

COURT OF APPEAL FOR ONTARIO

BETWEEN:

FIREPOWER DEBT GP INC., AS AGENT

Applicant (Respondent)

and

THEREDPIN, INC. and THEREDPIN.COM REALTY INC.

Respondents

FACTUM

(Motion for Direction on Appeal returnable February 11, 2019)

January 31, 2019

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PART I - OVERVIEW

1. The crux of this motion is whether the appeal is properly under the *Courts of Justice Act* (“*CJA*”) or the *Bankruptcy and Insolvency Act* (“*BIA*”).
2. The appellants – former real estate agents of TheRedPin, Inc. and TheRedPin.com Realty Inc. (the “TRP Agents” and “TRP Realty”, respectively) – submit that they properly appealed under the *CJA*. The issue on appeal is whether the Honourable Justice Penny erred in concluding that the TRP Agents’ commissions were not held in trust for them by TRP Realty. This engaged no section of the *BIA* and Penny J.’s decision was not made under any jurisdiction or authority conferred by that statute.
3. The TRP Agents therefore properly appealed under the *CJA*. They served their Notice of Appeal within the 30 day deadline, and their appeal lies as of right to this Court, without leave.
4. Certain respondents disagree and assert that the appeal should have been brought within 10 days, pursuant to the *BIA*. If that is the case, the appellants seek an extension of time to file their Notice of Appeal. The TRP Agents clear the relatively low threshold for such relief.
5. Even if the appeal is under the *BIA*, the TRP Agents do not require leave under s. 193 because the Order under appeal concerns future rights, is likely to affect other cases of a similar nature in the bankruptcy proceedings, and relates to property in excess of \$10,000.
6. In the alternative, if leave is required, the TRP Agents request 30 days to file a motion for leave to appeal.

PART II - FACTS

7. On June 14, 2018, the Honourable Justice Hailey granted an Order appointing MNP Ltd. (“MNP”) as receiver over the assets, undertakings and properties of TRP Realty.

Order of the Honourable Justice Hailey dated June 14, 2018, Exhibit "A" to the Affidavit of Jordan Goldblatt sworn January 31, 2019 ("Goldblatt Affidavit") (para. 2), Moving Party's Motion Record ("Motion Record"), Tab 2A

8. Adair Goldblatt Bieber LLP ("AGB") was appointed to represent the interests of the former TRP Agents in respect of whether the commissions they earned, or would earn, were impressed with a trust for their benefit when paid to TRP Realty. The commissions were paid to TRP Realty because the *Real Estate and Business Brokers Act, 2002* ("REBBA") requires that commissions earned by agents be paid to a brokerage.

Order of the Honourable Justice Chiappetta dated September 11, 2018, Exhibit "B" to the Goldblatt Affidavit (para. 4), Motion Record, Tab 2B

9. MNP brought a motion for directions on the commissions issue (the "Commissions Motion"). The TRP Agents, supported by their insurer, certain underwriters of Lloyd's of London (the "Insurer"), argued that the commissions were impressed with a trust. The secured creditors of TRP Realty, Trilogy Growth Fund LP and Firepower Debt GP Inc. (the "Secured Parties"), argued that the commissions were pledged to them under the terms of General Security Agreements ("GSAs").

MNP's Notice of Motion re: Commissions Motion, Exhibit "C" to the Goldblatt Affidavit (para. 5), Motion Record, Tab 2C

10. MNP's report to the Court, filed on the Commissions Motion, disclosed that:

- (a) TRP Realty had three bank accounts: an operating account, a real estate trust account, and a commissions account. The commissions account was a "separate bank account into which all commissions due to TRP Realty were received and then paid out".
- (b) Commissions owed to the TRP Agents were paid to them through the commissions account. Where TRP Realty was entitled to a portion of the commissions, these funds were first transferred from the commissions account to TRP Realty's operating account.

