justify granting leave to appeal notwithstanding its absence as a party at first instance. In my view, it has.

[50] This is not a case where the Superintendent made a conscious decision not to intervene at first instance. In the present case, the Superintendent was deprived of the opportunity to exercise its discretionary power to intervene in the Superior Court proceeding because it never received notice of the setting aside of the registrar's order, or Moore's amended notice of motion and notice of constitutional question. All of these issues were before the motion judge and would ordinarily have attracted the attention of the Superintendent, who would likely have intervened.

[51] Unaware of the proceedings, however, the Superintendent did not intervene. Its interests, thus, went unrepresented. And, as discussed above, the unique interests of the Superintendent – regarding the integrity of the bankruptcy and insolvency system – were, at least arguably, adversely affected. It is worth emphasizing that the interests of the Superintendent are not identical to those of the bankrupt. They are much broader and of a systemic nature. It is therefore no answer to say that the Superintendent's interests were represented below through the submissions of Moore.

[52] The Superintendent is not bound by the order of the motion judge in that it is required to take, or refrain from taking, some action. However, in so far as the motion judge made findings that dictate how certain debts are to be treated under the *BIA*, the Superintendent is bound by those findings in its supervision of the bankruptcy regime. Further, as discussed above, the Superintendent has an

arguable case that the motion judge's decision is the product of a misapprehension of the bankruptcy and insolvency system and its relationship with the *Highway 407 Act*. The Superintendent is also concerned that the decision appears to run counter to the interpretation given to s. 178(2) by the court is Saskatchewan in the recent decision of *Gorguis v. Saskatchewan Government Insurance*, 2011 SKQB 132, [2011] 6 W.W.R. 372, a decision presently under appeal.

[53] Finally, given the broader importance of the issues raised on this appeal and, specifically the concern that the decision of the motion judge may result in a conflict between how s. 178(2) of the *BIA* is interpreted in Ontario and in Saskatchewan, it is in the interests of justice to allow the Superintendent to pursue them before this court, rather than to leave the law in a state of uncertainty until such time as the issue arises in another proceeding.

[54] The importance of the arguable issues in the proposed appeal, combined with the inability of the Superintendent to respond to them at first instance brings this case within the narrow category of exceptional cases where leave to appeal ought to be granted to the Superintendent despite that it was not a party at first instance. I would therefore grant the Superintendent's application for leave to appeal.

Conclusion

[55] The Superintendent's application for an extension of time to file its notice of motion seeking leave to appeal the motion judge's decision is granted, as is its application for leave to appeal that decision. Because I agree with 407 ETR's submission that the Superintendent did not have a right to appeal, I would normally grant the relief sought and strike the appeal. However, as I am granting the Superintendent's application for leave, no useful purpose would be achieved by requiring the filing of a fresh notice of appeal. Costs of both motions are reserved to the panel hearing the appeal.

Released: Sept. 5, 2012
"KMW"

"Paul Rouleau J.A."
"I agree K.M. Weiler J.A."
"I agree R.A. Blair J.A."

COURT OF APPEAL FOR ONTARIO

CITATION: Reid v. College of Chiropractors of Ontario, 2016 ONCA 779
DATE: 20161024
DOCKET: M46840

Epstein J.A. (in chambers)

BETWEEN

Dr. Michael Reid

Appellant (Moving Party)

and

College of Chiropractors of Ontario

Respondent (Responding Party)

Zameer N. Hakamali, for the moving party

Chris Paliare and Karen Jones, for the responding party

Heard: August 25, 2016

On motion for an extension of time to file a notice of motion for leave to appeal the judgment of the Divisional Court (A.C.J.S.C. Marrocco, J. Wilson, Pattillo JJ.), dated June 13, 2016.

Epstein J.A. (in chambers):

[1] The moving party, Dr. Michael Reid, wants to appeal the decision of the Divisional Court released on June 13, 2016, in which it dismissed three appeals Dr. Reid brought from decisions of a panel of the Discipline Committee of the responding party, the College of Chiropractors of Ontario. Such an appeal is not as of right. Dr. Reid must obtain an order from this court granting leave to appeal.

However, Dr. Reid missed the deadline for filing his notice of motion seeking leave to appeal. He therefore brings this motion for an extension of time.

[2] The College opposes the motion on the basis that an extension would not be in the interests of justice. For the reasons that follow, I agree.

THE BACKGROUND

[3] Dr. Reid, a chiropractor, has been the subject of disciplinary proceedings that arose out of a series of complaints made to the College by a fellow chiropractor, Dr. Chris Paynter, and his wife, involving Dr. Reid's advertising practices.

[4] In 2006, 2008 and 2009, Dr. Paynter and his wife complained to the College that Dr. Reid was engaging in impermissible advertising practices. The College reprimanded Dr. Reid and issued two cautions against him.

