COURT OF APPEAL OF ALBERTA

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COURT OF APPEAL FILE NUMBER:	2101-0119AC
TRIAL COURT FILE NUMBER:	25-2332583
REGISTRY OFFICE:	CALGARY
APPLICANT:	ALVAREZ & MARSAL CANADA INC. in its capacity as the Court-appointed receiver and manager of MANITOK ENERGY INC.
STATUS ON APPEAL:	RESPONDENT
RESPONDENT:	YANGARRA RESOURCES LIMITED
STATUS ON APPEAL:	APPELLANT
NON-PARTY:	ORLEN UPSTREAM CANADA LTD.
DOCUMENT:	**FACTUM**

Appeal from the Decision of
The Honourable Justice B.E. Romaine
Dated the 14th day of April, 2021
Filed the 31st day of May, 2021

FACTUM AND AUTHORITIES OF THE RESPONDENT

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OVERVIEW

1. This is the factum of Alvarez & Marsal Canada Inc. (the "**Receiver**") in its capacity as the Court-appointed receiver and manager of Manitok Energy Inc. ("**Manitok**") in response to the factum of the Appellant, Yangarra Resources Limited ("**Yangarra**").

2. Contrary to Yangarra's submissions, this appeal does not concern "the purpose and effect of sale approval and vesting orders". Rather, it concerns the narrow issue of whether a pre-receivership debt claim ought to be treated as a secured claim because it arose from an agreement that was approved by a sale approval and vesting order granted prior to the receivership. The learned chambers justice, quite properly, found that it cannot.

3. A threshold issue for purposes of this appeal is whether Yangarra was required to obtain leave to appeal, and if so, what is the consequence of its failure to do so.

PART I – FACTS

4. The facts set forth below supplement and clarify the facts set forth in Yangarra's factum.

A. The Receivership Proceedings and the Orlen Action

5. Pursuant to an asset purchase agreement made effective October 1, 2017, Yangarra purchased certain assets from Manitok in the Ferrier area of Alberta ("**Yangarra APA**"). The Yangarra APA was purportedly based on a letter of intent presented in December 2017 and was executed on or about January 31, 2018.[1]

6. Manitok was operating under *Bankruptcy and Insolvency Act* ("**BIA**") proposal proceedings ("**Proposal Proceedings**") at the time the Yangarra APA was

[1] Sixteenth Report of the Receiver, dated October 5,2020 ("**Receiver's Report**"), Respondent's Extracts of Key Evidence ("**REKE**") page 010, para. 20; page 043 (Appendix G)

executed.[2] FTI Consulting Canada Inc. ("**FTI**") was appointed as Proposal Trustee ("**Proposal Trustee**") on or about January 10, 2018[3] and Manitok obtained an Interim Financing Order on January 12, 2018.[4]

7. Manitok, as debtor in possession in the Proposal Proceedings, obtained a Sale Approval and Vesting Order ("**SAVO**") on February 14, 2018[5] and the Yangarra APA closed on February 16, 2018.[6]

8. On February 20, 2018 the Court of Queen's Bench of Alberta granted a Receivership Order in Court File No. 25-2332583 (the "**Receivership Proceedings**"), pursuant to which the Respondent, Alvarez & Marsal Canada Inc. ("**A&M**"), was appointed as receiver and manager, without security, of all of the current and future assets, undertakings and properties of every nature and kind whatsoever, including but not limited to real property and wherever situate including all proceeds thereof (the "**Property**") of Manitok pursuant to section 243(1) of the BIA and section 13(2) of the *Judicature Act*.[7]

9. Also on February 20, 2018, the proposal proceedings were terminated by the court and Manitok was deemed bankrupt, with A&M replacing FTI as its Licensed Insolvency Trustee.[8]

10. On December 4, 2018, Yangarra commenced an action against Orlen Upstream Canada Ltd. ("**Orlen**") in the Court of Queen's Bench of Alberta as Court File No. 1801-17233 (the "**Orlen Action**").[9]

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[2] Receiver's Report, REKE page 010, para. 21
[3] First Report of the Proposal Trustee, Appellant's Extracts of Key Evidence ("**AEKE**") page 004
[4] Interim Financing Order dated January 12, 2018, Appeal Record page 86
[5] SAVO, Appeal Record page 121
[6] Receiver's Report, REKE page 010, para. 21
[7] Receiver's Report, REKE page 006, para. 1; Receivership Order filed February 20, 2018, Appeal Record page 142
[8] Receiver's Report, REKE page 006, para. 2; Order terminating Notice of Intention filed February 20, 2018, Appeal Record page 139
[9] Receiver's Report, REKE page 008, para. 13; page 015 (Appendix A)

11. On January 23, 2019, Orlen filed a Statement of Defence together with a Counterclaim seeking damages from Yangarra in the amount of $94,975 plus interest and costs (the "**Orlen Counterclaim**").[10]

12. On March 4, 2019, Yangarra filed a Statement of Defence to the Orlen Counterclaim.[11]

13. On August 23, 2019, Yangarra filed a Third Party Claim against A&M in connection with Orlen's Counterclaim in the Orlen Action (the "**Yangarra Claim**"). Yangarra subsequently filed an application for leave to commence that Third Party Claim.[12]

14. A&M objected to Yangarra's Third Party Claim and on October 29, 2019, a Consent Order was granted by the Court,[13] pursuant to which:

    a) Yangarra was directed to file and serve in the Orlen Action an Amended Third Party Claim and an amended application for leave to file the Amended Third Party Claim ("**Amended Leave Application**") by October 30, 2019, replacing A&M with Alvarez and Marsal Canada Inc. solely in its capacity as Court Appointed Receiver and not in any personal capacity. This was done on October 29, 2019, at which time Manitok was also added as a Third Party Defendant.[14]

    b) Yangarra was directed to seek leave to file and serve an application in the Manitok Receivership Action, #25-2332583, for payment of the Winter Service Funds and Proceeds, as those terms are defined in its Third Party Claim (the "**Receivership Application**"). However, no Receivership Application was ever filed or served.[15]

[10] Receiver's Report, REKE page 008, para. 14; page 020 (Appendix B)
[11] Receiver's Report, REKE page 008, para. 15; page 022 (Appendix C)
[12] Receiver's Report, REKE page 008 para. 16; page 026 (Appendix D)
[13] Receiver's Report, REKE page 008, para. 17; page 033 (Appendix E)
[14] Receiver's Report, REKE page 008, para. 17(a); page 036 (Appendix F)
[15] Receiver's Report, REKE page 009, para. 17(b)

c) The Yangarra Claim was stayed pending the determination of the Receivership Application. Within 7 days of a final decision on the Receivership Application or such other time as agreed by the parties, the Yangarra Claim is to be discontinued without costs.[16]

d) The Receiver was permitted to apply to strike out or dismiss the Yangarra Claim should it deem the circumstances to so warrant.[17]

15. The Yangarra Claim seeks payment by the Receiver of the Proceeds, as defined in the Yangarra Claim. These are funds payable by Manitok in respect of production from certain natural gas wells subject to the Yangarra APA for December 2017 and January 2018, which was prior to Manitok's receivership.

16. The Yangarra Claim also seeks contribution and indemnity from the Receiver in respect of any liability for the amount being sought in the Orlen Counterclaim. The Orlen Counterclaim seeks payment from Yangarra of $94,975 in respect of processing and related fees originally invoiced to Manitok for the period from October 2017 to January 2018, which again was prior to Manitok's receivership. This appears to be what Yangarra is claiming to be owed by Manitok for Winter Service Funds, as defined in the Yangarra Claim.[18]

17. As noted above, the Consent Order required Yangarra to bring the Receivership Application for payment of the Proceeds and Winter Service Funds. However, that was never done.[19] Accordingly, the Receiver applied to strike out the Yangarra Claim as the Receivership Proceedings were otherwise drawing to a close.

[16] Receiver's Report, REKE page 009, para. 17(c)
[17] Receiver's Report, REKE page 009, para. 17(d)
[18] Receiver's Report, REKE page 009, para. 18
[19] Receiver's Report, REKE page 009, para. 19

B. The Yangarra APA

18. The Yangarra Claim arises out of the Yangarra APA, which was a pre-receivership purchase transaction. The vendor under the Yangarra APA was Manitok, not the Receiver or the Proposal Trustee.[20]

19. The Yangarra APA included certain Manitok natural gas wells. Orlen processed the natural gas and related products from these wells ("**Production**") through its facilities and charged Manitok processing and related fees. Manitok took the Production in kind and arranged for the sale of Production to various third party purchasers, who paid Manitok directly.[21]

20. The Yangarra APA was a standard form of agreement generally utilized for oil and gas transactions in an insolvency situation.[22] Provisions of the Yangarra APA relevant to the Yangarra Claim include the following:

    a) The purchase price to be paid at closing was the sum of $2,082,500 plus or minus any adjustments for revenue and expenses of Manitok made on an accrual basis in accordance with generally accepted accounting principles between the effective date of October 1, 2017 and the closing date, which was February 16, 2018 ("**Closing Date**").[23]

    b) An interim accounting for adjustments was to be done and an interim statement of adjustments ("**ISOA**") was prepared and delivered on the Closing Date. The ISOA indicated a purchase price of $2,027,470.57, after GST of $20,825.00 and adjustments of $75,854.43 in favor of Yangarra as Purchaser for revenue and expenses for October and November, 2017.[24]