- (c) The commissions account was housed at various banks over time. When at RBC in 2018, pre-printed blank cheques stated “COMMISSION TRUST”. When at Comerica Bank from 2014 to 2018, the words “COMMISSION TRUST” were in the mailing line of the statements, and the cheques stated “COMMISSION TRUST”. When at TD Bank from 2010 to 2014, the statements said “TRUST ACCT” in the mailing address line.
- (d) On each transaction, the TRP Agents were provided a Trade Record setting out their anticipated commission, signed by the Broker of Record, with a statement that “it is understood between all parties that this agreement shall constitute a Commission Trust Agreement as set out in the contract”.

Receiver’s Report to Court in respect of the Commissions Motion, paras. 25(a), 27(a)(b) and 30, Exhibit “D” to the Goldblatt Affidavit (para. 5), Motion Record, Tab 2D.

11. The Commissions Motion was heard on October 22, 2018. On November 30, 2018, Penny J. (the “Motion Judge”) held that the commissions were not impressed with a trust, and were therefore subject to the terms of the Secured Parties’ GSAs.

Reasons for Decision of Justice Penny dated November 30, 2018 (“Reasons of the Motion Judge”), para. 53, Exhibit “H” to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

12. The Motion Judge correctly defined the issue before him as whether an implied trust existed based on the application of the “three certainties”, and noted that only “certainty of intention” was at issue. The Motion Judge ultimately held that TRP Realty did not intend to establish a trust in favour of the TRP Agents over the commissions payable to them from proceeds of real estate closings.

Reasons of the Motion Judge, paras. 5-7, 53, Exhibit “H” to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

13. On December 27, 2018, AGB delivered a Notice of Appeal on behalf of the TRP Agents and the Insurer within the 30 day appeal period in Rule 61.04 of the *Rules of Civil Procedure*.

Notice of Appeal dated December 27, 2018, Exhibit "I" to the Goldblatt Affidavit (para. 16), Exhibit "I", Motion Record, Tab 2I

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 61.04

14. Upon receipt of the Notice of Appeal, the Secured Parties took the position that the Notice of Appeal was not timely, as it had not been delivered within the 10 day appeal period in Rule 31(1) of the *Bankruptcy and Insolvency General Rules* (the "*BIA Rules*"). The Secured Parties also took the position that the appellants required leave to appeal under s. 193 of the *BIA*.

Goldblatt Affidavit, para. 17, Motion Record, Tab 2

Bankruptcy and Insolvency General Rules, C.R.C., c. 368, r. 31(1)

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

15. On December 31, 2018, the TRP Agents delivered an amended Notice of Appeal, seeking an extension of time to deliver the Notice of Appeal and leave to appeal, in the event the *BIA Rules* applied.

Amended Notice of Appeal dated December 31, 2018, Exhibit "M" to the Goldblatt Affidavit (para. 20), Motion Record, Tab 2M

PART III - ISSUES

16. The issues on this motion are:

- (a) Is this an appeal under the *CJA* or the *BIA*?
- (b) If this is an appeal under the *BIA*:
 - (i) Should this Court grant an extension of time to deliver the Notice of Appeal?
 - (ii) Do the appellants require leave to appeal?

PART IV - LAW & ARGUMENT

A. This appeal is an under the *CJA*

17. Under s. 6(1)(b) of the *CJA*, an appeal lies to the Court of Appeal from “a final order of a judge of the Superior Court of Justice” without leave to appeal. Pursuant to Rule 61.04 of the *Rules of Civil Procedure*, an appellant has 30 days from the order under appeal to serve its Notice of Appeal. Therefore, if this appeal is under the *CJA*, the appellants delivered their Notice of Appeal in time, and do not require leave.

Courts of Justice Act, R.S.O. 1990, c. C. 4, at s. 6(1)(b)

Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 61.04

18. In contrast, Rule 31(1) of the *BIA Rules* provides that appeals to the Court of Appeal under the *BIA* must be made by filing a Notice of Appeal within ten days of the decision appealed from, and s. 193 of the *BIA* limits the circumstances in which an appeal may be brought as of right.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368, r. 31(1)

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

19. However, it is only where the Order under appeal was granted “in reliance on jurisdiction under the *BIA*” that the *BIA Rules* and *BIA Act* apply. As this Court has noted, the jurisdiction of the Court is governed by the substance of the Order made. The question then is whether the Order under appeal arose from the power conferred on the Superior Court by s. 183(1) of the *BIA* to “exercise original, auxiliary and ancillary jurisdiction in bankruptcy and in other proceedings authorized by this Act.”

Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership, 2018 BCCA 283, at para. 21, Book of Authorities (“BOA”), Tab 6

RREF II BHB IV Portofino, LLC v. Portofino Corporation, 2015 ONCA 906 at para. 12, BOA, Tab 9

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 183(1)

20. The Motion Judge's determination of the Commissions Motion did not rely on any jurisdiction granted under the *BIA*. The Motion Judge resolved the motion with reference to only common law legal principles, and in particular, common law trust principles. No case law under the *BIA* was considered, no powers under the *BIA* were exercised, and the decision makes no reference to the *BIA* or any insolvency principles. Nor did MNP's Notice of Motion, other than a reference to s. 249, which gave it statutory authority to move for directions. Indeed, if ultimately heard by this Court, the appeal will not turn on any issue related to the *BIA*.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3 ("*BIA*"), s. 249

21. The Order under appeal was therefore not granted "in reliance on jurisdiction under the *BIA*", and the 10 day appeal period under the *BIA Rules* do not apply. The TRP Agents served their Notice of Appeal within the 30 day period in Rule 61.04 of the *Rules of Civil Procedure*, and have an appeal as of right under section s. 6(1)(b) of the *CJA*.

Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership, 2018 BCCA 283, at para. 21, BOA, Tab 6

B. If the *BIA* applies, an extension of time should be granted

22. In the alternative, if the TRP Agents ought to have appealed under the *BIA*, the time to deliver their Notice of Appeal should be extended.

23. Rule 31(1) of the *BIA Rules* explicitly contemplates that an appeal may be delivered "within such further time as a judge of the court of appeal stipulates." Section 187(11) of the *BIA* similarly provides that "[w]here by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose."

Bankruptcy and Insolvency General Rules, C.R.C., c. 368, r. 31(1)

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 187(11)

24. The inadvertence of a solicitor in failing to serve and file a document within the proper time should not work a hardship on the client. The court is concerned primarily with the rights of litigants rather than with the conduct of solicitors. Delay resulting from an error of counsel should not be visited on the client. The Court may, in special circumstances such as these, and in the absence of prejudice to a respondent, exercise discretion to relieve against unfairness in the imposition of a statutory limitation.

St. Denis v. TD Insurance Home & Auto Liberty Insurance Co. of Canada, 80 O.R. (3d) 706 (S.C.), at para.18 and 33, BOA, Tab 10

Canada v. MKM Manufacturing Ltd., 48 C.B.R. (4th) 222 (B.C.C.A.), at para. 7, BOA, Tab 2

25. In *National Telecommunications Inc. v. Stalt Telecom Consulting Inc.*, this Court recently considered whether and in what circumstances it would grant an order retroactively extending the time for filing a Notice of Appeal under the *BIA Rules*. Counsel for the appellant had similarly relied on the 30 day *CJA* period rather than the 10 day *BIA Rules* period. The Honourable Justice Simmons held that in such circumstances “the overriding principle on a motion for extension is whether the justice of the case requires an extension.”

National Telecommunications Inc. v. Stalt Telecom Consulting Inc., 2018 CarswellOnt 16593, at para. 15, BOA, Tab 7

26. Simmons J.A. then set out the well-established test for granting an extension:

The overarching principle is whether the justice of the case requires that an extension be granted. The relevant factors may include:

- a) whether the applicant had a bona fide intention to appeal before the expiration of the appeal period;
- b) the length of and explanation for the delay in filing;
- c) any prejudice to the responding parties caused by the delay; and

- d) the merits of the proposed appeal.

National Telecommunications Inc. v. Stalt Telecom Consulting Inc., 2018 CarswellOnt 16593, at para. 16, BOA, Tab 7

27. In a situation where, as here, there was “potential confusion” as to an appeal period, Simmons J.A. held that this “militate[s] in favour of an extension”. Applying the other factors similarly leads to the conclusion that an extension should be granted:

- (a) While the appellant did not form or communicate an intention to appeal before the expiry of the 10 day period, this was a result of confusion over which time period applies, and should not be visited on the TRP Agents;
- (b) The delay was only sixteen days, over a period with multiple statutory holidays. Counsel has sworn an affidavit attesting to the reason for the delay;
- (c) This brief delay has occasioned no prejudice on the responding parties; and
- (d) The appeal is “meritorious” in that it raises several non-frivolous grounds of appeal that present an arguable case. This threshold is “not very high”. These grounds of appeal are summarized in section (i) through (vi), below.