[5] In 2010, Dr. Paynter and his wife made a further complaint to the College about Dr. Reid's advertising practices. That complaint resulted in a Discipline Committee hearing (the "2012 Hearing") that proceeded by an agreed statement of facts. Dr. Reid was found guilty of professional misconduct and was ordered to enter into an undertaking to abide by the College's policies.

[6] Between the time Dr. Paynter complained to the College in 2010 and the 2012 Hearing, Dr. Reid made three telephone calls to Dr. Paynter and visited his

clinic twice. After the 2012 Hearing, Dr. Reid sent two emails to Dr. Paynter. Dr. Paynter complained to the College about these contacts and communications.

[7] On three occasions, the College provided Dr. Paynter's complaint and another complaint made by an insurance company to Dr. Reid, asking for his response. After five months had elapsed without receiving a response from Dr. Reid, the College appointed an investigator. The investigator experienced difficulty dealing with Dr. Reid.

[8] Five allegations of professional misconduct arising out of Dr. Reid's conduct toward Dr. Paynter, his failure to reply to the College's requests for a response to complaints made against him and his treatment of the investigator became the subject of a Discipline Committee hearing that took place in 2014 and 2015 (the "2014-5 Hearing").

[9] At the commencement of the 2014-5 Hearing, Dr. Reid unsuccessfully moved to have the chairperson of the Panel disqualified on the basis that he had been the chairperson of the 2012 Hearing.

[10] After hearing all the evidence, the Panel concluded that Dr. Reid's communications with Dr. Paynter were threatening and amounted to harassment, and that Dr. Reid's failure to respond to the College's requests and failure to cooperate with the College investigator amounted to professional misconduct. The Panel imposed a penalty of a twelve month suspension of Dr. Reid's license,

remedial measures and a fine of $10,000. The Panel ordered Dr. Reid to pay the College's costs in the amount of $166,194.50.

[11] Dr. Reid appealed the Panel's decision as to costs (the "Costs Decision"), as to liability, including the issue of bias (the "Liability Decision"), and as to penalty (the "Penalty Decision") separately to the Divisional Court. The three appeals were heard on February 11, 2016. In one combined decision, with one minor exception, the Divisional Court dismissed the three appeals.

[12] The evidence on this motion was provided by Mr. Douglas P. O'Toole, co-counsel to Dr. Reid with Mr. Hakamali in the 2014-5 Hearing and the Divisional Court appeals. In his affidavit, Mr. O'Toole says that he and Mr. Hakamali received the Divisional Court Decision on June 13, 2016. He and Mr. Hakamali discussed an appeal of the decision. Both lawyers were of the view that the appeal was to this court, within 30 days of the decision. They therefore advised Dr. Reid that the deadline to appeal was July 13, 2016. In an email dated July 13, 2016, Mr. Hakamali indicated to counsel for the College that it had come to his attention that to appeal to this court, Dr. Reid had to seek leave to appeal within 15 days of the Divisional Court Decision.

THE ISSUE

[13] The single issue is whether an extension of time to file the notice of motion for leave to appeal should be granted.

ANALYSIS

The Test for Extending Time

[14] The test on a motion to extend time is well-settled. The governing principle is whether the "justice of the case" requires that an extension be given: *Rizzi v. Mavros*, 2007 ONCA 350, 85 O.R. (3d) 401, at para. 17; *Enbridge Gas Distribution Inc. v. Froese*, 2013 ONCA 131, 114 O.R. (3d) 636, at para. 15. Each case depends on its own circumstances. The relevant considerations include:

a) whether the moving party formed a *bona fide* intention to seek leave to appeal within the relevant time period;

b) the length of, and explanation for, the delay in filing;

c) any prejudice to the responding party, caused, perpetuated or exacerbated by the delay; and

d) the merits of the proposed appeal.

See *Rizzi*, at para. 16; *Froese*, at para. 15.

[15] This court has held that lack of merit alone can be a sufficient basis on which to deny an extension of time, particularly in cases such as this where the moving party seeks an extension of time to file a notice of leave to appeal, rather than an extension of time to file a notice of appeal: *Miller Manufacturing and*

Development Co. v. Alden, [1979] O.J. No. 3109 (C.A.), at para. 6; *Froese*, at para. 16.

The Principles Applied

[16] The record does not support a finding that Dr. Reid formed the intention to appeal the Divisional Court Decision within the requisite 15 days. That said, it is clear that Dr. Reid had the requisite intention to have the Divisional Court Decision reviewed within a few days of the expiry of the 15 day period. Dr. Reid should have filed the notice of motion for leave to appeal on June 27, 2016 and his counsel advised the College of Dr. Reid's intention to seek leave to appeal on July 13, 2016.

[17] In terms of prejudice, I see nothing in the record, apart from the cost associated with permitting the litigation to continue, to suggest that the College will suffer prejudice if an extension is granted.

[18] I turn, therefore, to a consideration of the merits of the proposed appeal.