[20] Receiver's Report, REKE page 043 (Appendix G)
[21] Receiver's Report, REKE page 010, para. 22
[22] Receiver's Report, REKE page 010, para. 23
[23] Receiver's Report, REKE page 010, para. 23(a); pages 055-057, sections 2.5-2.7 (Appendix H)
[24] Receiver's Report, REKE page 010, para. 23(b); page 113(Appendix I)

c) Within sixty days of the Closing Date, a final accounting of adjustments was to be done and a final statement of adjustment ("**FSOA**") was to be agreed to by the parties. The FSOA was never done.[25]

d) Manitok as Vendor was responsible for all costs up to and including the Closing Date and Yangarra as Purchaser was responsible for all such costs thereafter.[26]

e) All adjustments were to be adjustments to the Purchase Price.[27]

f) Any Conveyance Document assigning a Title and Operating Document was to provide that notwithstanding Court Approval and such Conveyance Document, Yangarra as Purchaser was to have assumed such Title and Operating Document upon notice in writing of such assumption being given to any Third Party that was party to such Title and Operating Agreement.[28]

g) The Yangarra APA is the entire agreement between the parties.[29]

21. The General Conveyance executed and delivered at closing was made as of the Closing Date and indicates that:[30]

> *"This General Conveyance and the transfer of title to and possession of Vendor's interest in and to the Assets will, subject to the terms of the Agreement, be effective as of the Closing Date."*

22. Again, the Closing Date and the SAVO both pre-dated the Receivership Order.

[25] Receiver's Report, REKE page 011, para. 23(c); page 056, section 2.7(a) (Appendix H)
[26] Receiver's Report, REKE page 011, para. 23(d); page 055, section 2.6(b) (Appendix H)
[27] Receiver's Report, REKE page 011, para. 23(e); page 056, section 2.7(b) (Appendix H)
[28] Receiver's Report, REKE page 011, para. 23(f); page 066, section 7.4(b) (Appendix H)
[29] Receiver's Report, REKE page 011, para. 23(g); page 072, section 11.9 (Appendix H)
[30] Receiver's Report, REKE page 011, para. 24; page 104, section 5 (Appendix G)

C. Proceedings Giving Rise to the Appeal

23. On October 5, 2020 the Receiver applied in the Receivership Proceedings for an Order striking out the Yangarra Claim. Romaine J. granted that application by written decision dated April 14, 2021 ("**Lower Decision"**).[31] The Order formalizing the Lower Decision was filed on May 31, 2021.[32]

24. Yangarra filed a Notice of Appeal in connection with the Lower Decision on May 11, 2021.[33] However, this was outside the 10-day period prescribed by s. 193 of the BIA. Accordingly, Yangarra applied for an extension of the appeal period.[34]

25. Schutz J.A. granted Yangarra's application for an extension of the appeal period by written decision dated July 27, 2021.[35] However, she left the issue of whether Yangarra required leave to appeal for determination by this Honourable Court.[36]

PART II – GROUNDS OF APPEAL

26. Yangarra in its factum cites its substantive grounds of appeal before it addresses the issue of whether it required leave to appeal. However, the latter is a threshold issue which needs to be determined at the outset. As such, the Receiver will address this issue first in its argument below.

PART III – STANDARD OF REVIEW

27. Yangarra cites *Hill v Hill* in support of the proposition that the applicable standard of review on this appeal is correctness as the correct interpretation and application of the SAVO is a question of law.[37] However, this appeal does not involve the interpretation of the SAVO as much as it involves the findings of the learned chambers justice with respect to the application of the SAVO to the

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[31] Appeal Record page 181
[32] Appeal Record page 189
[33] Appeal Record page 191
[34] Appeal Record page 81
[35] Appeal Record page 198
[36] Appeal Record page 212, para 55
[37] Yangarra's Factum, at para. 19 citing *Hill v Hill*, 2016 ABCA 49 ("***Hill***") **[Yangarra's Authorities]**.

specific facts of this case, in which Manitok subsequently became subject to bankruptcy and receivership orders. As noted in *Hill*, the standard of review with respect to findings of fact is "palpable and overriding error.[38]

28. To the extent that the interpretation of the SAVO is in issue for purposes of this appeal, this involves issues of mixed fact and law, which are also subject to the standard of "palpable and overriding error".

29. That being said, it is submitted that even on a standard of "correctness", the learned chambers justice did not commit any reviewable errors in granting the Receiver's application to strike the Yangarra Claim.

PART IV – ARGUMENT

A. Yangarra Required Leave to Appeal

30. Yangarra addresses the issue of whether it required leave to appeal as something of an afterthought in its factum. As noted above, however, this is a threshold issue which needs to be determined at the outset.

31. Yangarra neither sought nor obtained leave to appeal the decision of the learned chambers justice. Even now, it has not brought such an application.

(i) Yangarra Does Not Have an Automatic Right of Appeal

32. Unless a party meets one or more of the limited criteria for an automatic right of appeal under ss. 193(a)-(d) of the BIA, it is obligated to seek leave to appeal under s. 193(e).[39] As a matter of procedure, Rules 31(1) and (2) of the BIA Rules require a notice of appeal to be filed and served within 10 days after the order or

[38] *Hill* **[Yangarra's Authorities]**, at para 23 citing *Housen v Nikolaisen*, 2002 SCC 33 ("***Housen***") at para. 10

[39] See *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66 ("***Athabasca***") **[Tab 1]**, at para. 7

decision appealed from, which must include an application for leave to appeal when an appeal is brought under s. 193(e).[40]

33. Yangarra did not follow this procedure. Instead, it filed a Notice of Appeal outside the 10-day appeal period prescribed by the BIA Rules and did not include an application for leave to appeal. It then applied for an order extending the appeal period, but still did not include an application for leave to appeal.

34. The Receiver raised this issue in opposing Yangarra's application to extend the appeal period. As noted above, Schutz J.A. extended the time for appeal, but left the issue of whether Yangarra required leave to appeal for determination by this Honourable Court.

35. Yangarra argues that its appeal falls within ss. 193(a), 193(b) and/or 193(c) of the BIA in that it involves future rights, is likely to affect other cases when sale and approval orders are considered, and exceeds $10,000 in value respectively. The Receiver submits that Yangarra's appeal does not invoke any of these provisions.

36. In Her Ladyship's decision extending the time for Yangarra to appeal, Schutz J.A. stated that "it is doubtful whether this appeal fits within Sections 193(a) ["future rights"], or 193(b) ["likely to affect other cases of a similar nature in the bankruptcy proceedings"]".[41] She then considered whether it fits within paragraph 193(c) ["if the property involved in the appeal exceeds $10,000 in value"], but did not decide this issue.

37. As noted above, Yangarra has framed its appeal as arising out of the interpretation of the SAVO. For the reasons that follow, this appeal does not trigger a right of appeal under any of ss. 193(a)-(c) of the BIA. Accordingly, leave to appeal pursuant to s. 193(e) is required and ought to be denied, as discussed below.

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[40] BIA Rules, Rule 31(1) **[Yangarra's Authorities]**
[41] Appeal Record page 211, para. 48

(a) Future Rights – s. 193(a)

38. Yangarra baldly states in its factum that its appeal involves future rights, without identifying the future rights allegedly in jeopardy.

39. "Future rights" are future legal rights, not procedural rights or commercial advantages or disadvantages that may accrue from the order challenged on appeal.[42] They do not include rights that presently exist but that may be exercised in the future.[43]

40. In *2403177 Ontario Inc v Bending Lake Iron Group Ltd*, the Court found that s. 193(a) did not apply because, *inter alia*, to the extent that the approval and vesting order in question affected the rights of those with an economic interest in the debtor, it affected the present, existing rights of the debtor's creditors and shareholders, not their future rights.[44]

41. Similarly, the SAVO has no effect upon the future rights of Yangarra. The right it asserts is the right to recover amounts allegedly due and owing under the Yangarra APA. As this is a present and existing right, Yangarra does not have a right of appeal pursuant to s. 193(a).

(b) Effect on Proceedings – s. 193(b)

42. Yangarra argues that its appeal is likely to affect other cases when sale and approval orders are considered. However, it misapprehends the scope of s. 193(b) in saying that this provision will be applicable if the outcome of the appeal will affect the disposition of later cases in bankruptcy law.

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[42] *Bending Lake*, 2016 ONCA 225 ("***Bending Lake***") **[Tab 2]**, at para 23 citing *Business Development Bank of Canada v Pine Tree Resorts Inc*, 2013 ONCA 282 ("***Pine Tree***") **[Tab 3]**, at para. 15
[43] *Ibid*
[44] *Bending Lake* **[Tab 2]**, at para. 40

43. In reality, for s. 193(b) to operate, the appeal must concern "real disputes likely to affect other cases raising the same or similar issues in the same bankruptcy or receivership proceedings".[45]

44. The Receivership Proceedings are substantially complete, with the Yangarra Claim being one of the few remaining substantive issues requiring finalization for the purpose of allowing the Receiver to obtain its discharge.[46] Accordingly, this appeal will not affect any other cases in these Receivership Proceedings.