National Telecommunications Inc. v. Stalt Telecom Consulting Inc., 2018 CarswellOnt 16593, at para. 18, BOA, Tab 7

Canada v. MKM Manufacturing Ltd., 48 C.B.R. (4th) 222 (B.C.C.A.), at para. 5, BOA, Tab 2

- (i) ***The Motion Judge erred by conflating the indicia of an express trust with evidence supporting an implied trust***

28. At paragraph 23 of his Reasons for Decision, the Motion Judge held that the TRP Agents’ contracts with TRP Realty did not contain a provision “that commissions are to be held in trust by TRP Realty for the benefit of the Agents, nor is there any language that could reasonably be construed as having this meaning or intent”.

29. The Motion Judge returned to the absence of such contractual language both in (i) finding that this was a “critical element” that distinguished the case from *Eu v. Rosedale Realty Corp* (“*Eu*”), in which a trust was found over a real estate agent’s commissions, and (ii) reaching his ultimate conclusion that there was no trust. The Motion Judge erred in law by conflating what would have created an express trust, with the TRP Agent’s position that the trust was implied. This was an error of law.

Reasons of the Motion Judge, paras. 45-49, Exhibit “H” to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

Eu v. Rosedale Realty Corp. (Trustee of), [1997] O.J. No. 2275 (Gen. Div.), BOA, Tab 4

(ii) *The Motion Judge erred by disregarding evidence from TRP Realty’s founder regarding his intention in setting up the brokerage*

30. Tarik Gidamy, a founder of TRP Realty, swore that when he set up TRP Realty, he set up the commissions account to segregate funds for TRP Realty’s agents and co-operating brokers. Mr. Gidamy swore that he segregated these funds because they “did not belong to TRP Realty”, and that “TRP Realty could only use money that was to TRP Realty’s credit in the commission account” after it transferred the funds from the commission account to an operating account. It was precisely this type of segregated structure that led the Court in *Eu* to conclude that agents’ commissions were held in trust.

Affidavit of Tarik Gidamy sworn September 19, 2018, para. 9, Exhibit “E” to the Goldblatt Affidavit (para. 6), Motion Record, Tab 2E

31. The Motion Judge mischaracterized Mr. Gidamy’s evidence as an “after the fact characterization of the status of commissions.” The contemporaneous records referenced in the Receiver’s report were consistent with Mr. Gidamy’s evidence that the commissions were segregated, and never used for TRP Realty’s purposes until transferred into an operating account.

In mischaracterizing Mr. Gidmay's evidence and distinguishing *Eu*, the Motion Judge fell into error.

Reasons of the Motion Judge, para. 51, Exhibit "H" to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

(iii) *The Motion Judge erred by permitting the Secured Parties to secure their advances over assets that TRP Realty considered as not belonging to it prior to the receivership*

32. The evidence on the Commissions Motion was that TRP Realty had no expectation that it could use funds in the commission account in the ordinary course of its business. The Motion Judge's decision achieved the commercially unreasonable result of giving the Secured Parties a greater right to the assets of TRP Realty than TRP Realty ever took for itself.

Reasons of the Motion Judge, para. 22, Exhibit "H" to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

(iv) *The Motion Judge erred in respect of the import, evidentiary value, and weight to be given to TRP Realty's 2016 audited financial statements*

33. The Motion Judge found that audited financial statements signed by TRP Realty in 2016 supported his conclusion that there was no trust, as the commissions were recorded as part of "cash and cash equivalents", and not subject to any reservations.

