COURT OF APPEAL FOR ONTARIO

CITATION: Unity Health Toronto v. 2442931 Ontario Inc., 2025 ONCA 93
DATE: 20250207
DOCKET: M55571 (COA-24-CV-0319)

Coroza J.A. (Motions Judge)

In The Matter of the Receivership of
2442931 Ontario Inc.

BETWEEN

Unity Health Toronto

Moving Party
(Responding Party/Respondent))

and

2442931 Ontario Inc.

Responding Party
(Respondent)

AND BETWEEN

Bank of Montreal, as Administrative Agent

Applicant
(Moving Party/Appellant)

and

Unity Health Toronto

Respondent
(Responding Party/Respondent)

Harvey Chaiton and Matthew Gottlieb, for the appellant/moving party Bank of Montreal, as administrative agent

Sarit E. Batner, Andrew Kalamut and Michael (Ruofan) Cui for the respondent/responding party Unity Health Toronto

Heard: December 12, 2024

ENDORSEMENT

I. OVERVIEW

[1] At issue on this motion is whether the appellant, Bank of Montreal, has an automatic right of appeal of an order made by Kimmel J. (the "motion judge") dated March 13, 2024 pursuant to s. 193(c) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA") or if it requires leave to appeal the order pursuant to s. 193(e), and whether leave should be granted.

[2] As I will explain, I conclude that the appellant does not have an automatic right of appeal and leave to appeal is denied.

II. BACKGROUND FACTS

[3] The underlying dispute concerns the financing of a redevelopment project for the benefit of the respondent, Unity Health Toronto[1] (the "Project"). Following a public procurement process in 2015, the respondent awarded the Project to 2442931 Ontario Inc. ("ProjectCo"). The respondent and ProjectCo entered into an agreement in which ProjectCo would build, design, and finance the Project for a fixed price (the "Project Agreement").

1 Unity Health Toronto was formerly known as St. Michael's Hospital.

[4] To obtain funding for the Project, ProjectCo and a syndicate of lenders (the "Lenders") entered into an agreement under which the Lenders would incrementally advance a construction loan of approximately $230 million (the "Credit Agreement"). The appellant is the administrative agent of the Lenders.

[5] Under both the Project Agreement and Credit Agreement, the respondent agreed to make a payment for an agreed upon amount to ProjectCo upon certification that a particular project milestone, known as the "Tower Interim Completion" (the "TIC"), had been achieved (the "TIC payment"). In addition, both the Project Agreement and Credit Agreement required ProjectCo to obtain and maintain both a performance bond and a labour and materials payment bond for the Project. ProjectCo obtained these bonds from Zurich Insurance Company ("Zurich").

[6] Finally, the appellant, the respondent, and ProjectCo entered into the Lenders' Direct Agreement (the "LDA"). The LDA and Project Agreement contained provisions delineating the rights of each party if ProjectCo defaulted under the Project Agreement. In the event of default, the respondent had the right to terminate the Project Agreement, triggering an obligation on the respondent to pay the Lenders an agreed upon sum of money ("Compensation on Termination"). Alternatively, the respondent had the right to issue a notice of default, allowing the Lenders to exercise their right under the LDA to "step-in" and assume the rights and obligations of ProjectCo under the Project Agreement.

[7] In August 2018, ProjectCo's parent company became insolvent and ProjectCo was in default under the Project Agreement. At this time, certification for the TIC payment had not yet been achieved. The respondent exercised its right to provide the Lenders with a notice of default, giving the Lenders an opportunity to "step-in" and assume the obligations of ProjectCo. The Lenders declined to do so.

[8] In December 2018, the appellant obtained an order putting ProjectCo into receivership. The order had the effect of staying any proceedings against ProjectCo, including termination of the Project Agreement by the respondent.

[9] After the receivership order was made, the receiver called upon the performance bond with Zurich. This left Zurich with an election to make: cure the default of ProjectCo and work to complete the Project, or pay the balance of the performance bond it had provided to ProjectCo. Zurich elected to work at completing the Project and over the next twelve months made payments to trades under the bonds to continue construction.

[10] In August 2019, Zurich elected to cease involvement in the Project. In December 2019, the respondent, with the Lenders' consent, obtained an order lifting the stay for the singular purpose of allowing the respondent to complete the Project with a new contractor (a remedy available to the respondent under the Project Agreement). The stay was lifted for this singular purpose without prejudice

to the respondent's right to exercise its other remedial rights, including its right to terminate the Project Agreement.