[19] It must be borne in mind that the decision Dr. Reid seeks to appeal was rendered by the Divisional Court exercising its appellate jurisdiction. In *Sault Dock Co. Ltd. v. City of Sault Ste. Marie*, [1973] 2 O.R. 479 (C.A.), at para. 6, this court explained that, as a general rule, decisions made by the Divisional Court in its appellate capacity are intended to be final. A review of such a decision by this court is an exception to the general rule.

[20] Before granting leave, this court must be satisfied that the proposed appeal presents an arguable question of law, or mixed law and fact, requiring consideration of matters such as the interpretation of legislation; the interpretation, clarification or propounding of a general rule or principle of law; or the interpretation of an agreement or by-law where the point in issue involves a question of public importance: *Sault Dock Co.* at para. 8.

[21] At para. 9 of *Sault Dock Co.*, the court added that it will also consider cases where special circumstances make the matter sought to be brought before it one of public importance or where it appears that the interests of justice require that leave should be granted. Finally, at para. 10, this court observed that there may be cases in which there is clearly an error in the judgment or order of the Divisional Court such that the Court of Appeal might grant leave to correct the error.

<u>The Proposed Appeal of the Costs Decision</u>

[22] Dr. Reid submits that the appeal of the Costs Decision will affect future approaches to the reasonableness of cost awards under s. 53.1 of the Health Professions Procedural Code, Schedule 2 of the *Regulated Health Professions Act, 1991*, S.O. 1991, c. 18 (the "Code"). He further argues that, given the dissent, the cost decision has merit.

[23] I disagree.

[24] Section 53.1 of the Code gives the College jurisdiction to order costs. The courts have recognized this jurisdiction and have described it as being broad and discretionary: *Freedman v. Royal College of Dental Surgeons*, [2001] O.J. No. 1726 (Div. Ct.), at paras. 3, 6; *Aronov v. Royal College of Dental Surgeons*, [2002] O.J. No. 5973 (Div. Ct.), at para. 54. The courts have also identified the College's right and responsibility to protect its members from the weight of the expense of protracted disciplinary hearings: *Aronov*, at para. 53.

[25] The standard of review of reasonableness applies to the Costs Decision as the College was interpreting its own statute and was exercising discretion in making the award: *Venneri v. College of Chiropractors of Ontario*, 2010 ONSC 473, [2010] O.J. No. 334, at para. 6. A decision is only unreasonable if there is no line of analysis in the reasons that could reasonably lead the administrative tribunal from the evidence to the conclusion reached: *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247, at para. 55.

[26] The majority conducted a reasonableness review when assessing the Costs Decision. On the basis of this review, the majority concluded that the Panel had considered relevant factors, including the parameters of s. 53.1 of the Code, the College's costs, the findings of liability and the College's relative success.

[27] In the light of the discretionary nature of the Costs Decision, the standard of review and the Divisional Court's thorough and unimpeachable approach to

the issue, I conclude that the application for leave to appeal the Costs Decision is without merit.

[28] My conclusion is not impacted by the dissent, as I am of the view that Wilson J.'s analysis is, with respect, incorrect. As is apparent from the above analysis, her view that no decisions have considered the issue of reasonable costs under s. 53.1 of the Code is clearly in error. Moreover, she conducted her own independent cost analysis rather than conducting a reasonableness review, which was her mandate.

[29] I therefore find there to be no merit in the leave application as it applies to the Costs Decision.

<u>The Proposed Appeal of the Liability Decision</u>

[30] Dr. Reid submits that he was found guilty of professional misconduct because he breached standard practice when he failed to provide responses to complaints, as requested by the Inquiries, Complaints and Reports Committee (ICRC). He argues that the College did not have the authority to create the Standard of Practice and that the proposed appeal will have "far reaching implications for the conduct of investigations by Colleges".

[31] I reject this argument. First, the expert evidence called on behalf of both parties was that Dr. Reid was, in fact, obligated to respond to complaints and

provide the requested response to the College. Second, Dr. Reid himself admitted that he had a professional obligation to respond to the ICRC's requests.

[32] The conclusions of the Panel and the Divisional Court that Dr. Reid had an obligation to cooperate with the College and that he breached it by failing to provide submissions to complaints, are unassailable.

[33] Dr. Reid further argues that there was no evidence to support findings of professional misconduct in relation to his conduct towards Dr. Paynter. This part of the proposed appeal is entirely fact based. It does not raise an arguable question of law, and certainly not one of the sort contemplated by para. 8 of *Sault Dock Co.* Moreover, the purported appeal does not involve a special circumstance or a matter of public importance.

[34] Finally, Dr. Reid argued before the Panel and the Divisional Court that the Panel's chairperson should have been recused on the basis that he had been the chairperson of his 2010 Hearing. He raises this issue as a further reason why his leave application has merit.