Reasons of the Motion Judge, paras. 36-38, Exhibit "H" to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

34. However, in so finding, the Motion Judge ignored the evidence that funds recorded under the "cash and cash equivalents" designation unambiguously *included* trust funds for other parties/purposes. TRP Realty's commissions account included commissions to be paid both to its own agents (the TRP Agents) *and to other co-operating brokerages*. On cross-examination, a representative of a Secured Party representative admitted that (i) the amounts owing to the

co-operating brokerages were indeed impressed with a trust, and (ii) the only amounts recorded on the financial statements as excluded from “cash and cash equivalents” were real estate deposit funds, which were not held in the commissions bank account, but in a segregated account for deposit funds.

Receiver’s Report to Court in respect of the Commissions Motion, para. 27(a-b), Exhibit “D” to the Goldblatt Affidavit (para. 5), Motion Record, Tab 2D

Answers to Undertakings of Jared Kalish, Exhibit “F” to the Goldblatt Affidavit (para. 7), Motion Record, Tab 2F

Reasons of the Motion Judge, para. 42, Exhibit “H” to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

35. This evidence undermines the Motion Judge’s conclusion that the commissions at issue must have been the property of TRP Realty (and not held in trust for the TRP Agents) because they were characterized as “cash and cash equivalents” in the financial statements. Based on the Secured Party’s admission, the “cash and cash equivalents” in the 2016 financial statements included trust funds owing to the co-operating brokerages. No other finding of fact was available.

36. The Motion Judge, however, either found otherwise, or failed to turn his mind to this important fact. His finding that the recording of the commissions within the “cash and cash equivalents” category in the 2016 financial statements was reliable evidence that the commissions were TRP Realty’s property, and not held in the trust for the TRP Agents, is inconsistent (and irreconcilable) with the admission that the “cash and cash equivalents” category in the 2016 financial statements included trust funds belonging to the co-operating brokerages.

37. The Motion Judge’s error in this regard is evidenced by his (incorrect) finding of fact that the commissions owed to co-operating brokers were “lodged in the real estate trust account” when they were in fact in the commissions account. The Motion Judge’s finding that the co-operating

brokerage's commissions were placed in the real estate trust account was a palpable and over-riding error.

Reasons of the Motion Judge, para. 11, Exhibit "H" to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

Real Estate and Business Brokers Act, 2002, S.O. 2002, c. 30, Sched. C., at s. 27(1)

- (v) ***The Motion Judge failed to consider that even if the 2016 audited financials did pledge the commissions as security, TRP Realty could not revoke a trust that it had already constituted***

38. The Motion Judge erred in relying on the 2016 financial statements as establishing there was no trust, given that from 2010 onwards, TRP Realty kept the commissions in a segregated bank account explicitly identified as a "trust". The Motion Judge ought to have considered whether the financial statements, if they did pledge the commissions under the Secured Parties' GSAs, represented an impermissible revocation by TRP Realty of a trust that had been in existence since 2010.

Reasons of the Motion Judge, paras. 19-20, Exhibit "H" to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

Oosterhoff, Chambers & McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials* (8th Edition) Carswell: Toronto, at 329-330, BOA, Tab 8

- (vi) ***The Motion Judge erred in finding there was an "absence of evidence that the commission account at TD/Comerica/RBC was, in fact a trust account"***

39. The Motion Judge reached this conclusion in spite of finding as a fact that the commission account had the word "trust" as part of its nomenclature, and that this was "most likely" "requested by the client, TRP Realty, since the bank does not normally assign nomenclature of this kind to any account". There was clearly evidence of a trust. The Motion Judge therefore misapprehended the evidence.

Reasons of the Motion Judge, paras. 21 and 45(2), Exhibit "H" to the Goldblatt Affidavit (para. 11), Motion Record, Tab 2H

C. If the *BIA* applies, leave to appeal is not required

40. Section 193 of the *BIA* sets out the circumstances where an appellant has an appeal as of right, as opposed to being obliged to seek leave to appeal. The TRP Agents submit that they do not require leave to appeal under s. 193(e) of the *BIA* because the appeal falls within ss. 193(a), 193(b), and 193(c):

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

Bankruptcy and Insolvency Act, R.S.C., 1985, c. B-3, s. 193

(i) Section 193(a): Future rights

41. Leave to appeal is not required if the point at issue involves future rights. Future rights “refer to rights which could not at the present time be asserted but which will come into existence at a future time.”

