

COURT OF APPEAL FOR ONTARIO
IN THE MATTER OF THE RECEIVERSHIP OF
2423402 ONTARIO INC.

BETWEEN:

BANK OF MONTREAL

Applicant
(Respondent on Appeal)

- and -

2423402 ONTARIO INC.

Respondent

NOTICE OF MOTION OF THE MOVING PARTY,
BANK OF MONTREAL

The Respondent/Moving Party, Bank of Montreal, (the “**Administrative Agent**”),
will make a motion to the Court on a date to be fixed by the Registrar, at Osgoode Hall,
Toronto, Ontario.

PROPOSED METHOD OF HEARING: The motion is to be heard orally.

THE MOTION IS FOR:

1. An order quashing the within appeal;
2. Costs of this motion; and
3. Such further and other relief as this Honourable Court deems just.

THE GROUNDS FOR THE MOTION ARE:

The Project

1. The Cambridge Memorial Hospital (“**CMH**”) is currently under-going a major construction and redevelopment project (the “**Project**”) pursuant to a P3 (Public-Private Partnership) development contract awarded to 2423402 Ontario Inc. (“**Project Co**”) dated August 14, 2014.
2. The Project involves the construction of a brand new, 254,000 square foot patient care wing and extensive renovations to the existing Wing “B” of the Hospital and was initially slated for completion in the Spring of 2019 for a fixed price of approximately \$187 million.
3. Project Co is a special purpose entity that is wholly-owned by Bondfield Construction Company Limited (the “**Contractor**”). The construction of the Project was to be undertaken by the Contractor pursuant to a construction contract dated August 14, 2014 (the “**Construction Contract**”) as between Project Co and the Contractor.
4. There have been delays and cost overruns in the construction work due to various and continuing defaults of the Construction Contract committed by the Contractor.
5. The Project is funded by a senior secured credit facility provided to Project Co pursuant to the credit agreement between Project Co, as borrower, each of the financial institutions and other entities from time to time parties thereto, as lenders, and the Administrative Agent, made as of August 14, 2014, as amended (the “**Credit Agreement**”).

The Performance Bond

6. Zurich Insurance Company Ltd. (“**Zurich**”) acted as surety for the Project and, as required by the Credit Agreement, issued three bonds in respect of the Project, including Performance Bond No. 6342957 (the “**Performance Bond**”).

7. The Performance Bond provides that whenever the Contractor, as principal, is declared to be in default under the Construction Contract, Zurich is to “...promptly select and carry out one of the four following options” to rectify the default. The specific language of the Performance Bond relating to the obligations of Zurich is as follows:

Whenever the Principal shall be, and declared by the Obligeo to be in default in respect of its obligations to the Obligeo under the Construction Contract (a “**Contractor Event of Default**”), the Obligeo having performed the Obligeo's obligations under the Construction Contract, the Surety shall promptly select and carry out one of the four following options:

1. remedy any default, or;
2. complete the Construction Contract in accordance with its terms and conditions, or;
3. obtain a bid or bids for submission to the Obligeo for completing the Construction Contract in accordance with its terms and conditions and upon determination by the Obligeo and the Surety of the lowest responsible bidder, acceptable to CMH acting reasonably, arrange for a contract between such bidder and the Obligeo or between such bidder and such other party as an Additional Named Obligeo shall be entitled to direct, and the Surety shall make available as work progresses (even though there should be a default, or a succession of defaults, under the contract or contracts of completion, arranged under this paragraph) sufficient funds to pay to complete the Principal's obligations in accordance with the terms and conditions of the Construction Contract, less the Balance of the Construction Contract Price and to pay all expenses incurred by the Obligeo as a result of the Principal's default relating directly to the performance of the Construction Work under the Construction Contract, but not exceeding the Bond Amount. The

Balance of the Construction Contract Price is the total amount of the Guaranteed Price payable to the Principal under the Construction Contract, less the amount properly paid by the Obligor to the Principal under the Construction Contract; or

4. pay the Obligor the lesser of (1) the Bond Amount or (2) the Obligor's proposed cost to complete the Construction Contract in accordance with its terms and conditions less the Balance of the Construction Contract Price.