[35] Again, I disagree. Dr. Reid's argument that the Divisional Court erred in finding there was no valid issue of bias completely lacks merit. It is a bald assertion. As previously noted the 2010 Hearing proceeded on an Agreed Statement of Facts. No evidence was called. Dr. Reid's credibility was not in issue.

The Proposed Appeal of the Penalty Decision

[36] Dr. Reid has made it clear that his application to seek leave to appeal the Penalty Decision is dependent on his appeal of the Liability Decision. Given my conclusion that the appeal concerning the Liability Decision is without merit, it follows that his appeal concerning the Penalty Decision is also without merit.

CONCLUSION

[37] The College has not been prejudiced by the delay, nor fairly, does it claim to be. The fact that there is no evidence that Dr. Reid formed an intention to appeal the Divisional Court Decision within the relevant time frame alone may constitute a sufficient basis upon which to dismiss Dr. Reid's motion. However, my decision to dismiss the motion rests on the basis that, given the lack of merit of the proposed appeal, justice requires that Dr. Reid's motion for extension of time to file his motion for leave to appeal, be dismissed.

DISPOSITION

[38] The motion is therefore dismissed. Further to the parties' consent, the College is entitled to its costs, including the costs of the cross-examination of Mr. O'Toole, in the amount of $5,000, all in.

Released: October 24, 2016

"Gloria Epstein J.A."

CITATION: 1787930 Ontario Inc. v. Transit Petroleum, 2019 ONSC 716
COURT FILE NO.: 35-2395487 & 35-2395481
ESTATE FILE NO.: 35-2395481
DATE: 20190128

SUPERIOR COURT OF JUSTICE – ONTARIO

IN BANKRUPTCY AND INSOLVENCY

RE: IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 178930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

BEFORE: Justice R. Raikes

COUNSEL: Sherry Kettle Counsel, for Transit Petroleum

Bruce Simpson and Mr. Ly Counsel, for 1787930 Ontario Inc.

Trustee of 1787930 Ontario Inc. – MNP Ltd. (Att'n: Sheldon Title)

HEARD: December 19, 2018

ENDORSEMENT

[1] 1787930 Ontario Inc. is a logistics company carrying on business as Messenger Freight Systems (hereafter "Messenger"). It operates a fleet of trucks for delivery of goods to customers.

[2] Transit Petroleum (hereafter "Transit") was a supplier of fuel for Messenger's trucks. It supplied approximately $200,000 of fuel to Messenger each month.

[3] Messenger paid for the fuel by pre-authorised debits ("PADs") from its account with the Bank of Nova Scotia. By June 2018, Messenger was in arrears for fuel already supplied by Transit. Some of the PADs did not go through because Messenger lacked sufficient funds to cover the payment (NSF). In addition, Messenger stopped payment on some payments due.

[4] In mid-June 2018, the Canada Revenue Agency ("CRA") issued a Requirement to Pay ("RTP") and froze Messenger's account at the Bank of Nova Scotia from which the PADs were drawn to pay Transit. Unbeknownst to Transit, the Bank of Nova Scotia then served Messenger with a Notice to Enforce Security pursuant to s. 144 of the *Bankruptcy and Insolvency Act* ("*BIA*") seeking repayment of monies owing to the Bank, and informed Messenger that they were preparing materials to appoint a receiver.

[5] The PAD payment due on June 18, 2018 did not go through. Transit received the PAD back with a notification from the Bank: "Account Frozen".

[6] On June 22, 2018, Nathan McDaniel ("McDaniel"), the Financial Controller at Messenger, spoke by telephone with Monique Paul ("Paul"), a Credit Analyst at Transit, concerning the overdue account; specifically, how Messenger was going to pay the arrears and ongoing fuel supplies. According to Paul, she was informed by McDaniel that Messenger's account was frozen because of fraudulent activity.

[7] By email dated June 22, 2018 to McDaniel, Paul confirmed Messenger's proposal to pay the arrears by four PAD's with the first on Monday, July 2 and the last on July 23, 2018. The proposal by McDaniel contemplated the following payments:

> Monday, July 2, 2018 - $83,734.05
> Monday, July 9, 2018 – regular amount owing plus $27,911.35 for arrears
> Monday, July 16, 2018 – same as July 9
> Monday, July 23, 2018 – same as July 9

Paul asked McDaniel to confirm the proposal before she spoke to the fuel manager to get his approval. With the account at the Bank of Nova Scotia frozen, McDaniel needed to provide new banking details in order for the PAD's to be processed. She attached a new PAD for him to fill out.

[8] On June 25, 2018, McDaniel emailed Paul to request that the first payment be changed from Monday, July 2 to Friday, July 6.

[9] On June 26, 2018, Paul and Tina Thorne ("Thorne") spoke with McDaniel by telephone with respect to the requested change. They advised McDaniel that if the change was made to Thursday, the terms of payment would have to change from Net 14 to Net 7. Paul and Thorne aver that McDaniel agreed to that change during the telephone call; McDaniel does not recall what was discussed in that call.