Elias v. Hutchison (1981), 121 D.L.R. (3d) 95 (A.B.C.A.) at paras. 100-101, quoted in *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, at para. 22, BOA, Tab 1

42. Not all of the TRP Agents’ commissions are currently the property of TRP Realty: as noted by the Motion Judge, the TRP Agents’ entitlement to the commissions arises only on the closing of transactions, “most of which are scheduled to close in the future over a period that will run from 2018 until 2023.”

Reasons of the Motion Judge, para. 7 (emphasis added), Exhibit “H” to the Goldblatt Affidavit (para. 9), Motion Record, Tab 2H

43. The TRP Agents' future rights to their commissions are affected by the Order under appeal. The Motion Judge's disposition of the Commissions Motion applies not only to the commissions currently on deposit with TRP Realty, but those to be recovered upon closings in the next five years. The TRP Agents' appeal therefore involves their future rights, and leave to appeal is therefore not required.

(ii) Section 193(b): Likely to affect other cases of a similar nature in the bankruptcy proceedings

44. Section 193(b) is engaged where there are a number of persons in the bankruptcy proceedings who assert rights based on similar facts, and a judgment has been rendered declaring those rights to be well- or ill-founded.

Houlden, Morawetz & Sarra, *The 2016 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2016), at pg. 989, BOA, Tab 5

45. While the argument before the Motion Judge proceeded only in respect of the entitlement of the TRP Agents to commissions, the Receiver's motion was broader than this. The Receiver recognized that other classes of affected individuals arguably also had trust claims over the disputed funds. In its Notice of Motion, the Receiver sought:

the Court's advice and direction concerning whether any or all of the Third-party Commission (as defined below) collected and to be collected by the Receiver are held and are to be held in trust for the benefit of TRP Salespersons, the Outside Brokerages, the Assignees and/or the Cashback Buyers (as such terms are defined below) and such further and other relief as counsel may advise and this Honourable Court may permit.

46. While the Motion Judge made a determination only in respect of commissions collected on behalf of the TRP Salespersons (i.e., the TRP Agents), the Outside Brokerages, Assignees and/or Cashback Buyers may still seek to have this issue resolved.

47. The Cash Back Buyers and Assignees were clients of TRP Realty who received a portion of the net commissions once in TRP Realty's hands (i.e., from TRP Realty's operating account). This issue was put before the Court, and although no decision was rendered, the Motion Judge's decision will bear on any subsequent determination of the issue. The issue under appeal therefore "concern[s] 'real disputes' likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings", as required under section 193(b) of the *BIA*.

Receiver's Report to Court in respect of the Commissions Motion, para. 35(f), Exhibit "D" to the Goldblatt Affidavit (para. 5), Motion Record, Tab 2D

2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 22, at para. 32, BOA, Tab 1

(iii) 193(c): The property involved in the appeal exceeds in value \$10,000

48. Finally, leave to appeal is not required because the appeal concerns \$3,700,000 in commissions, which far exceeds the \$10,000 threshold in s. 193(c).

49. The consensus amongst Canadian courts is that the monetary threshold in s. 193(c) refers to the "value of the matter in controversy" or the property "in jeopardy", as opposed to establishing a requirement that the order under appeal make an actual monetary judgment in excess of \$10,000. This Court has repeatedly characterized the operative question as whether the appeal "directly involves", or puts "directly in issue", property in excess of \$10,000.

Houlden, Morawetz & Sarra, *The 2016 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2016), at pg. 989, BOA, Tab 5

Trimor Mortgage Investment Corp. v. Fox, 2015 ABCA 44, at para. 8, BOA, Tab 11

Enroute Imports Inc. (Re), 2016 ONCA 247, at paras. 5-6, BOA, Tab 3

50. The \$3,700,000 in commissions "directly in issue" and "in jeopardy" on this appeal unequivocally engage s. 193(c).

51. In *2403177 Ontario Inc. v. Bending Lake Iron Group Limited* (“*Bending Lake*”), Brown J.A. took a more restrictive approach to s. 193(c). However, even on his heightened standard, s. 193(c) is engaged by this appeal and leave is not required.