8. On November 16, 2018, the Administrative Agent made a demand on the Performance Bond. However, Zurich refused to recognize the demand on the Performance Bond by the Administrative Agent, asserting that in order to assert rights on the Performance Bond, the Administrative Agent was required to “step-in” to the position of Project Co under the applicable agreements. Accordingly, Zurich refused to comply with its obligation to promptly select and carry out one of the four options listed in the Performance Bond.

Appointment of the Receiver

9. In order to address this gating issue, the Administrative Agent brought an application for the appointment of a receiver (the “**Receivership Proceedings**”). On December 6, 2018, the Honourable Mr. Justice Hainey issued an order (the “**Appointment Order**”) appointing Alvarez & Marsal Inc. as receiver (the “**Receiver**”) on a limited basis over all of the assets, undertakings and properties of Project Co.

10. The Appointment Order clearly contemplated, and indeed required, that the Receiver would have the authority to make a demand under the Performance Bond on behalf of Project Co. The Appointment Order provides, at paragraph 27:

27. THIS COURT ORDERS that the Receiver shall make a demand under the Performance Bond for and on behalf of the Debtor as soon as reasonably practical and shall be empowered and authorized to execute, issue and endorse any agreements or documentation for and on behalf of the Debtor as the Receiver considers necessary or advisable to facilitate making such demand. The Receiver shall not take or consent to any actions that would compromise recovery under the Contractor Bonds without written consent of the Applicant.

11. Zurich did not oppose the Appointment Order, including the language regarding the demand that would be made by the Receiver on the Performance Bond. Zurich did not appeal the Appointment Order.

Performance Bond Demand by Receiver

12. On December 7, 2018, the day following its appointment, the Receiver made a demand on the Performance Bond (the “**Performance Bond Demand**”). Again, Zurich refused to recognize the validity of the Performance Bond Demand and refused to comply with its obligation to promptly select and carry out one of the four options listed in the Performance Bond.

13. Accordingly, on May 6, 2019, the Administrative Agent commenced a motion in the Receivership Proceedings for certain relief with respect to Zurich, including, among other things, a declaration that the Performance Bond Demand was a valid call on the Performance Bond, and an order directing Zurich to comply with the Performance Bond by promptly selecting and carrying out one of the four options listed in the Performance Bond.

Decision Being Appealed

14. On September 25, 2019, the Honourable Madam Justice Conway issued a decision (i) declaring that the Receiver had made a valid call on the Performance Bond, and (ii) directing Zurich to comply with the Performance Bond by promptly selecting and carrying out one of the four options (the “**Conway Decision**”).

15. On October 4, 2019, Zurich delivered a Notice of Appeal appealing the Conway Decision to this Court (the “**Appeal**”).

No Appeal as of Right

16. There is no common law right of appeal. In Ontario, the right to appeal must be conferred by statute.

17. Zurich has asserted that it has an appeal as of right to this Court based on (i) subsection 193(a) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (“**BIA**”), (ii) subsection 193(c) of the BIA, or (iii) subsection 6(1)(b) of the *Courts of Justice Act*, RSO 1990, c. C.43 (“**CJA**”).

18. None of these provisions apply in these circumstances.

19. First, the Appeal does not involve future rights. Subsection 193(a) of the BIA is to be narrowly construed and restricted to cases involving a future legal right, not rights that presently exist but may be exercised in the future, and not procedural rights or commercial advantages or disadvantages that may accrue from the order being challenged. The Appeal

only concerns the existing legal rights and obligations of Zurich under the Performance Bond, not any future legal rights.

20. Second, the Appeal does not involve property that exceeds \$10,000 in value. Subsection 193(c) of the BIA is to be narrowly construed and restricted to cases where the appeal directly involves property exceeding \$10,000 in value. The Appeal only concerns an order requiring Zurich to comply with its contractual obligations, it does not directly involve any property.

21. Third, the appeal provisions in the CJA do not apply. An appeal from a decision or order made in proceedings instituted under the BIA (such as the Receivership Proceedings) is governed by the BIA and the *Bankruptcy and Insolvency General Rules*, CRC, c. 368 (the “**Bankruptcy Rules**”), not by the CJA and the *Rules of Civil Procedure*, RRO 1990, Reg. 194.