[10] After the telephone call, Paul emailed McDaniel on June 26, 2018. Paul indicated that Transit was prepared to change the PAD's from Mondays to Thursdays "with the below proposal on getting the account current". The proposal is materially different from that outlined in the June 22 email above. It contemplates three, not four payments. The first payment is $111,645.40, the second $83,004.86 and the last is the regular fuel payment plus $27,911.35. The email is silent with respect to change of credit terms from Net 14 to Net 7.

[11] McDaniel emailed Paul on June 27 at 5:40 PM. He wrote:

> Much thanks for the patience and support that both you and Tina have demonstrated; it means a lot to me. Attached is a scan of a voided check [sic] from our new checking [sic] account; please use this banking information for future billings. With regards to the below – mentioned proposal, I would ask that

we adjust is [sic] slightly to be more in line with our original conversation. Would you let me know if my proposal is acceptable?

July 5	$83,734.05	(50% of the arrears amount)
July 12	regular amount plus $27,911.35	(16.67% of the arrears amount)
July 19	regular amount plus $27,911.35	(16.67% of the arrears amount)
July 26	regular amount plus $27,911.35	(16.67% of the arrears amount)

With this payment plan, we would effectively have the arrears amount paid up by EOM July.

[12] Paul responded by email dated June 28, 2018 at 8:55 AM. She indicated that his proposal had been discussed at length with Thorne and Trevor Chambers, the fuel manager. She wrote: "...we will accept this proposal, with below stipulations." After setting out the same payment schedule and amounts proposed by McDaniel in his June 27 email, she wrote:

> Currently terms are Net 14 with Monday PAD making invoices 15 days old, if we agree to move your PAD to Thursday we will need to change your terms to Net 7 making your invoices 11 days old, we cannot keep your terms at Net 14 and Paul on Thursday as that makes the invoices 19 days old.
> We have continuously gone above and beyond to work with Messenger on their financial issues, but going forward we need to be reassured that we will no longer have any problems going forward which is why we are agreeing to the Thursday PAD.
> We have already had to pay the fuel purchased and used by Messenger, as out [sic] terms are Net 7 with our supplier.
> We need to be clear that this will be the last time we can split payments due to the inability to pay your fuel purchases on the agreed-upon pull date.
> *We need the above approved no later than 3pm on Friday June 29, 2018,* in order to pull the first payment on Thursday, July 5th, 2018. [Italics added]

[13] McDaniel emailed Paul on June 29, 2018 at 4:05 PM. He apologized for his delay and advised that he was being pulled in several directions. He asked her to call him on Tuesday when she was back in the office and indicated: "I just have a few questions regarding the terms... I want to make sure I am on the same page with you." No further communications took place between McDaniel and Paul until July 3, 2018 when Paul emailed McDaniel to ask him to call as soon as possible.

[14] Transit takes the position that the June 28, 2018 email by Paul merely confirms the terms that had previously been agreed upon and accepts McDaniel's proposal as to the amounts and timing of payment. In other words, the change from Net 14 to Net 7 was already agreed upon and implicit in McDaniel's proposal of June 27 which Transit was accepting.

[15] Messenger takes the position that the change to Net 7 was not previously agreed to, did not form part of McDaniel's proposal and represents a counter-offer to his June 27, 2018

proposal. In short, Paul asked for confirmation of acceptance/approval because it represented a change in the terms previously discussed. Thus, there was no agreement on June 28, 2018, nor was there any communication of acceptance of Transit's proposed terms at any point before July 5, 2018.

[16] On June 28, 2018, the Bank of Nova Scotia informed Messenger that it required Messenger to proceed by way of Notice of Intention to File a Proposal ("NOI") failing which the Bank would not forbear from enforcement procedures. No further discussions took place with Transit between June 28 and July 2 when, Messenger issued a NOI.

[17] Thus, by the time Paul left a voicemail message and emailed McDaniel on July 3, the NOI had already been issued. In her voicemail message, she indicated that she needed to hear back from him by 10 AM that day to confirm that he would have no issues with the PAD on July 5. She testified that she simply wanted to make sure that funds would be available given the past history of NSF's and stop payments.

[18] When she did not hear back from McDaniel, Paul sent a further email at 11:17 AM on July 3 in which she informed him that she had put the PAD through for withdrawal for July 5, 2018. She deposed that McDaniel did not respond and the PAD was submitted to Libro on July 3, 2018 at 11:45 AM for withdrawal from Messenger's account on July 5.

[19] Messenger did not stop payment on the PAD and, according to Transit's witnesses, it did not advise Transit of the N0I before the PAD was processed and funds were transferred from the account to Transit on July 5.