52. Applying a contextual approach “alive to...the needs of modern, “real-time” insolvency litigation”, Brown J.A. held that s. 193(c) “does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor’s property, or (iii) orders that do not result in a loss.” None of these restrictions apply to the TRP Agents’ appeal:

- (a) **The Order is not procedural:** it finally resolves rights in respect of trust property;
- (b) **The Order affects the value of the debtor’s property:** the determination of this issue will result in a significant swing in the value of the debtor's assets that can be realised by the Secured Parties; and.
- (c) **The Order resulted in a loss:** the TRP Agents commissions will not be returned to them as trust property (at least not in full), and their interests fall in priority as unsecured creditors. Being unsecured creditors as opposed to them having trust property returned to them is significant.

2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225, at paras. 48-50, 53, BOA, Tab 1

53. In the alternative, if leave to appeal is required, the TRP Agents request an order allowing them 30 days to seek leave to appeal. This is precisely the result directed by Brown J.A. in *Bending Lake*.

2403177 Ontario Inc. v. Bending Lake Iron Group Limited, 2016 ONCA 225, at para. 71, BOA, Tab 1

PART V - ORDER REQUESTED

54. The TRP Agents request:

- (a) an Order, as may be necessary, extending the time for delivery of a Notice of Appeal;
- (b) an Order giving direction in respect of whether leave to appeal is required, and if leave to appeal is required, setting a date by which the appellants must move for leave to appeal;
- (c) costs of this motion; and
- (d) such further and other grounds as counsel may advise and this Honourable Court may permit.

55. The TRP Agents estimate that time for oral argument is 30 minutes, not including reply.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 31st day of January, 2019



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SCHEDULE "A"

LIST OF AUTHORITIES

1. *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225
2. *Canada v. MKM Manufacturing Ltd.*, 48 C.B.R. (4th) 222
3. *Enroute Imports Inc. (Re)*, 2016 ONCA 247
4. *Eu v. Rosedale Realty Corp. (Trustee of)*, [1997] O.J. No. 2275
5. Houlden, Morawetz & Sarra, *The 2016 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2016)
6. *Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCCA 283
7. *National Telecommunications Inc. v. Stalt Telecom Consulting Inc.*, 2018 CarswellOnt 16593
8. Oosterhoff, Chambers, McInnes, *Oosterhoff on Trusts: Text, Commentary and Materials* (8th Edition) (Toronto: Carswell, 2014)
9. *RREF II BHB IV Portofino, LLC v. Portofino Corporation*, 2015 ONCA 906
10. *St. Denis v. TD Insurance Home & Auto Liberty Insurance Co. of Canada*, 80 O.R. (3d) 706
11. *Trimor Mortgage Investment Corp. v. Fox*, 2015 ABCA 44

SCHEDULE “B”

TEXT OF STATUTES, REGULATIONS & BY-LAWS

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

PART I – ADMINISTRATIVE OFFICIALS

Borrowing powers with permission of court

31 (1) With the permission of the court, an interim receiver, a receiver within the meaning of subsection 243(2) or a trustee may make necessary or advisable advances, incur obligations, borrow money and give security on the debtor’s property in any amount, on any terms and on any property that may be authorized by the court and those advances, obligations and money borrowed must be repaid out of the debtor’s property in priority to the creditors’ claims.

PART VII – COURTS AND PROCEDURE

Courts vested with jurisdiction

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

- (a) in the Province of Ontario, the Superior Court of Justice;
- (b) [Repealed, 2001, c. 4, s. 33]
- (c) in the Provinces of Nova Scotia and British Columbia, the Supreme Court;
- (d) in the Provinces of New Brunswick and Alberta, the Court of Queen’s Bench;
- (e) in the Province of Prince Edward Island, the Supreme Court of the Province;
- (f) in the Provinces of Manitoba and Saskatchewan, the Court of Queen’s Bench;
- (g) in the Province of Newfoundland and Labrador, the Trial Division of the Supreme Court;
and
- (h) in Yukon, the Supreme Court of Yukon, in the Northwest Territories, the Supreme Court of the Northwest Territories, and in Nunavut, the Nunavut Court of Justice.

