

COURT OF APPEAL FOR ONTARIO

CITATION: Royal Bank of Canada v. 1434399 Ontario Inc., 2025 ONCA 878

DATE: 20251215

DOCKET: M56482 (COA-25-CV-1307)

Huscroft J.A. (Motion Judge)

BETWEEN

Royal Bank of Canada

Applicant (Respondent)

and

1434399 Ontario Inc.

Respondent (Appellant/Responding Party)

E. Patrick Shea, K.C. and Carol Liu, for the moving party, msi Spergel Inc.

Victoria Adams, for the respondent Royal Bank

Alastair McNish and Chit Leung, for the responding party, 1434399 Ontario Inc.

Heard: December 12, 2025

REASONS FOR DECISION

[1] The receiver brings this motion seeking an order declaring that the responding party, 1434399 Ontario Inc. (“143”), has no right of appeal under ss. 193(a) or (c) of the *Bankruptcy and Insolvency Act*, R.S.C., 1985, c. B-3 (the “*BIA*”) from three orders of Sheard J., dated May 27, 2025: an approval and vesting order, an ancillary order, and a discharge order. The receiver seeks a further order

denying leave to appeal and requests alternative orders in the event the appeal is permitted to proceed.

[2] The motion is granted for the reasons that follow.

BACKGROUND

[3] 143, the subject of the receivership, owns, and formerly operated, a gym. John Fulton is the sole director, officer, and principal of 143.

[4] The receiver was appointed on September 28, 2023, following an unopposed application by the Royal Bank of Canada (“RBC”), a secured creditor of 143. RBC’s debt is secured by a mortgage on the principal asset of 143 – the real property on which the gym operated. Mr. Fulton is guarantor of the RBC debt. The receiver received only two offers for the property following substantial price reductions. The receiver accepted the best offer and, on May 20, 2025, sought the court’s approval of the sale. 143 brought a cross-motion to redeem its debt to RBC of approximately \$1.7 million and discharge the receiver.

[5] The matter was adjourned, peremptory to May 27, at 143’s request. On May 27, at 10:30 a.m., counsel for 143 and Mr. Fulton, Stephen Barbier, sent a without prejudice email to the receiver indicating that Mr. Fulton was working to secure additional financing and that he was willing to offer \$1.4 million “if that would get us to a consent discharge.” At 10:41 a.m., Mr. Barbier sent another without prejudice email to the receiver. He stated: “I confirm that Fulton is offering a firm

\$1,400,000 for a consent discharge. I don't see how RBC can do better than that on its own motion and enforcement. Please advise."

[6] At the motion, 143 filed affidavits from Gerald Guilbeault, described as a "long-time friend" of Mr. Fulton, and Lawson J. Fulton, Mr. Fulton's son, indicating that they were prepared to lend 143 a total of \$1.4 million "to salvage its ownership of the [...] property".

[7] 143 submitted that it was attempting to, and should be permitted to, redeem the mortgage. The motion judge responded:

THE COURT: Your client -- okay. You have to stop saying things that aren't accurate. Your client is not in a position to redeem. [...] He cannot redeem, can he? He doesn't have the money to redeem. You've said that to me at least twice if not three times.

S. BARBIER: Well, I would say -- make a distinction that he's offering a substantial redemption and there's cases where, you know --

THE COURT: But he hasn't offered it.

S. BARBIER: -- the ---

THE COURT: He hasn't offered it. He said, "Oh, I think I've got a friend of a friend of mine, my son, he's going to appear -- look here's his bank account.". That's not the same. If your client had been in a position to redeem, I assume he would have done so, and if your client had been in a position to provide a buyer that was prepared to pay more than whoever it is who has been bragging about what he paid for, your client would have done so. What he's doing now is, I'm afraid, is he is doing all he

can and you for him, and I commend you for your efforts, but it is too little, too late.

[8] The motion judge then granted the receiver’s motion approving sale of the property and dismissed 143’s motion to discharge the receiver. In her reasons, the motion judge noted that 143 had 20 months to secure new money to redeem but was unable to do so. She characterized 143’s proposal as “something less than binding commitments to provide funds in a total amount that was much less than the amount [it] needed to redeem.” It was “too late and too little”. 143 had no funds in hand and there was “no real basis on which to accept [its] optimism that it would soon, or ever, be in a position to redeem. In reality, she said, 143 had not presented an offer at all, yet it argued that the receiver should accept its proposal because it would generate more than if the sale were approved. Acceptance of its proposal, the motion judge said, would “seriously undermine the integrity of the court-approved sale process that has been in place since September 2023.”

[9] 143 appealed prior to the release of motion judge’s reasons. Following the release of the reasons, on June 12, counsel for the receiver sent an email to appeal counsel for 143 and Mr. Fulton, Alastair McNish, asking whether 143 was still planning to appeal. He responded that it was. Counsel for the receiver then asked several questions: “Do you have funds in your trust account? What is the amount? When would the redemption funds be paid to the Receiver? When would your client seek the discharge of the Receiver?” Mr. McNish asked whether these

questions were an indication that the receiver was prepared to consider a resolution. A phone call followed, and presumably the terms of any such resolution were discussed. Counsel for the receiver followed up on June 26, 2025, stating “please advise today as to 1) are you in funds and 2) the amount of the funding. I asked for this information last week and have yet to hear from you.” There is no record of any further communications.