45. In the result, Yangarra has no right of appeal pursuant to s. 193(b).

(c) Property over $10,000 – s. 193(c)

46. Courts have held that a narrow construal of "property involved in the appeal" is necessary under s. 193(c). Otherwise, the low quantum of this automatic right of appeal would make s. 193(e) practically redundant.[47] As Paperny J.A. recently held in *Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*:

> Applicants also rely on s 193(c). They assert that the value of the property far exceeds the threshold of ten thousand dollars, because the value of the asset being sold exceeds that amount. This is a broad interpretation of "value of the property" within the meaning of s 193(c), and has been rejected. In *Dominion Foundry*, the Manitoba Court of Appeal noted that to allow an appeal as of right under subsection (c) where the property of the bankrupt exceeds this threshold would undermine the purpose of the BIA, which is to allow for the disposition of the bankrupt's assets and the distribution of the proceeds amongst creditors. Almost every case would qualify, making the requirement for leave meaningless and undermining one of the most important purposes of the act, expeditious determination and the prospect of finality.[48]

47. Three principles have emerged from the decisions adopting a narrow approach, namely that s. 193(c) does not apply to: (i) orders that are procedural in nature;

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[45] *Ibid*, at para 32 citing *Global Royalties Ltd v Brook*, 2016 ONCA 50 at para. 19 (emphasis added)
[46] Receiver's Report, REKE page 013, para. 28
[47] *Downing Street Financial Inc v Harmony Village-Sheppard Inc*, 2017 ONCA 611 **[TAB 4]** at para. 21 citing *Pine Tree* **[Tab 3]**, at para 17. See also: *Re Enroute Imports Inc,* 2016 ONCA 247 **[Tab 5]**, at para. 5 and *Romspen Investment Corp v Courtice Auto Wreckers Ltd*, 2017 ONCA 301 **[Tab 6]**, at para. 22
[48] *Athabasca* **[Tab 1]**, at para. 12

(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 (the "***Bending Lake* Principles**").[49]

48. In its factum, Yangarra notes that this appeal concerns the narrow issue of what legal effect a vesting order has in the context of subsequent insolvency proceedings of the same debtor.[50]

49. This Court, among others, has considered s. 193(c) in relation to approval and vesting orders involving post-receivership transactions. These authorities are generally favorable to the Receiver's position, as the approval and vesting orders in question concerned the methods by which the receiver realized the estate's assets and were therefore found to be procedural in nature and not subject to an automatic right of appeal.[51]

50. There is no sound policy reason why an approval and vesting order that pre-dates the receivership of the debtor should be treated any differently.

51. Where, as in this case, the court has determined that certain claims should be struck for reasons including that those claims involve pre-receivership transactions and obligations to which the receiver is not bound, an automatic right of appeal would offend the "expeditious determination and the prospect of finality", which is one of the most important purposes of the BIA.[52]

52. If Yangarra were accorded an automatic right of appeal under s. 193(c), it would effectively receive a key to the Court of Appeal without the Receiver being permitted to speak to Yangarra's right to enter.

53. The end results of an automatic right of appeal in these circumstances are the erosion of the debtor's assets to the detriment of secured creditors and a squandering of the Court's valuable resources. To avoid this wastefulness, the

[49] *Bending Lake* **[Tab 2]**, at para. 53
[50] Yangarra's Factum, at para. 62
[51] See for example *Athabasca* **[Tab 1]**, at paras 12-16, *Bending Lake* **[Tab 2]**, at paras. 43-70 and *Cosa Nova Fashions Ltd v the Midas Investment Corporation*, 2021 ONCA 581 **[Tab 7]**, at paras. 20-35
[52] *Athabasca* **[Tab 1]**, at para. 12

test for granting leave under s. 193(e) incorporates an assessment respecting the merits of an appellant's case as an integral component of the analysis. This process is also in the interests of procedural fairness.

54. Yangarra relies on *Trimor Mortgage Investment Corp v Fox* for the proposition that the focus of the s. 193(c) inquiry is the amount of money at stake.[53] It also cites *1905393 Alberta Ltd v Servus Credit*, wherein this Court questioned whether s. 193(c) should be construed narrowly as per various Ontario cases.[54]

55. It is important to note that *Trimor* was decided before the narrow interpretation of s. 193(c) came into favor with the oft-cited *Bending Lake* decision. Accordingly, *Trimor* is of little precedential value. Further, since *190 Alberta* was decided, this Court has unequivocally adopted the narrow approach to s. 193(c).[55]

56. The only authorities cited by Yangarra in support of its position that s. 193(c) applies are *Trimor* and *190 Alberta*, which favour the now defunct broad approach. No authorities have been cited wherein an automatic right of appeal arose in a situation involving a sale and vesting order.

57. As noted above, the authorities have found that sale and vesting orders are not subject to an automatic right of appeal pursuant to s. 193(c). In *Athabasca*, Paperny J.A. noted that an approval and vesting order is procedural in nature and "does not determine the entitlement of any party with an economic interest in the sale proceeds".[56] Yangarra's appeal, which arises out of the chambers justice's application of the SAVO, therefore does not fit within the ambit of s. 193(c).

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[53] *Trimor Mortgage Investment Corp v Fox*, 2015 ABCA 44 ("***Trimor***") **[Yangarra's Authorities]**
[54] *190 Alberta* **[Yangarra's Authorities]**
[55] See *Athabasca* **[Tab 1]**, at paras. 8-16
[56] *Athabasca* **[Tab 1]**, at para. 15

58. For the reasons set forth above, the Receiver submits that Yangarra requires leave to appeal pursuant to s. 193(e). This is particularly so in view of the existing jurisprudence indicating that sale and vesting orders are not subject to an automatic right of appeal pursuant to s. 193(c).

(ii) Yangarra's Failure to Obtain Leave is Fatal to its Appeal

59. Rule 31(1) of the BIA Rules states that an appeal to a court of appeal must be made by filing a notice of appeal 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. Rule 31(2) of the BIA Rules states that if an appeal is brought under s. 193(e), the notice of appeal must include an application for leave.

60. Yangarra neither sought nor obtained leave to appeal the decision of the learned chambers justice. Even now, Yangarra has not brought such an application.

61. One approach taken by the courts when dealing with the situation of an invalid notice of appeal in relation to an order that can only be appealed with leave is to make an order quashing the appeal or declaring the notice of appeal to be a nullity because of the failure to seek leave to appeal.[57] Another approach is to permit the notice of appeal to stand as a notice of application for leave to appeal and grant the appellant time to bring an application for leave to appeal.[58] A third approach is to convert the notice of appeal into an application for leave to appeal.[59]

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[57] *PricewaterhouseCoopers Inc v Ramdath*, 2018 MBCA 41 ("***Ramdath***") **[Tab 8]**, at para. 26 citing *Kapelus v University of British Columbia*, 2002 BCCA 566 at para 10, aff'd 2003 BCCA 109, *Wright v Sun Life Assurance Co of Canada*, 2015 BCCA 312 at para. 60, aff'd 2015 BCCA 528 and *Bending Lake* **[Tab 2]** at para. 71

[58] *Ramdath* **[Tab 8**], at para 27 citing *Freshwest Equities Trading Corp v Dosanjh*, 2015 BCCA 482 at para 11 and *Sangha v Bhamrah*, 2017 BCCA 434 at para. 12

[59] *Industrial Alliance Insurance and Financial Services Inc v Wedgemount Power Limited Partnership*, 2018 BCCA 283 **[Tab 9]**, at para. 27

62. In *2003945 Alberta Ltd v 1951584 Ontario Inc*, this Court found that the appellant had failed to comply with Rule 31(2) of the BIA Rules when it filed a notice of appeal only, and that the notice of appeal therefore was of no effect.[60]

63. In *The McDonnell Group, LLC v Control Mobile Inc*, the Court found that whether an appeal ought to be converted into an application for leave to appeal is a matter of discretion.[61] The Court refused to exercise its discretion to convert the notice of appeal to an application for leave to appeal in that case, finding, *inter alia*, that no division of the Court would interfere with the earlier decision.[62]

64. Yangarra has had ample opportunity to file an application for leave to appeal, but has chosen not to do so. Any uncertainty on Yangarra's part as to whether leave to appeal was required warranted the exercise of caution and compliance with the provisions of Rules 31(1) and (2). Moreover, and for the reasons set out below, there is no reviewable error in the reasons of the learned chambers justice that would warrant disturbing her decision.

65. In keeping with *Control*, the Receiver submits that Yangarra's appeal should not be converted into an application for leave to appeal. Rather, the appeal ought to be quashed or the notice of appeal declared a nullity, in accordance with *200 Alberta* and the cases cited in *Ramdath*.[63]

(iii) The Test for Leave to Appeal is Not Met

66. In the event that this Honourable Court is prepared to extend the time for an application for leave to appeal, or to convert the notice of appeal into a leave application, it is submitted that the test for granting leave to appeal is not met. Yangarra addresses this issue in a cursory fashion at paragraphs 69-73 of its factum.