[11] In April 2020, Zurich commenced an application to rescind the bonds it provided to ProjectCo, alleging it had discovered fraud and collusion in the procurement process.

[12] At the time of the proceedings below, the redevelopment was occupied and in use, albeit not finished.

[13] In April 2022, the appellant brought an application for a declaration that the TIC had been achieved, or, in the alternative, an order for the respondent to complete all steps required to achieve the TIC and pay the Lenders the TIC payment (the "TIC application"). In August 2022, the appellant brought a motion for an order assigning all of ProjectCo's rights to enforce and recover the TIC payment to the appellant, or, in the alternative, directing the receiver on behalf of ProjectCo to join the TIC application as a co-applicant ("the assignment motion").

[14] In response, the respondent brought a motion to dismiss both the appellant's TIC application and assignment motion. The respondent also brought a motion to lift the stay of proceedings under the receivership order so that it could terminate the Project Agreement.

III. THE MOTION JUDGE'S DECISION

[15] All motions were heard together. First, the motion judge lifted the stay of proceedings to allow the respondent to exercise its right to terminate the Project Agreement (the "Lift Stay Order"). The motion judge found that the prejudice suffered by the respondent if the stay was not lifted was more "material and direct" than the prejudice that flowed to the appellant if the stay was lifted. The motion judge reasoned that any prejudice to the appellant was attenuated by her finding that the appellant lacked standing to bring the TIC application.

[16] Second, the motion judge granted the respondent's motion to dismiss the appellant's TIC application and dismissed the appellant's assignment motion based in part on her finding that the appellant lacked standing to enforce the right to the TIC payment (the "Dismissal Order"). She rejected the appellant's argument that the irrevocable direction in the Project Agreement that the TIC payment be made to the Lenders constituted a legal or equitable assignment of rights.

[17] The appellant seeks to appeal the decision of the motion judge with respect to both orders. There is no dispute that the appellant has an appeal as of right to this court from the Dismissal Order as a final order of a judge of the Superior Court: *Courts of Justice Act*, R.S.O. 1990, c. C.43. s. 6(1)(b).

[18] The Lift Stay Order, however, does not fall under s. 6(1)(b) of the *Courts of Justice Act*. This order flows from the BIA. To appeal the order to this court, the

appellant must demonstrate that it has an appeal route under s. 193 of the BIA. The appellant has brought this motion before me to direct which, if any, of the clauses of s. 193 allow the appellant to appeal the Lift Stay Order.

IV. POSITION OF THE PARTIES

[19] The appellant argues it has an automatic right of appeal from the Lift Stay Order pursuant to s. 193(c). In the alternative, it argues that leave to appeal should be granted pursuant to s. 193(e). The appellant submits that if it cannot appeal the Lift Stay Order, its appeal of the Dismissal Order will be rendered moot because the respondent will terminate the Project Agreement once the stay is lifted and any claim to the TIC payment will be extinguished.

[20] The respondent argues that the motion should be dismissed. First, the appellant does not have an appeal as of right under s. 193(c) because the Lift Stay Order is purely procedural and does not directly bring into play the value of the debtor's property or result in a loss, as required by the provision. Second, the appellant has not satisfied the test for leave under s. 193(e) as set out in *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 O.R. (3d) 617 ("*Pine Tree*").

[21] I will deal with these two issues in turn.

(1) The appellant does not have an appeal as of right under s. 193(c)

[22] Section 193(c) of the BIA states:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> …
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars

[23] The right of appeal under s. 193(c) has been narrowly construed by this court to promote efficient and expeditious resolution of bankruptcy proceedings: *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, 369 D.L.R. (4th) 635 ("*Bending Lake*"), at paras. 46-53. Accordingly, the court in *Bending Lake* held that s. 193(c) does not apply to orders that: (i) are procedural in nature, (ii) do not bring into play the value of the debtor's property, or (iii) do not result in a loss.

[24] The appellant argues that the motion judge's order is not purely procedural because the "effect" of the Lift Stay Order impacts the value of the TIC payment, asserted by the appellant to be valued at approximately $90 million. Once the stay is lifted, the respondent will terminate the Project Agreement, extinguishing any claim to the TIC payment and resulting in significant loss to the appellant.

[25] I am not persuaded by the appellant's argument. Section 193(c) is not applicable because the Lift Stay Order is: (a) on its face procedural in nature; (b) does not directly put any property of the debtor into play; and (c) does not directly result in a loss. Instead, the Lift Stay Order simply removes a roadblock to

permit the respondent to exercise its rights under the bargain it negotiated with the Lenders.