[20] On July 4, 2018, McDaniel sent an internal email at 2:37 PM in which he confirmed that he had asked Chambers, fuel manager at Transit, to put a hold or stay on the PAD for July 5. McDaniel deposes that there was no agreement to pay the $83,734.05 on July 5 because he never accepted the changed terms. He also disputes that Transit was not informed that the PAD should not go through.

[21] Transit asserts that it was unaware of the NOI until a meeting on July 5 at approximately 1 PM. The owner of Messenger, Louise Vonk (hereafter "Vonk"), and general manager, Blaine Skirtschak (hereafter "Skirtschak"), met with Paul and Trevor Chambers of Transit. During that meeting, Vonk informed Paul and Chambers that Messenger had filed a NOI on July 2, 2018 to restrict further action by CRA and to give Messenger some time to reorganize financially to carry on business.

[22] During the July 5 meeting, Vonk indicated that Messenger needed Transit's support to keep operating and she was willing to do whatever was necessary to keep Transit as its fuel supplier. She did not request return of the monies received by Transit from the July 5 PAD. According to Paul and Chambers, Vonk advised that she allowed the PAD to go through because Transit was a "vital vendor" necessary for Messenger to remain in business.

[23] Neither Vonk nor Chambers filed responding affidavits to dispute the evidence of the discussion at the meeting on July 5, 2018.

[24] On July 6, 2018, Paul called McDaniel twice and left voice messages to discuss the following week's PAD for post-NOI purchases of fuel. McDaniel emailed Paul at 5:50 PM on July 6 to apologize for not reaching out and advised that he would contact her on Monday, July 9, 2018.

[25] On July 9, 2018, McDaniel spoke by telephone with Paul, Chambers and Don Poort, CFO for Transit. According to affidavits by Paul and Poort, McDaniel did not request return of the monies received by Transit on July 5 from the PAD. McDaniel advised in that telephone call that he had allowed the PAD to be processed because he had agreed to that payment on June 28, the payment had been processed and received by Transit before they knew of the NOI, and Messenger needed Transit to continue as a supplier to stay in business.

[26] In his supplementary affidavit sworn October 15, 2018, McDaniel deposed, *inter alia*, that:

a. he asked Paul on July 3 not to proceed with the July 5 PAD;
b. he tried unsuccessfully to stop the July 5 payment;
c. he did not retroactively authorize the July 5 PAD, nor did he offer the reasons proffered by Transit's witnesses for allowing the PAD to go through; and
d. he did not ask Poort for return of the July 5 PAD monies, but he did ask Paul for same.

[27] As is evident, there are facts in dispute. Counsel for Transit asks me to find that McDaniel's evidence is not credible or reliable. She points to inconsistencies which she asserts undermine his evidence. The facts in dispute are material to whether there was an agreement to pay the arrears by four PAD's including the first on July 5, whether Messenger asked Transit not to proceed with that payment before July 5, and whether Messenger approved of that payment after the NOI was issued as part of an arrangement to ensure ongoing fuel supply from Transit.

[28] Despite these factual issues, the following facts are not disputed:

a. Messenger issued its NOI on July 2, 2018;
b. The PAD for $83,734.05 was submitted to Libro on July 3 and processed on July 5, 2018, three days after the NOI was issued;
c. That payment was on account of monies owing by Messenger to Transit for fuel supplied before the NOI was issued;
d. After the NOI was issued, Transit supplied additional fuel to Messenger in the amount of $48,434.30;
e. On July 11, 2018, Messenger entered into arrangements with Petro Canada for fuel for its trucks;
f. Messenger severed its fuel supply relationship with Transit on that date;

g. Transit filed a Proof of Claim in Messenger's Proposal in the amount of $202,791.59 as arrears owing as of July 2, 2018. That figure includes the monies subsequently received on July 5 through the PAD.

Position of Parties

a. Messenger

[29] Messenger takes the following positions on this application:

a. the payment received by Transit on July 5, 2018 by PAD is barred by s. 69(1)(a) of the *BIA*;
b. allowing Transit to retain those monies on account of pre-NOI debt is contrary to the objectives of the *BIA*;
c. there was no agreement to pay those monies by PAD on July 5 – at most, the parties had discussions but no agreement was reached;
d. the payment amounts to a fraudulent preference vis-à-vis other creditors of Messenger; and
e. at most, Transit should retain only the amount payable for post-NOI fuel supplied to Messenger which amounts to $48,434.30. The balance should be repaid.

b. Transit

[30] Transit takes the following positions:

a. the July 5 PAD payment does not constitute the exercise of a remedy and, accordingly, is not barred by s.69 of the *BIA*;
b. the PAD was made to Transit pursuant to an agreement made on June 28, 2018. That agreement was subsequently confirmed by Messenger's representatives;
c. the payment received by Transit on July 5, 2018 is consistent with the objectives of the *BIA* which promote arrangements to give debtors time and means to restructure financially to continue in business;
d. Messenger has no standing to assert a claim of fraudulent preference; and
e. In any event, the payment in question was not a fraudulent preference.