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[60] *2003945 Alberta Ltd v 1951584 Ontario Inc*, 2018 ABCA 48 ("***200 Alberta***") **[Tab 10]**, at para. 24
[61] *The McDonnell Group, LLC v Control Mobile Inc*, 2018 BCCA 309 ("***Control***") **[Tab 11]**, at para. 30
[62] *Ibid*, at para. 31
[63] *Supra*, footnotes 57 and 60

67. The factors to be considered in an application for leave to appeal under s. 193(e) of the BIA are:

(a) Is the point of appeal of significance to the bankruptcy practice?

(b) Is the point of significance to the action itself?

(c) Is the appeal *prima facie* meritorious?

(d) Will the appeal unduly hinder the progress of the action or the insolvency proceedings?

(e) Does the judgment appear to be contrary to law, amount to an abuse of judicial power, or involve an obvious error causing prejudice, for which there is no other remedy?[64]

68. Whether the appeal is *prima facie* meritorious is the starting point for the application of s. 193(e). If the appeal has *prima facie* merit, only then will the other elements of the test be considered.[65]

69. In assessing the merits of a leave to appeal motion under this provision, the Court's inquiry is informed by the deference owed to a commercial court justice. Absent demonstrable error, an appeal court will not interfere.[66] In addition, where the order sought to be appealed from is discretionary, leave will not be granted unless the matter is of importance either to the administration of justice generally or to the respective rights of the parties to the litigation.[67]

70. The Court in *Re Ravelston Corp* cited with approval the following passage from *Re Canadian Airlines Corp*:

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[64] *200 Alberta* **[Tab 10]**, at para. 41
[65] *Enchino v Munro*, 2014 ABCA 422 ("***Enchino***") **[Tab 12]**, at para. 11
[66] *Re Kaiser,* 2011 ONCA 713 **[Tab 13]**, at para. 18
[67] *Ibid*, at para. 19

> … there must appear to be an error in principle of law or a palpable and overriding error of fact. Exercise of discretion by a supervising judge, so long as it is exercised judicially, is not a matter for interference by an appellate court, even if the appellate court were inclined to decide the matter another way. It is precisely this kind of a factor which breathes life into the modifier "prima facie" meritorious.[68]

71. In *Enchino*, the Court found that the applicants had not established that their appeal was *prima facie* meritorious or raised an arguable case, as the chambers justice had applied the appropriate principles and the correct legal standard.[69] As a result, Bielby J.A. refused to grant leave to appeal.[70]

72. In *Athabasca*, the Court found that the applicants had not identified any error of law in the supervising justice's analysis that would warrant judicial intervention. Rather, it was a discretionary decision that warranted a high degree of deference and the prospect of a successful appeal was therefore doubtful.[71] Accordingly, Paperny J.A. refused to grant leave to appeal.[72]

73. The lack of merit in Yangarra's appeal is addressed in the next section of this factum. The Receiver submits that not only does the appeal fail to establish threshold merit, but it is wholly without merit as a matter of substance. Accordingly, Yangarra does not meet the test for leave to appeal.

74. Should this Honourable Court have any reservations with respect to the merits of Yangarra's case, this factor, together with other elements of the s. 193 test (which also are unfavorable to Yangarra's position, as set out above) are sufficient to refuse leave to appeal.[73] Further, even if the appeal were found to have some degree of merit, the jurisprudence has evolved to a point where the

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[68] *Ravelston Corp, Re*, [2005] OJ No 5351 (ONCA) **[Tab 14]**, at para. 30 citing *Canadian Airlines Corp, Re,* 2000 ABCA 149 at para. 35
[69] *Enchino* **[Tab 12]**, at para. 12
[70] *Ibid* at para. 25
[71] *Athabasca* **[Tab 1]**, at para. 25
[72] *Ibid*, at para. 29
[73] *Pine Tree* **[Tab 3]**, at para. 41

test for leave to appeal is not simply merit-based. Rather, it requires a consideration of all of the factors outlined above.[74]

75. As for the remaining s. 193 factors, the Receiver submits as follows:

(a) This appeal addresses an extremely narrow issue, which Yangarra describes as the legal effect of a vesting order in the context of subsequent insolvency proceedings of the same debtor.[75] The Receiver submits that the significance of this appeal to the practice of bankruptcy is limited to this Court's decision respecting the s. 193 issue.

(b) As noted in *Athabasca*, it would be a rare case where an interested party does not view a proposed appeal to be significant to the action itself.[76] In most instances, the answer to this question will be in the affirmative, but will be balanced against the other criteria.[77]

(c) Yangarra's late filing of its notice of appeal and failure to file an application for leave to appeal contrary to Rules 31(1) and (2) have already created unnecessary delay and uncertainty in the Receivership Proceedings. Should leave to appeal be granted, Manitok's creditors will be prejudiced as a result of the additional delay in distributing the funds the Receiver has held back for the Yangarra Claim.

(d) In *Pine Tree*, the Court subsumed the final s. 193(e) factor into the consideration of the *prima facie* merit of the proposed appeal.[78] The Receiver's submissions on the substance of Yangarra's appeal are set forth below.

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[74] *Ibid*, at para. 32
[75] Yangarra's Factum, at para. 62
[76] *Athabasca* **[Tab 1]**, at para. 20
[77] *Ibid*
[78] *Pine Tree* **[Tab 3]**, at para. 31

76. In short, the Receiver submits that Yangarra has not met the threshold requirement of establishing that its appeal has *prima facie* merit. In the alternative, even if *prima facie* merit is demonstrated, the remaining s. 193(e) factors warrant denying Yangarra leave to appeal.

B. The Learned Chambers Justice Did Not Commit a Reviewable Error in Interpreting the SAVO or the Yangarra APA

77. Contrary to Yangarra's submissions, Romaine J. did not find that the Proceeds and Winter Service Funds form part of the assets of the Estate of Manitok.[79] Indeed, the Receiver does not deny that Yangarra acquired clear title to these assets as part of the Yangarra APA pursuant to the terms of the SAVO. However, the Proceeds were payable by Manitok in respect of production for December 2017 and January 2018 and the Winter Service Funds were payable to Orlen in respect of processing and related fees originally invoiced to Manitok for the period from October 2017 to January 2018. As these amounts were all payable prior to the issuance of the Receivership Order on February 20, 2018, they give rise to unsecured claims in the Receivership Proceedings.

78. With respect to Yangarra's claim against the Receiver for contribution and indemnity, it is beyond doubt that any direct claim Orlen may have had against Manitok for payment of the Winter Service Funds would have been an unsecured claim in the Receivership Proceedings. As the Receiver understands it, even Orlen does not take issue with this proposition.

79. Yangarra incorrectly asserts in its factum that it was not a creditor of Manitok's.[80] Upon the execution of the Yangarra APA, as approved by the SAVO, Yangarra became contractually entitled to payment of the Proceeds by Manitok. As such, it became a creditor of Manitok's, without security.

[79] Yangarra's Factum, at para 17(b)
[80] Yangarra's Factum, at paras. 26 and 53

80. In the Court below, Yangarra argued, as it does on this appeal, that these pre-receivership claims can and should be addressed through a proper interpretation of the SAVO. After considering that position, Romaine J. found as follows: [81]

> [30] Yangarra submits that this dispute can and should be addressed through a proper interpretation of the [SAVO]. However, there is nothing in that order that would change the status of any claim that Yangarra may have from an unsecured claim in the Manitok receivership to a secured claim or that obliges the Receiver to treat the claim as anything other than an unsecured claim.
>
> [39] What the [SAVO] affected [sic] was approval of a sale transaction, defined as the Transaction, contemplated by an agreement for purchase and sale, and the execution of the sale agreement.
>
> [42] In summary, the [SAVO] does not create any rights in Yangarra or obligations of Manitok with respect to the Ferrier purchase and sale that are not contemplated by the agreement.
>
> [43] While the [SAVO] provides that the vesting of the purchased assets will be binding on any trustee in bankruptcy, it does not expand Yangarra's rights under the purchase and sale agreement.
>
> [47] While Yangarra's indemnity claim against Manitok may not be statute-barred, it would still be a contingent unsecured claim in the receivership.
>
> [48] In the circumstances, the Receiver is entitled to the relief it seeks: Yangarra's claim to the funds held by the Receiver pending the resolution to its claim relating to the sale of property to Yangarra is struck.

81. Yangarra states in its factum that, while Romaine J. held that the unpaid amounts were unsecured obligations, she did not include an analysis of the effect of the SAVO having been granted pre-receivership.[82] It then recites the terms of the SAVO (which Romaine J. considered), but provides no assessment of its own respecting the effect of the pre-receivership circumstances of the SAVO. It simply asserts that neither Manitok nor the Receiver have a valid claim to the unpaid amounts.[83]

82. Romaine J.'s interpretation and application of the Yangarra APA and SAVO were simple and straightforward. She undertook a plain reading of the language

[81] Lower Decision, Appeal Record page 181
[82] Yangarra's Factum, at para. 30
[83] Yangarra's Factum, at paras. 31-33

contained therein and found nothing that would provide Yangarra with a secured claim in the Receivership Proceedings. Her Ladyship's reasoning does not disclose a palpable and overriding error, particularly in the absence of any analogous precedent. In the circumstances, the Lower Decision is owed considerable deference.