Authority of the Courts

Court may extend time

187 (11) Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

Appeals

Court of Appeal

193 Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:

- (a) if the point at issue involves future rights;
- (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
- (c) if the property involved in the appeal exceeds in value ten thousand dollars;
- (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
- (e) in any other case by leave of a judge of the Court of Appeal.

PART XI – SECURED CREDITORS AND RECEIVERS

Receiver may apply to court for directions

249 A receiver may apply to the court for directions in relation to any provision of this Part, and the court shall give, in writing, such directions, if any, as it considers proper in the circumstances.

Bankruptcy and Insolvency General Rules, C.R.C., c. 368

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.

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

PART I – COURT OF APPEAL FOR ONTARIO

Court of Appeal jurisdiction

6 (1) An appeal lies to the Court of Appeal from,

- (a) an order of the Divisional Court, on a question that is not a question of fact alone, with leave of the Court of Appeal as provided in the rules of court;
- (b) a final order of a judge of the Superior Court of Justice, except an order referred to in clause 19 (1) (a) or an order from which an appeal lies to the Divisional Court under another Act;
- (c) a certificate of assessment of costs issued in a proceeding in the Court of Appeal, on an issue in respect of which an objection was served under the rules of court;
- (d) an order made under section 137.1. R.S.O. 1990, c. C.43, s. 6 (1); 1994, c. 12, s. 1; 1996, c. 25, s. 9 (17); 2015, c. 23, s. 1.

Real Estate and Business Brokers Act, 2002, S.O. 2002, c. 30, Sched. C

Trust account

27 (1) Every brokerage shall,

- (a) maintain in Ontario an account designated as a trust account, in,
 - (i) a bank, or an authorized foreign bank, within the meaning of section 2 of the Bank Act (Canada),
 - (ii) a corporation registered under the Loan and Trust Corporations Act, or
 - (iii) a credit union within the meaning of the *Credit Unions and Caisses Populaires Act*, 1994;
- (b) deposit into the account all money that comes into the brokerage's hands in trust for other persons in connection with the brokerage's business;
- (c) at all times keep the money separate and apart from money belonging to the brokerage; and
- (d) disburse the money only in accordance with the terms of the trust.

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

RULE 61 – APPEALS TO AN APPELLATE COURT

COMMENCEMENT OF APPEALS

Time for Appeal and Service of Notice

61.04 (1) An appeal to an appellate court shall be commenced by serving a notice of appeal (Form 61A or 61A.1) together with the certificate required by subrule 61.05 (1), within 30 days after the making of the order appealed from, unless a statute or these rules provide otherwise,

- (a) on every party whose interest may be affected by the appeal, subject to subrule (1.1); and

(b) on any person entitled by statute to be heard on the appeal. O. Reg. 14/04, s. 31; O. Reg. 536/18, s. 2 (1).

(1.1) The notice of appeal and certificate need not be served on,

- (a) a defendant who was noted in default; or
- (b) a respondent who has not delivered a notice of appearance, unless the respondent was heard at the hearing with leave.

Title of Proceeding

(2) The title of the proceeding in an appeal shall be in accordance with Form 61B.

Notice of Appeal

(3) The notice of appeal (Form 61A or 61A.1) shall state,

- (a) the relief sought;
- (b) the grounds of appeal; and
- (c) the basis for the appellate court's jurisdiction, including references to,
 - (i) any provision of a statute or regulation establishing jurisdiction,
 - (ii) whether the order appealed from is final or interlocutory,
 - (iii) whether leave to appeal is necessary and if so whether it has been granted, and
 - (iv) any other facts relevant to establishing jurisdiction.

(4) The notice of appeal, with proof of service, shall be filed in accordance with subrule 4.05 (4) (leaving in or mailing to court office) in the Registrar's office within ten days after service

FIREPOWER DEBT GP INC., AS AGENT
Applicant (Respondent)

-and- THEREDPIN, INC. et al.
Respondents

Court of Appeal File No. C66336

COURT OF APPEAL FOR ONTARIO

PROCEEDING COMMENCED AT
TORONTO

FACTUM
(Returnable February 11, 2019)

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