Analysis

[31] Section 69(1) of the *BIA* immediately stays any remedies against a debtor upon issuance of a NOI. Section s.69(1) states:

> (1) Subject to subsections (2) and (3) and sections 69.4, 69.5 and 69.6, on the filing of a notice of intention under section 50.4 by an insolvent person,

> (a) no creditor has any remedy against the insolvent person or the insolvent person's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[32] In cross-examination, Paul confirmed that the full amount outstanding as at July 2, 2018 was a claim provable in bankruptcy. The amount then outstanding included the amount later received on July 5, 2018 when the PAD was processed. The Proof of Claim filed included the $83,734.05 received on July 5, 2018.

[33] Section 69.4 of the *BIA* permits a creditor affected by the operation of section 69 to apply to the court for a declaration that that section does not operate for that creditor. The court may make such declaration if it is satisfied that the creditor is likely to be materially prejudiced by the continued operation of that section or it is equitable on other grounds to make that declaration: s. 69.4

[34] Transit has never sought relief under section 69.4.

[35] In *The Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters Canada, 2018) by Lloyd W. Houlden and Geoffrey B. Morawetz, the authors explain the intent and purpose of s. 69 and stay of proceedings in the following terms:

> One of the objects of the *Bankruptcy and Insolvency Act* is to provide for the orderly and fair distribution of the property of a bankrupt among his or her creditors on a *pari passu* basis…: *R. v. Fitzgibbon* (1990), 78 C.B.R. (N.S.) 193, 1990 CarswellOnt 172 (S.C.C.). Sections 69, 69.1, 69.2 and 69.3 are designed to prevent proceedings by a creditor that might give the creditor an advantage over other creditors.
>
> Sections 69, 69.1, 69.2 and 69.3 do not give the court power to order a stay; rather they create a stay *ipso facto* on the filing of a notice of intention or of a proposal or consumer proposal or on bankruptcy by prohibiting a creditor from instituting or continuing the proceedings mentioned in the sections without leave of the Bankruptcy Court: *Re Cohen* (1948), 29 C.B.R. 111, aff'd 29 C.B.R. 163 (Ont. C.A.); *3031085 Nova Scotia Ltd. v. Classic Freight Systems Ltd.* (2002), 34 C.B.R. (4th) 313, 2002 CarswellNS 245, 2002 NSSC 151 (N.S. S.C. [In Chambers]). …
>
> Knowledge that a notice of intention or proposal has been filed or that the debtor has gone into bankruptcy is unnecessary for a stay to be effective. If a creditor cashes a cheque that it has received from the debtor after the debtor has filed a notice of intention, the money must be repaid. The cashing of the cheque is a remedy within s. 69(1)(a): *Startek Computer Inc. (Trustee of) v. Samtack Computer Inc.* (2000), 20 C.B.R. (4th) 166, 2000 CarswellBC 1802, 2000 BCSC 1316 (S.C. [In Chambers]).

[36] The word "remedy" in s. 69(1)(a) is to be given a broad interpretation: *Gene Moses Construction Ltd., Re*, 1999 CarswellBC 149 at paras. 9 and 10. Remedies are not restricted to proceedings of a judicial nature: *Gene Moses*, para. 11.

[37] In *Golden Griddle Corp. v. Fort Erie Truck & Travel Plaza Inc.*, 2005 CarswellOnt 9935 (S.C.J.), Lederman J. considered the scope of the meaning of "remedy" in the context of s. 69. He wrote at paras. 11 and 12:

> 11. While I agree that the word "remedy" in section 69(1)(a) should be given a broad interpretation, it must be a purposive one that is in accord with the objectives of the BIA generally, and in particular, the specific purposes of the stay provisions against secured and unsecured creditors, giving, in the words of E.B. Leonard and R.G. Marantz in their article, "Debt restructuring under the *Bankruptcy and Insolvency Act*, June 1, 1995 – Stays of Proceedings, under the *Bankruptch and Insolvency Act*" (for the 1995 Insolvency Institute of Canada lectures), "a reorganizing debtor an opportunity to have some 'breathing room' during which to negotiate with its creditors and hopefully put together a prospective financial restructuring which would meet their requirements."
>
> 12. A purposive definition of the word 'remedy' in section 69(1)(a) would suggest that, remedies which in any way hinder or could impair that process are caught within the section and are stayed. The issue should be approached contextually on a case-by-case basis and the remedy sought should be considered in terms of its impact on the objectives of the statutory stay provision. It is the impact rather than the generic nature of the relief sought which should govern. Therefore, if the injunctive relief sought detrimentally affects or could impair the ability of the insolvent person to put forth a proposal, it should be stayed, whereas, if the nature of the injunction sought would have no effect whatsoever on that ability, it should not be stayed.