83. Contrary to Yangarra's submissions,[84] Romaine J. did not find that the SAVO did not bind the Receiver. What she did find, as noted above, is that "there is nothing in [the SAVO] that would change the status of any claim that Yangarra may have from an unsecured claim in the Manitok receivership to a secured claim or that obliges the Receiver to treat the claim as anything other than an unsecured claim."[85] Not only is this finding free from palpable and overriding error, but it is manifestly correct.

C. The Learned Chambers Justice Did Not Commit a Reviewable Error in Distinguishing *Extreme Retail*

84. Yangarra essentially asks this Court to overturn the Lower Decision without identifying any palpable and overriding error or even making any principled argument in support of its position that it has a secured claim in the Receivership Proceedings.

85. On the application below, Yangarra cited *Extreme Retail (Canada) Inc v Bank of Montreal*[86] as the sole authority in support of its position. Romaine J. distinguished that decision on a number of grounds and Yangarra now argues that Her Ladyship committed a reviewable error in doing so. In the circumstances, Yangarra is effectively seeking to argue the application *de novo* in the hope that this Court will come to a different conclusion with respect to the applicability of that decision. This of course is not the way it works.

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[84] Yangarra's Factum, at para 12(a)
[85] Lower Decision, Appeal Record page 181, para. 30
[86] Yangarra's Factum, at paras 34-53; *Extreme Retail (Canada) Inc v Bank of Montreal*, [2002] OJ No 3304 (ONSC) ("***Extreme Retail***") **[Yangarra's Authorities]**

86. Yangarra in its factum considers *Extreme Retail* at length and argues that it is the most analogous decision to the case at bar.[87] The Receiver disputes this assertion for the reasons noted by the learned chambers justice, as discussed in more detail below. But even so, a court is not required to follow another decision just because it may be the "most analogous" case. Indeed, the "most analogous case" may be irreconcilably distinguishable on the basis of the facts. This is the situation as between *Extreme Retail* and the case at bar.

87. In the Lower Decision, Romaine J. considered *Extreme Retail* in detail and distinguished it for a number of reasons:[88]

> [38] There are a number of important distinctions between Extreme and this case. Manitok's Receiver had not been appointed at the time of the February order, and there is no evidence that it had any involvement in the sale or the application for the order. While the February order includes similar, usual-course vesting language, the issue in this application is not whether any existing security has been expunged by the order, and the Receiver is not seeking to amend or vary the order, which was essentially what was sought in *Extreme*.

88. These are all valid and proper reasons for distinguishing *Extreme Retail* on the facts of this case.

89. In its factum, Yangarra argues that it is not necessary for the Receiver to have been appointed or for it to have been involved with the Yangarra APA or SAVO process in order for the SAVO to have a binding effect on all parties.[89] As noted above, the Receiver does not deny that the SAVO is binding on the parties. However, this does not change the fact that amounts payable by Manitok under the Yangarra APA prior to the subsequent Receivership Order have the status of unsecured debts for purposes of the Receivership Proceedings.

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[87] Yangarra's Factum, at paras. 35-36
[88] Lower Decision at para. 38
[89] Yangarra's Factum, at para. 50

90. Yangarra also argues that there is "clear evidence that A&M was tangentially involved with both the sale and the application for the SAVO".[90] However, this is not the case at all. Rather, the Yangarra APA and the SAVO both pre-dated the Receivership Order, with the Manitok APA having been executed by Manitok as part of the Proposal Proceedings and the SAVO having been obtained with the involvement and support of Manitok's Proposal Trustee.[91]

91. There is a fundamental distinction between the case at bar, in which the SAVO crystallized the nature and extent of Yangarra's entitlements *vis-à-vis* Manitok prior to the commencement of the Receivership Proceedings, and the usual case where a receiver obtains a sale approval and vesting order in the course of a receivership.

92. Yangarra further argues that the Receiver could (or perhaps should) have appealed the SAVO or applied to have it varied.[92] However, the Receiver has never taken issue with the validity of the SAVO or the Yangarra APA. Nor has it taken any issue with the payment of any post-receivership amounts due and owing by the Estate of Manitok to Yangarra pursuant to the terms of the Yangarra APA, as approved by the SAVO. All the Receiver has done is apply to dismiss Yangarra's claim to pre-receivership amounts owing under the Yangarra APA on the basis that they are unsecured claims, subordinate to both the secured claim of National Bank of Canada and end of life obligations to the Alberta Energy Regulator.[93] That application was properly granted by Romaine J. for the reasons set forth in her decision.

93. In short, Romaine J. did not commit a reviewable error in finding that Yangarra's claims to the Proceeds and Winter Service Funds cannot be treated as secured claims because of the SAVO.

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[90] Yangarra's Factum, at para. 50
[91] Receiver's Report, REKE page 043 (Appendix G); Application for SAVO, Appeal Book page 012; SAVO, Appeal Book page 142; First and Second Reports of the Proposal Trustee, AEKE pages 004 and 028
[92] Yangarra's Factum, at para. 51
[93] Receiver's Report, REKE page 012, para. 25(b)

PART V – RELIEF SOUGHT

94. For the reasons set forth above, it is submitted that Yangarra's appeal ought to be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 22ND DAY OF NOVEMBER, 2021

SCOTT VENTURO RUDAKOFF LLP

EUGENE J. BODNAR

Solicitors for the Receiver

Estimated time for oral argument: 45 minutes

TABLE OF AUTHORITIES

Tab	Authority
1.	*Athabasca Workforce Solutions Inc v Greenfire Oil & Gas Ltd*, 2021 ABCA 66
2.	*2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225
3.	*Business Development Bank of Canada v. Pine Tree Resorts Inc., 2013 ONCA 282*
4.	*Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611
5.	*Enroute Imports Inc. (Re*), 2016 ONCA 247
6.	*Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301
7.	*Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONCA 581
8.	*PricewaterhouseCoopers Inc v Ramdath*, 2018 MBCA 41
9.	*Industrial Alliance Insurance and Financial Services Inc. v. Wedgemount Power Limited Partnership*, 2018 BCCA 283
10.	*2003945 Alberta Ltd v 1951584 Ontario Inc*, 2018 ABCA 48
11.	*The McDonnell Group, LLC v. Control Mobile Inc.*, 2018 BCCA 309
12.	*Enchino v Munro*, 2014 ABCA 422
13.	*Re Kaiser*, 2011 ONCA 713 (hyperlink not available)
14.	*Ravelston Corp. (Re), 2005* CanLII 63802 (ON CA)

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209 A.C.W.S. (3d) 223, 285 O.A.C. 275, 84 C.B.R. (5th) 269

In the Matter of the Bankruptcy of Morris Kaiser of the City of Toronto in the Province of Ontario

Morris Kaiser, a Bankrupt (Applicant) and Soberman Inc., Trustee in Bankruptcy of the Estate of Morris Kaiser (Respondent)

E.A. Cronk J.A.

Heard: October 18, 2011
Judgment: November 14, 2011
Docket: CA M40462

Proceedings: refusing leave to appeal *Kaiser, Re* (2011), 2011 ONSC 4877, 2011 CarswellOnt 8304 (Ont. S.C.J. [Commercial List])

Counsel: Melvyn L. Solmon, Cameron J. Wetmore for Applicant
Neil Rabinovitch, Milton A. Davis for Respondent

Subject: Civil Practice and Procedure; Insolvency; Estates and Trusts
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.6 Discovery and examinations
XVII.6.d Evidentiary issues
XVII.6.d.iii Privilege
XVII.6.d.iii.B Miscellaneous
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.9 Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Miscellaneous
Bankrupt was assigned into bankruptcy — Lawyer for trustee had been involved in proceedings against bankrupt for several years, and was currently representing creditor L in action against others who had acted for bankrupt in litigation — In course of proceedings trustee signed document purporting to waive privilege of bankrupt — Bankrupt brought motion to remove counsel for trustee and to nullify waiver of privilege — Motion for removal of counsel dismissed, motion regarding waiver allowed — Bankrupt brought application for leave to appeal — Application dismissed — Bankrupt had not satisfy test for leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act — Trustee had sworn that there was no conflict, that counsel had not preferred L's interests over those of trustee, and that bankrupt's largest creditors, together with trustee, wished counsel to continue as counsel to trustee.
Bankruptcy and insolvency --- Practice and procedure in courts — Discovery and examinations — Evidentiary issues — Privilege — Miscellaneous

Bankrupt was assigned into bankruptcy — Lawyer for trustee had been involved in proceedings against bankrupt for several years, and was currently representing creditor L in action against others who had acted for bankrupt in litigation — In course of proceedings trustee signed document purporting to waive privilege of bankrupt — Bankrupt brought motion to remove counsel for trustee and to nullify waiver of privilege — Motion for removal of counsel dismissed, motion regarding waiver allowed — Bankrupt brought application for leave to appeal — Application dismissed — Bankrupt had not satisfy test for leave to appeal under s. 193(e) of Bankruptcy and Insolvency Act — Trustee had sworn that there was no conflict, that counsel had not preferred L's interests over those of trustee, and that bankrupt's largest creditors, together with trustee, wished counsel to continue as counsel to trustee.