There is no right of appeal under s. 193(a)

[10] Section 193(a) of the *BIA* establishes a right of appeal “if the point at issue involves future rights”.

[11] 143 argues that its appeal involves future rights because Mr. Fulton, as guarantor of the mortgage, will be subject to greater liability when RBC seeks to enforce its claim against him personally.

[12] I do not accept this argument. It is well established that “future rights” mean future *legal* rights. As explained in *North House Foods Ltd. (Re)*, 2025 ONCA 563, 20 C.B.R. (7th) 1, at para. 25:

Future rights under s. 193(a) mean future legal rights. The phrase has been interpreted to mean “rights which could not at the present time be asserted but which will come into existence at a future time”. The question is whether the rights engaged in an appeal are future rights or presently existing rights that are exercisable in the future. Future rights do not include procedural rights or commercial advantages or disadvantages that may

accrue from the order challenged on appeal. [citations omitted.]

[13] There is no question that, as guarantor of 143's debt, Mr. Fulton's commercial interests are affected by the approval and vesting order. That order determines the extent of his liability on the guarantee, but that is his present liability, not a future right: see *2403177 Ontario Inc. v. Bending Lake Iron Group Ltd.*, 2016 ONCA 225, 396 D.L.R. (4th) 635, at paras. 27-28.

[14] 143 did not press the future rights argument at the hearing of the motion, focusing instead on s. 193(c).

There is no right of appeal under s. 193(c)

[15] Section 193(c) provides a right of appeal "if the property involved in the appeal exceeds in value ten thousand dollars".

[16] 143 focuses on the \$10,000 threshold, arguing that it is clearly surpassed by the value of the property in this case and the loss it says it will incur if the sale is completed.

[17] However, it is well established that the right of appeal under s. 193(c) must be construed narrowly to avoid undermining the stay imposed by s. 195: see e.g., *Cosa Nova Fashions Ltd. v. The Midas Investment Corporation*, 2021 ONCA 581, 95 C.B.R. (6th) 240, at para. 22, citing *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, 74 C.B.R. (6th) 1, at para. 15; *Bending Lake*, at para. 53. In *Bending Lake*, Brown J.A. held that s. 193(c) does

not provide for an appeal as of right from: “(i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor’s property, or (iii) orders that do not result in a loss.”

[18] At the hearing of the motion, 143 argued that “loss” was established because two people were willing to lend 143 \$1.4 million and were seeking mortgages as security for their loans. From this, 143 argued that it could be inferred that the value of the property was \$1.4 million. Although the price obtained by the receiver is subject to a sealing order, for the purposes of this motion, the receiver agreed that the price could be assumed to be \$1 million. Thus, 143 argued that it had suffered a “loss” of \$400,000 – the difference between the value of the property and the approved sale price.

[19] I do not accept this argument. The inference I am invited to draw as to the value of the property is simply not available. Affidavit evidence as to what a friend and a family member were willing to lend says nothing about the objective value of the property. Moreover, the affidavits are an unenforceable statement of intention. They state that someone is willing to make a loan, but no such loan was made at the relevant time. 143 characterized its attempt to redeem the mortgage as “essentially” an offer but acknowledged that it was not articulated as an offer to purchase the property for \$1.4 million, and that there was a difference between affidavits promising money and money held in a trust account, available to complete a purchase. All that was available on May 27 was the affidavits.

[20] Essentially, 143 attempted to redeem its debt to RBC, albeit for significantly less than the amount of the debt. This was no offer to purchase, and even if it could be so characterized, it was contingent on raising monies that it did not have. 143 had only non-binding promises of money. The receiver was under no obligation to act on these promises, and its decision not to do so occasioned no loss, let alone the loss of \$400,000 that 143 contends.

Leave to appeal is denied

[21] The receiver opposes the grant of leave on the basis that 143 did not request leave in its notice of appeal, as required by r. 31(2) of the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 1 (the “*BIA Rules*”). This court has stated that leave should generally be refused where it is not sought in the notice of appeal: *North House Foods*, at para. 43. However, in rare circumstances, based on the combined operation of r. 3 of the *BIA Rules* and r. 61.08(3) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, an order may be granted to amend a notice of appeal to seek leave *nunc pro tunc*: *North House Foods*, at paras. 44-46.

[22] I do not think this is the rare case in which such an order should be made. But I add that I would not have granted leave even if it had properly been sought. Applying the test from *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617, at para. 29, this appeal concerns a fact-based matter rather than a matter of general importance to the law. 143 was unsuccessful in its attempt to redeem the mortgage for less than the amount owing.

It had ample time to make an offer if it wished to do so – some 20 months – and it failed to do so. Finally, this matter has been subject to considerable delay – it proved difficult to sell the property and for a variety of reasons the court’s processes did not work efficiently. There is no basis to delay things further by granting leave to appeal.

DISPOSITION

[23] The motion is granted.

[24] The receiver is entitled to costs in the agreed amount of \$5,000. RBC did not make submissions and did not seek costs.

“Grant Huscroft J.A.”