[38] In *Gene Moses*, the debtor construction company leased logging equipment with financial assistance from GE Capital Leasing. Monthly lease payments were payable. The lease payments were restructured at some point but were payable monthly by way of preauthorized debits (PAD's). The construction company executed a NOI under the *BIA* which was filed with the official receiver on December 17, 1998. Five days later, GE presented three debit memos to the company's bank totaling $29,149. The bank honoured the debit memos and paid the money to GE.

[39] The construction company sought return of the monies paid to GE after the NOI was issued. At para. 14, Master Powers held:

> I conclude that "remedy" in section 69 must be given a broad meaning. I also conclude that in presenting the debit memos for payment of the arrears of lease payments GE Capital was exercising a remedy to try and collect its debt. The exercise of this remedy is stayed pursuant to section 69(1) of the *Bankruptcy and Insolvency Act* and therefore GE Capital was not entitled to the use of those debit memos.

[40] In *Startek Computer Inc. (Trustee of)*, Startek purchased computer equipment from Samtack. Startek paid for the goods by a cheque that was returned NSF. Startek then

issued a second cheque to pay for the goods. Startek filed a NOI. Four days later, Samtack presented the first cheque to the bank again and this time it was honoured. Startek sought return of the funds received.

[41] Harvey J. of the British Columbia Supreme Court held at para. 11 that by renegotiating the first cheque without the knowledge or consent of Startek or the trustee, the creditor (Samtack) "exercised a remedy and violated the existing state of proceedings".

[42] Transit distinguishes the result in *Startek* on the basis that Messenger expressly consented to the PAD being exercised on July 5, 2018, and subsequently confirmed that consent by word and conduct.

[43] Transit argues that fuel is an essential requirement for a trucking business. Messenger needed time to restructure its debts while continuing to operate. It could not operate without fuel. As Ms. Vonk indicated at the July 9 meeting, Transit was a vital supplier. Allowing Transit to negotiate and retain the monies from the July 5 PAD is entirely consistent with the objectives of the *BIA*. Accordingly, the negotiation of that PAD on July 5 did not constitute the exercise of a "remedy".

[44] I disagree for the following reasons:

a. The July 5, 2018 PAD was for fuel already delivered and consumed before July 2;

b. While Transit was aware that Messenger was having financial difficulties as evidenced by the frozen bank account and NSF payments, Transit was not aware of the full extent of Messenger's difficulties or its plan to restructure its debt going forward. This is not a case where Messenger shared its plan, went to Transit to secure its future cooperation as a critical supplier and Transit agreed to do so only if its arrears were paid;

c. Messenger was able to replace Transit as a supplier within a day or two of the July 9 meeting;

d. Like the PAD's in *Gene Moses* and the cheque in question in *Startek,* the July 5 PAD was simply to catch up payments missed or dishonoured before the NOI;

e. The July 5 PAD was part of an alleged "agreement" that contemplated four payments. Transit does not assert nor did it move under s. 69.4 to assert that the other three payments are other than debts provable in bankruptcy that are captured by the proposal made. There is no reason to treat the July 5 PAD different from the other PAD's contemplated by the "agreement"; and

f. It was not open to Messenger to determine which creditors should be paid for monies already owing and to give its consent to payments to some creditors in preference to others.

[45] I find that the July 5 PAD constitutes a remedy that is captured by the stay in s. 69(1)(a) of the *BIA*. It is contrary to the objective of the *BIA* to treat all creditors fairly to permit Transit to retain the monies received.

[46] As mentioned, Transit did supply fuel in July 2018 after the NOI was issued and before Messenger switched to Petro Canada. It is entitled to set off the debt owing for that fuel against the monies payable to Messenger for the July 5 PAD. In the result, Transit shall pay to Messenger the sum of $35,299.75.

[47] It is unnecessary for me to determine whether the parties reached an agreement on June 28 or at any point before July 2, 2018. The fact of such agreement would not change the analysis or result above. I note, however, that that issue did not lend itself to determination on the basis of conflicting affidavits and transcripts of cross-examinations. Were it necessary to determine that issue, I would direct a trial of an issue.

[48] It is likewise unnecessary to determine whether the July 5 payment amounts to a fraudulent preference. I have grave misgivings with respect to Messenger's standing to assert that claim. It strikes me as passing odd that the party who preferred one creditor over others should make the application.

[49] If the parties cannot agree on costs, they may make submissions not exceeding 3 pages within 21 days.

R Raikes

Justice R. Raikes

Date: January 28, 2019

IN THE MATTER OF THE NOTICES OF INTENTION TO MAKE A PROPOSAL OF 1732427 ONTARIO INC. AND 1787930 ONTARIO INC. BOTH OF THE CITY OF ST. THOMAS, IN THE PROVINCE OF ONTARIO

Court of Appeal File No. M50303
File Numbers: 35-2395487 and 35-2395481

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at London

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