Table of Authorities

Cases considered by *E.A. Cronk J.A.*:

Colville-Reeves v. Canadian Home Publishers Inc. (2002), 2002 CarswellOnt 546, [2002] O.T.C. 124 (Ont. S.C.J. [Commercial List]) — referred to

Dugas, Re (2003), 2003 NBQB 197, 2003 CarswellNB 203, (sub nom. *Dugas (Bankrupt), Re)* 261 N.B.R. (2d) 315, 685 A.P.R. 315, 41 C.B.R. (4th) 168, 32 C.P.C. (5th) 69 (N.B. Q.B.) — referred to

Engels v. Richard Killen & Associates Ltd. (2002), 2002 CarswellOnt 2435, 60 O.R. (3d) 572, 35 C.B.R. (4th) 77 (Ont. S.C.J.) — considered

Engels v. Richard Killen & Associates Ltd. (2004), 2004 CarswellOnt 62, 48 C.B.R. (4th) 68, 69 O.R. (3d) 183, 181 O.A.C. 94 (Ont. C.A.) — referred to

Fiber Connections Inc. v. SVCM Capital Ltd. (2005), 2005 CarswellOnt 1834, 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) — followed

GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc. (2003), 2003 CarswellOnt 6652 (Ont. C.A. [In Chambers]) — followed

Lautec Properties Inc. v. Barzel Windsor (1984) Inc. (2002), 2002 CarswellOnt 3049, 26 C.P.C. (5th) 131 (Ont. S.C.J. [Commercial List]) — considered

MacDonald Estate v. Martin (1990), [1991] 1 W.W.R. 705, 77 D.L.R. (4th) 249, 121 N.R. 1, (sub nom. *Martin v. Gray)* [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, 70 Man. R. (2d) 241, 1990 CarswellMan 384, 285 W.A.C. 241, 1990 CarswellMan 233 (S.C.C.) — referred to

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Statutes considered:

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

s. 163 — referred to

s. 193 — considered

s. 193(a) — considered

s. 193(a)-193(d) — referred to

s. 193(c) — considered

s. 193(e) — considered

Rules considered:

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368
Generally — referred to

Proceeding: Motion/Application for Leave to Appeal.

APPLICATION by bankrupt for leave to appeal from judgment reported at *Kaiser, Re* (2011), 2011 ONSC 4877, 2011 CarswellOnt 8304 (Ont. S.C.J. [Commercial List]), which refused to order removal of law firm as counsel of record for trustee in bankruptcy.

***E.A. Cronk J.A.*:**

1 This is a motion for leave to appeal to this court from the order of Newbould J. of the Superior Court of Justice, In Bankruptcy, dated August 16, 2011, refusing to order the removal of a law firm as counsel of record for a trustee in bankruptcy.

I. Background

2 The applicant, Morris Kaiser ("Kaiser"), was adjudged bankrupt on October 17, 2009. The respondent, Soberman Inc. (the "Trustee"), was appointed trustee of the bankrupt estate.

3 For more than a decade, Milton Davis ("Davis"), a partner in the law firm of Davis Moldaver LLP, has acted as counsel in various legal proceedings against or involving Kaiser. Specifically, since the spring of 1999, Davis has acted as counsel for approximately 20 individual or corporate litigants in more than 14 actions against Kaiser or his interests. By reason of these professional engagements, Davis has gained considerable knowledge of Kaiser as a litigant.

4 Davis, through Davis Moldaver LLP, also acts for the Trustee in the Kaiser bankruptcy.

5 As set out in an affidavit sworn by Kenneth Tessis ("Tessis") of the Trustee's offices on July 14, 2010, as a result of Davis' extensive experience with Kaiser, the Trustee regards Davis Moldaver LLP as "the best suited law firm to be acting on behalf of the Trustee" in the Kaiser bankruptcy.

6 Representatives of three of Kaiser's largest creditors — Bernie Ghert, Lautec Properties Inc. ("Lautec") and the Canada Revenue Agency — serve as inspectors in Kaiser's bankruptcy. It is undisputed that each of these creditors has "unequivocally" advised the Trustee of their desire to have Davis Moldaver LLP continue to act for the Trustee in the Kaiser bankruptcy.

7 It is against this general background that this leave to appeal motion must be understood.

(1) Removal Motion

8 In the summer of 2011, Kaiser moved for an order removing Davis Moldaver LLP as counsel of record for the Trustee (the "Removal Motion"). As relevant to this leave motion, Kaiser alleged on the Removal Motion that Davis Moldaver LLP was in a conflict position because: (1) while acting for the Trustee, Davis was also acting for Lautec; and (2) in breach of obligations that Kaiser claimed are owed to him by Davis and the Trustee (in particular, the alleged duty to protect Kaiser's right to solicitor-client privilege), Davis advised and permitted the Trustee to take steps that preferred Lautec's interests over those of the Trustee and the Kaiser estate.

9 By order dated August 16, 2011, the motion judge dismissed the Removal Motion and awarded costs to the Trustee.

(2) Leave to Appeal Motion

10 Kaiser seeks leave to appeal from the motion judge's order dismissing his request for a removal order. If leave be granted, he also seeks an order expediting the appeal.

11 Section 193 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") provides for an appeal as of right to the Court of Appeal from any order or decision of a judge in bankruptcy in limited circumstances as set out in ss. 193(a) to (d). Under s. 193(e), leave of a judge of the Court of Appeal is required to appeal to this court "in any other case".

12 Thus, the preliminary issue on this motion is whether leave to appeal the motion judge's decision to this court is required.

13 In his notice of motion, Kaiser seeks leave to appeal, "if leave is required", pursuant to s. 193(e) of the BIA. Kaiser previously filed a Notice of Appeal and Amended Notice of Appeal in which he invoked ss. 193(a) and (c) and, "if necessary", s. 193(e) of the BIA as the jurisdictional basis for appealing the motion judge's decision to this court.

14 In both his leave motion materials and his oral submissions, Kaiser took the position that leave to appeal under s. 193(e) is not required. At the same time, he also expressly sought leave to appeal under s. 193(e) of the BIA. He advanced no argument regarding an appeal as of right under any of ss. 193(a) to (d) of the BIA. Leave to appeal was the only relief sought on the motion, apart from an expedited appeal date.

15 Argument of the leave motion proceeded on the basis that s. 193(e) of the BIA applies in the circumstances. It is the Trustee's position that s. 193(e) is engaged, that leave to appeal to this court is required, and that leave should be denied given the history of this matter, as outlined below.

16 I am not persuaded that Kaiser's proposed appeal from the motion judge's decision falls within any of the appeal as of right categories set out in s. 193 of the BIA. [1] Nor, as I have said, did Kaiser urge a contrary conclusion. I therefore proceed on the basis that leave to appeal to this court is required under s. 193(e) of the BIA.

II. Governing Legal Principles

17 The jurisprudence of this court indicates that a flexible approach should be applied to the factors to be considered on a motion for leave under s. 193(e) of the BIA. As Armstrong J.A. of this court explained in *Fiber Connections Inc. v. SVCM Capital Ltd.* (2005), 10 C.B.R. (5th) 201 (Ont. C.A. [In Chambers]) (in chambers), at para. 19, "There is a variety of factors to consider depending upon the circumstances presented to the court." These factors include: (1) whether the judgment at issue appears to be contrary to law, amounts to an abuse of judicial power or involves an obvious error, causing prejudice for which there is no remedy; (2) whether the point of the appeal is of significance to the practice or to the action itself; (3) whether the appeal is *prima facie* meritorious or frivolous; and (4) whether the appeal will unduly prejudice the progress of the action: see *Fiber Connections Inc.*, *per* Armstrong J.A., at para. 15; *GMAC Commercial Credit Corp. - Canada v. TCT Logistics Inc.*, [2003] O.J. No. 5761 (Ont. C.A. [In Chambers]) (in chambers), *per* Feldman J.A., at para. 9. The relevant factors to consider will vary according to the circumstances of each case.

18 One factor that is considered in all cases where leave to appeal under s. 193(e) of the BIA is sought is whether the proposed appeal is *prima facie* meritorious. In assessing the merits of a leave to appeal motion under this provision, the court's inquiry is informed by the principle of deference owed to a commercial court judge. Absent demonstrable error, an appeal court will not interfere. See *Ravelston Corp., Re*, 2007 ONCA 268, 31 C.B.R. (5th) 233 (Ont. C.A. [In Chambers]), (in chambers), *per* Borins J.A., at paras. 11-12; *Fiber Connections Inc.* , *per* Armstrong J.A., at paras. 15-19; *GMAC Commercial Credit*, *per* Feldman J.A., at para. 9.

19 In addition, where the order sought to be appealed from is discretionary, as in this case, this court has recognized that leave will not be granted unless the matter is of importance either to the administration of justice generally or to the respective rights of the parties to the litigation: *Fiber Connections Inc.* , *per* Armstrong J.A., at para. 15; *GMAC Commercial Credit*, *per* Feldman J.A., at paras. 9 and 14; *Zurich Indemnity Co. of Canada v. Reemark Rideau Developments Ltd.* (1992), 22 C.B.R. (3d) 291 (B.C. C.A.) (in chambers), *per* Southin J.A., at para. 21.

20 Given the nature of the order sought to be appealed, Kaiser's leave motion is also informed by those principles that govern the court-ordered removal of a litigant's counsel of record. These principles were relevant to the motion judge's discretionary

decision to deny the relief sought by Kaiser. They are also a relevant consideration in assessing the merits of Kaiser's proposed appeal.