22. The Conway Decision was made in the context of the Receivership Proceedings and concerns the validity and effect of the Performance Bond Demand by the Receiver. The purpose of the Receivership Proceedings and the appointment of the Receiver pursuant to section 243 of the BIA was to facilitate the Receiver making the Performance Bond Demand. Accordingly, the appeal provisions in the BIA and the Bankruptcy Rules govern the Appeal.

23. As none of these statutory provisions apply in these circumstances to ground an appeal as of right, Zurich may only appeal the Conway Decision to this Court if it obtains leave to appeal pursuant to subsection 193(e) of the BIA.

Application for Leave to Appeal is Out of Time

24. Rule 31(2) of the Bankruptcy Rules provides that “[w]here an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.” While Zurich has pled in the alternative in its notice of appeal that leave to appeal should be granted if it is necessary, it has failed to include an application seeking that leave.

25. Rule 31(1) of the Bankruptcy Rules provides that the notice of appeal must be filed within 10 days of the order or decision appealed from.

26. The Conway Decision was issued on September 25, 2019. Accordingly, Zurich is now out of time to file an application seeking leave to appeal as it was required to do. Leave to appeal should be refused on this basis alone.

Leave to Appeal Should Not Be Granted

27. In the alternative, in deciding whether to exercise its discretion to grant leave to appeal pursuant to subsection 193(e) of the BIA, the following factors should be considered by this Court:

- (a) whether the Appeal raises an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and is one that this Court should therefore consider and address;
- (b) whether the Appeal is *prima facie* meritorious; and

- (c) whether the Appeal would unduly hinder the progress of the bankruptcy/insolvency proceedings.

28. Each of these factors militates against granting leave to appeal.

29. First, the Appeal concerns the effect of a particular demand by the Receiver and the rights and obligations of Zurich under a particular contract and falls far short of raising an issue that is of general importance to the practice of bankruptcy and insolvency matters or to the administrative of justice as a whole.

30. Second, the Appeal does not reveal any clear and demonstrable error by Justice Conway. Accordingly, the Appeal does not meet the high threshold of being *prima facie* meritorious in order for an appellate court to interfere with the exercise of discretion by a commercial court judge charged with the responsibility of supervising insolvency and restructuring proceedings.

31. Third, the Appeal would unduly hinder the progress of the Receivership Proceedings and the progress of construction work on the Project. As Justice Conway noted in her endorsement, the purpose of the Conway Decision was to move the dispute, now at a stalemate, ahead. Granting leave to appeal and staying the Conway Decision would return construction work on the Project back to its previous state of paralysis. This would cause irreparable harm to CMH, its staff, physicians, patients and the community which it serves.

32. Accordingly, the Court should not grant leave to appeal pursuant to subsection 193(e) of the BIA.

Statement of Jurisdiction

33. The Court of Appeal has jurisdiction to hear this motion to quash and grant the relief requested by the Administrative Agent pursuant to section 134(3) of the CJA.

34. The Administrative Agent will rely on such further and other grounds as counsel may advise and this Honourable Court may permit.

35. The Administrative Agent estimates that 15 minutes will be required for its oral argument.

THE FOLLOWING DOCUMENTARY EVIDENCE will be used at the hearing of the motion:

- (a) The Reasons for Decision of the Honourable Justice Conway dated September 25, 2019;
- (b) The Notice of Appeal dated October 4, 2019;
- (c) The Affidavit of Eden Orbach, to be sworn; and
- (d) Such further and other evidence as counsel may tender and this Honourable Court may permit.

October 10, 2019

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AND TO: THE SERVICE LIST

IN THE MATTER OF THE RECEIVERSHIP OF 2423402 ONTARIO INC.

BANK OF MONTREAL - and - 2423402 ONTARIO INC.

Court of Appeal File No.: C67522

Superior Court File No.: CV-18-610236-00CL

COURT OF APPEAL FOR ONTARIO

Proceeding commenced at TORONTO

**NOTICE OF MOTION OF THE MOVING
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