21 As the motion judge properly noted, "A litigant should not be deprived of counsel of its choice without good cause. See *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235 (S.C.C.)." For this reason, Canadian courts exercise the highest level of restraint before interfering with a party's choice of counsel. Where such discretionary, equitable relief is invoked, there must be a possibility of real mischief should a removal order be refused. The test is whether a fair-minded and reasonably informed member of the public would conclude that counsel's removal is necessary for the proper administration of justice: see for example, *MacDonald Estate*; *Zawadzki v. Matthews Group Ltd.* (1998), 18 C.P.C. (4th) 373 (Ont. Gen. Div.); *Colville-Reeves v. Canadian Home Publishers Inc.* (2002), 111 A.C.W.S. (3d) 1202 (Ont. S.C.J. [Commercial List]) [*Colville-Reeves v. Canadian Home Publishers Inc.* (2002), 2002 CarswellOnt 546 (Ont. S.C.J. [Commercial List])]; *Lautec Properties Inc. v. Barzel Windsor (1984) Inc.* (2002), 26 C.P.C. (5th) 131 (Ont. S.C.J. [Commercial List]).

III. Discussion

22 In my opinion, it cannot be said that Kaiser's appeal is *prima facie* meritorious. Far from it.

23 Kaiser sought discretionary, equitable relief of a type that is granted only sparingly and with great caution — the involuntary removal of counsel chosen by a client in the face of the client's opposition to the removal. That relief was denied by the motion judge for clear and cogent reasons. On the motion judge's findings, the requested relief was sought for improper and tactical, rather than legitimate, reasons. This factor alone tells strongly against granting equitable relief. Further, in all the circumstances, I do not regard any of the issues sought to be raised on appeal as important either to the administration of justice generally or to the rights of the parties.

24 I therefore conclude that Kaiser has failed to satisfy the test for leave under s. 193(e) of the BIA. I note, in particular, the following.

25 First, the record suggests that Kaiser has a demonstrated history of initiating proceedings, including removal motions, for purely strategic reasons. His motive for bringing the Removal Motion, which was a central issue before the motion judge, bears directly on the merits of his proposed appeal.

26 The motion judge declined to exercise his discretion in favour of granting the requested removal order in part because he concluded that the Removal Motion had been brought "for tactical purposes to try to delay actions by the [T]rustee [to recover Kaiser's assets for the estate]". In his view, the Removal Motion was "completely miscast". These conclusions are firmly grounded in the evidentiary record.

27 The record reveals that the Removal Motion was not Kaiser's first attempt to secure Davis' removal as counsel of record in proceedings against Kaiser or his interests. In 2002, Kaiser moved for an order removing Davis as counsel of record in 14 related actions. In dismissing that motion, Epstein J., then of the Superior Court of Justice, concluded that: (1) the motion was brought for an improper, tactical purpose; (2) the moving parties knew that such an order would cause delay and inconvenience; and (3) the evidence before her did not support the allegations of misconduct advanced against Davis: *Lautec Properties Inc.*, at paras. 42-45. These were serious findings of impropriety by Kaiser. Justice Epstein put it this way, at para. 46: "[T]he case made out in support of the relief sought ... was like a blanket heavily patterned with strong animus toward Mr. Davis and woven together with speculation and conjecture."

28 Further, Kaiser had attempted in the past, without success, to secure a removal order against Davis' predecessor — also a senior member of the litigation bar in Toronto — as counsel of record for parties opposite in interest to Kaiser. On that removal motion as well, Kaiser alleged serious professional wrongdoings by the involved counsel, allegations that were later found to be wholly groundless.

29 Moreover, it is uncontested that Kaiser previously sued Davis for conspiracy, but adduced no evidence to support this serious claim when the matter proceeded to arbitration. The experienced arbitrator, a former judge of the Superior Court of

Justice, held that there was no evidentiary basis for any criticism of Davis and that the allegations against him were "unfounded and persistent". He awarded costs to Davis and others on a substantial indemnity scale.

30 This troublesome history of improperly-motivated litigation strongly supports the motion judge's conclusion in this case that removal motions "appear to be part of Mr. Kaiser's *modus operandi*" and that Kaiser holds a clear *animus* towards Davis. Kaiser's pattern of advancing serious unfounded allegations of professional improprieties against counsel opposite and of initiating ill-founded removal motions, raises a sharp red flag, necessitating close scrutiny of the merits of any proposed appeal from the motion judge's ruling on the Removal Motion.

31 Second, the record also indicates that Kaiser, in numerous ways, has declined to co-operate with the Trustee and has sought to frustrate the disclosure of his financial resources and assets and the efficient administration of his bankrupt estate by the Trustee.

32 The motion judge held that Kaiser, "who has an obligation to the trustee to assist in locating assets belonging to the bankrupt estate", was "taking every opportunity to refuse to provide information that could assist the trustee". This finding was not challenged during argument of the leave motion. Nor is it attacked by Kaiser in his Notice of Appeal or Amended Notice of Appeal as a factual finding tainted by palpable and overriding error.

33 Again, there was considerable evidence before the motion judge to support this finding. Consider the following:

> (1) the Trustee provided evidence on the Removal Motion that although Kaiser claimed to be impecunious at the time of his bankruptcy, he engaged in a lifestyle, both *before and after* the date of his bankruptcy, that belied this claim. This included evidence of frequent gambling trips to the United States, the loss of significant funds at gambling tables during these trips and numerous cash withdrawals on credit cards belonging to or controlled by a third party (who is suspected by the Trustee to be complicit in Kaiser's efforts to conceal his assets) at or near various casinos;
>
> (2) it was also the Trustee's uncontradicted evidence on the Removal Motion that the Trustee has not been able "to determine much regarding Kaiser's affairs", that a motion is pending to determine the source of funds being used by Kaiser to finance this litigation, that Kaiser appears to have structured his affairs "in such a way as to have [a third party act] as a 'straw man' — thereby shielding his funds from the Trustee and his creditors" and, further, that Kaiser appears to have "access to funds, which he did not have before, the source of which is unknown to the Trustee, to pay for his various family, living and day-to-day expenses";
>
> (3) on his examination conducted under s. 163 of the BIA, Kaiser or his counsel objected to approximately one-half of the questions asked on the ground of privilege. Yet, in the opinion of the motion judge following a review of the relevant questions, most, if not all, the refusals related to factual matters in respect of which a privilege claim could not be advanced; and
>
> (4) on June 30, 2011, Kaiser was cross-examined in respect of the pending Removal Motion. The motion judge noted that every question asked of Kaiser regarding his affairs was objected to, as being irrelevant to the Removal Motion.

34 In part on the basis of these facts, Tessis indicated in his affidavit sworn on behalf of the Trustee in response to the Removal Motion that, in the Trustee's opinion, the Removal Motion was brought "to deflect attention from the fact that [Kaiser] seems to have access to significant sums of money which he has not disclosed to the Trustee".

35 The foregoing circumstances militate in favour of the conclusion that the Removal Motion and, arguably, this associated leave motion, are merely the latest steps taken by Kaiser to delay and impede the expeditious and efficient administration of his bankrupt estate. At the very least, they provide a solid foundation for the motion judge's decision to deny discretionary equitable relief of the type sought by Kaiser. They also undercut Kaiser's contention that his proposed appeal from that decision is meritorious or of significance either to the parties or to commercial bankruptcy practice in general.

36 Finally, a word about the merits of the specific proposed grounds of appeal identified by Kaiser. To be blunt, I consider the merits of the identified grounds to be highly dubious.

37 Kaiser raised numerous grounds of appeal in his Amended Notice of Appeal. However, during oral argument of this motion, these grounds became more focused.

38 Kaiser's principal complaint is that Davis, while acting as counsel for the Trustee, also acted for Lautec, one of Kaiser's major creditors. Kaiser seeks to renew his argument on appeal, advanced before the motion judge, that Davis' dual engagement as counsel placed him and Davis Moldaver LLP in a conflict position, that Davis allegedly abused his role as counsel to the Trustee and breached alleged duties to Kaiser by advising the Trustee to take steps that favoured Lautec's interests over those of the Trustee and Kaiser, and that, by so doing, Davis exposed Davis Moldaver LLP "to an influence that impaired its professional judgment in respect of the Kaiser bankruptcy".

39 At the heart of this complaint is a written waiver document dated February 10, 2010, prepared by Davis and executed by the Trustee (the "Waiver"), pursuant to which the Trustee purported to waive Kaiser's solicitor-client privilege and authorized certain solicitors to disclose information that might otherwise have been subject to that privilege.

40 In the main, Kaiser contends that Davis, as counsel for the Trustee, owed a duty to Kaiser to protect his solicitor-client privilege. Kaiser invokes the professional standards set out in the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (the "Rules"), in support of his claim that Davis breached this duty by drafting and arranging for the execution and subsequent use of the Waiver for the benefit of Lautec in breach of Kaiser's right to solicitor-client privilege. Kaiser describes the Waiver as an "unlawful, misleading and prejudicial document", the preparation and use of which was "a misuse of the process and powers of the BIA".

41 These arguments were raised before the motion judge and fully addressed by him in his reasons on the Removal Motion. He rejected Kaiser's claims of any impropriety by the Trustee, Davis or Davis Moldaver LLP generally and, in particular, in respect of the Waiver. I see no reviewable error in this ruling.

42 Kaiser argued before the motion judge, and seeks to re-argue on appeal, that duties are owed directly by a trustee in bankruptcy's counsel to the bankrupt. In support of this proposition, he relies on *Engels v. Richard Killen & Associates Ltd.* (2002), 60 O.R. (3d) 572 (Ont. S.C.J.), aff'd (2004), 69 O.R. (3d) 183 (Ont. C.A.) and *Dugas, Re*, 2003 NBQB 197, 41 C.B.R. (4th) 168 (N.B. Q.B.), and various of the Rules.

43 The Rules do not appear to have been raised before the motion judge. The motion judge considered the above-mentioned cases cited by Kaiser and declined to follow them, preferring instead to adopt his own prior reasoning on this issue in *Turbo Logistics Canada Inc. v. HSBC Bank Canada* [2009 CarswellOnt 5929 (Ont. S.C.J. [Commercial List])], 2009 CanLII 55292. *Turbo* involved yet another solicitor-removal motion brought by counsel who act for Kaiser on this motion, albeit against another law firm in an unrelated proceeding. In *Turbo*, after considering the decisions in *Engels* and *Dugas*, the motion judge said, at para. 16:

> I cannot agree with the notion that counsel for a trustee in bankruptcy, or for a court-appointed receiver, normally owes any duty to the creditors of the bankrupt or debtor under a court-appointed receiver. The obligation of a solicitor is to his or her client. The fact that the solicitor is an officer of the court does not change that. It is the trustee in bankruptcy or the court-appointed receiver that owes a fiduciary duty to the creditors or other stakeholders. To suggest that the lawyer advising the trustee in bankruptcy or the court-appointed receiver owes a duty to those creditors or other stakeholders would, amongst other things, lay the solicitor open to actions at the hands of the creditors of the trustee in bankruptcy or court-appointed receiver for failure to properly carry out the lawyer's obligations to those creditors or stakeholders. This is not the law and would make no sense. A solicitor giving advice to a client, whether the client is a trustee in bankruptcy or court-appointed receiver or otherwise, is responsible to the client to give proper advice to the client. It is the client, and not the solicitor, that owes duties to creditors and other stakeholders in the case of a trustee in bankruptcy or courtappointed receiver.

See also *Manufacturers Life Insurance Co. v. Juno Developments (North Bay) Ltd.*, 2011 ONSC 3945, 79 C.B.R. (5th) 229 (Ont. S.C.J. [Commercial List]).

44 I see no error in the motion judge's reasoning on this issue or in the proposition that it is the trustee in bankruptcy, as principal, rather than his or her solicitor, as agent, who owes direct legal duties to the creditors of a bankrupt or the bankrupt. Nor do I read the Rules now cited by Kaiser as undermining this conclusion.

45 I reject Kaiser's contention that his proposed appeal raises "an important question of law for which there are conflicting authorities in Ontario", namely, whether a trustee's counsel owes direct legal duties to a bankrupt and, if so, the scope of those duties.

46 *Engels* is the only Ontario decision cited by Kaiser that is said to be contrary to the motion judge's ruling on this issue. *Engels* was concerned primarily with whether the bankrupt in that case was bound by a common law non-solicitation restriction following the sale by a trustee in bankruptcy of a book of business to a third party. It was in this context that the trial judge in *Engels* commented on the duties of trustees in bankruptcy and the obligation of the trustee and its counsel to act fairly and neutrally in the conduct of the administration of a bankrupt estate.

47 In any event, it is not in every instance in which potentially conflicting decisions exist that leave to appeal to this court is warranted. The issue has now been addressed squarely in two recent Superior Court decisions — *Turbo* and *Manufacturers Life*. In both cases, the notion of duties of counsel of the type urged by Kaiser was rejected.

48 Perhaps more importantly, on the motion judge's findings, neither Davis nor Davis Moldaver LLP breached any obligations to Kaiser.

49 The motion judge considered, and rejected, Kaiser's contention that the drafting, execution and use of the Waiver required the removal of Davis Moldaver LLP as the Trustee's counsel. In my view, this conclusion is overwhelmingly supported by the record.

50 First, the Waiver was prepared following the numerous privilege-based refusals by Kaiser on his BIA s. 163 examination, described above. Although Davis sent the Waiver to Kaiser's previous solicitors, he did not, in fact, request the disclosure of privileged information by those solicitors. In addition, it is uncontroverted that no privileged information was obtained as a result of the Waiver. Thus, regardless of the propriety of the Waiver, no prejudice was occasioned to Kaiser by its creation, execution or use.

51 Second, the motion judge granted a declaration, without opposition from the Trustee, that the Waiver was "null, void and of no effect".

52 Third, the motion judge accepted the Trustee's argument that the issue of the Waiver, and the attempt to invoke it as a basis for the removal of Davis Moldaver LLP as counsel for the Trustee, was part of a continuing effort to protect Kaiser from having to provide information to the Trustee.

53 Fourth, and importantly, the record indicates that Kaiser instructed his counsel to object to Davis' representation of the Trustee about one month *before* the Waiver was signed. Thus, Kaiser's reliance on the Waiver to support the Removal Motion was an 'after-the-fact' stratagem.

54 Fifth, the motion judge, as he was entitled to do, accepted the Trustee's evidence that the Waiver was used in an effort to trace funds that the Trustee has grounds to believe either emanated from Kaiser or from persons who hold money at his behest. He also accepted that at least part of the funds at issue may have been applied to reduce the debt owed to Lautec, one of Kaiser's largest creditors. The reduction of this debt, if it occurred, could only have decreased the amount of Lautec's claim in the bankruptcy and, consequently, increased the funds potentially available for recovery by Kaiser's other creditors. In these circumstances, the Trustee had a legitimate interest in attempting to trace the funds in question.

IV. Disposition

55 I end where I began. It bears repeating that none of the Trustee or Kaiser's major creditors and estate inspectors has voiced any objection to the representation of the Trustee by Davis and his law firm. Nor have they voiced any concern about Davis' conduct or a conflict of interest arising from the fact that Davis acts for both Lautec and the Trustee.

56 To the contrary, the Trustee has sworn that there is no conflict, that Davis has not preferred Lautec's interests over those of the Trustee, and that Kaiser's largest creditors, together with the Trustee, wish Davis to continue as counsel to the Trustee. The Trustee's position was succinctly stated in Tessis' affidavit on the Removal Motion:

> [I]t would be a disservice to the creditors and bankruptcy estate and ultimately a large and expensive impediment to the smooth administration of this bankruptcy if [Davis Moldaver LLP] was to be removed as solicitor of record.

57 Accordingly, for the reasons given, I conclude that Kaiser has not satisfied the test for leave to appeal under s. 193(e) of the BIA. The leave motion is dismissed.

V. Costs

58 The Trustee is entitled to its costs of this motion. I have now received and reviewed the parties' written submissions concerning costs. The Trustee seeks its costs of the leave motion on a full indemnity basis, in the sum of $21,521.48. The Trustee argues that this motion, like the Removal Motion, was tactical in nature and designed to further delay the proper administration of Kaiser's bankrupt estate. Consequently, the Trustee says that the dismissal of the leave motion should attract a costs award on the full indemnity scale.

59 Kaiser submits that his leave motion was reasonable and justified. He argues that, based on the decisions in *Engels* and *Dugas*, he had a legitimate legal foundation on which to object to Davis Moldaver LLP's continuing representation of the Trustee. He argues that the costs of the leave motion should be fixed in the amount of $5,000.

60 The Trustee emphasizes that the motion judge awarded costs to the Trustee in the amount of $50,000 — almost the entire amount of the Trustee's full indemnity costs ($53,758.76). In large part, that award was based on the motion judge's conclusion that the Removal Motion was misconceived and tactical in nature. He viewed the Removal Motion as merely one more effort by Kaiser to "stone wall" the Trustee's efforts to ascertain and realize on Kaiser's assets for the benefit of his bankrupt estate.

61 I have strong suspicions that, like the Removal Motion, Kaiser's leave motion was brought for tactical reasons. That said, the record before me does not clearly establish an improper purpose in the decision to seek leave to appeal.

62 I therefore conclude that the Trustee is entitled to its partial indemnity costs of the leave motion. Contrary to Kaiser's submission, I regard the amount of $14,200, inclusive of disbursements and all applicable taxes, as an appropriate award of partial indemnity costs in this case and I so order. I decline to grant any other relief in respect of the Trustee's costs of this motion.

Application dismissed.

Footnotes

1 For example, s. 193(a) of the BIA provides for an appeal as of right "if the point at issue involves future rights". The proposed appeal concerns the motion judge's discretionary ruling refusing to order the removal of Davis Moldaver LLP as ongoing counsel of record for the Trustee. Kaiser has no existing, let alone future, right to dictate the Trustee's choice of counsel. I do not regard the Trustee's selection of counsel as implicating Kaiser's "future rights". Similarly, it is difficult to see how s. 193(c) of the BIA is engaged in this case. That provision applies "if the property involved in the appeal" exceeds $10,000 in value.