(a) The motion judge's order is procedural

[26] I agree with the respondent that the appellant, in its submissions, has mischaracterized the Lift Stay Order as a "lift stay" and "termination" order. The relevant excerpts of the motion judge's order is set out below:

> 2. THIS COURT ORDERS that the stay of proceedings against ProjectCo, granted pursuant to the Receivership Order, is hereby lifted for the purpose of permitting Unity to exercise the remedy pursuant to section 34.3(a) of the Project Agreement to terminate the Project Agreement.
>
> 3. THIS COURT DECLARES that the Project Agreement is terminated effective as of the date this issued and entered Order, together with the Notice of Termination appended as Schedule A to this Order, is served on counsel to the Receiver and counsel to the Administrative Agent, and upon such service, the written notice provisions of the Project Agreement and Lenders' Direct Agreement will be satisfied. [Emphasis added.]

[27] Plainly, the order is procedural in nature because it simply "lift[s]" the stay for the purpose of permitting the respondent to exercise its rights under the Project Agreement. Although paragraph 3 declares that the Project Agreement is terminated as of the date of service of the order and notice of termination, this declaration simply outlines when and how the agreement may be terminated, not that the agreement is in fact terminated by the order.[2]

2 Counsel for the respondent advised that no notice of termination has been served.

[28] The order does not terminate the Project Agreement; it only lifts the stay of the receivership order to enable the respondent to exercise its contractual right to terminate.

(b) The order does not directly "bring into play" the value of the debtor's property

[29] The appellant relies on this court's decision in *Hillmount Capital Inc. v. Pizale,* 2021 ONCA 364, 462 D.L.R. (4th) 228, to argue that even if the order is procedural, it does not necessarily follow that there is not property value involved that meets the requirement of s. 193(c). The appellant asks me to, as instructed in *Hillmount*, look beyond the procedural nature of the order and analyze the "economic effect" of the order: *Hillmount,* at para. 41. The appellant argues that while the Lift Stay Order appears procedural, it is the effect of that order that brings into play property that exceeds $10,000.

[30] In my view, to accept the appellant's argument would be to expand this court's interpretation of s. 193(c). And I do not read *Hillmount* as having expanded the application of automatic rights of appeal under the BIA; on the contrary, *Hillmount* reaffirmed that there is no right of appeal under s. 193(c) from a question involving procedure alone: see paras. 29-40.

[31] The facts at hand bear analogy to the facts in *Romspen Investment Corporation v. Courtice Auto Wreckers Limited*, 2017 ONCA 301, 138 O.R. (3d)

373, a case cited in *Hillmount* for the proposition that this court has construed the right to appeal under s. 193(c) to cases which directly deal with property valued over $10,000: at paras. 29-30. In *Romspen*, the majority of the court held that the appellant did not have an automatic right of appeal under s. 193(c) because the proposed appeal involved a procedural matter that did not directly involve any quantum of money: at para. 22. The appellant was a union seeking to certify a bargaining unit at a corporation that was placed in receivership. The union also sought to file an unfair labour practice complaint against the corporation for firing four employees in retaliation for the certification application. However, because the corporation was in receivership, no proceedings could be commenced against the corporation and so the union's certification application and complaint were stayed. When the union's motion to lift the stay was denied, they sought to appeal the decision under s. 193(c) of the BIA, arguing that the stay prevented them from seeking reinstatement of the four terminated employees (and that the value of these employees plus damages and back pay was in excess of $10,000).

[32] The majority of the court rejected the union's argument, holding, at para. 22, that the proposed appeal involved a procedural matter: "can the union proceed at this time with its certification application and [complaint]"? The majority held that based on this question, the appeal did not involve a quantum of money and did not fall under s. 193(c).

[33] Similarly, the question at issue in this appeal is a procedural one: can the respondent proceed with its contractual right to terminate the Project Agreement? The motion judge's order is thus procedural and does not directly involve the economic interests of the appellant. Even if the appellant was successful on appeal of the Lift Stay Order, its success would not guarantee its recovery of the TIC payment. At best, the appellant would have the opportunity to sue the respondent for the TIC payment. The order's effect, then, is to deny the appellant the chance to try to obtain the TIC payment, not to deny the appellant the actual TIC payment due.

[34] The appellant also relies on Tulloch J.A.'s (as he then was) decision in *C & K Mortgage Services Inc. v. Camilla Court Homes Inc.*, 2020 CanLII 100559 (Ont. C.A.). In that case, the appellant entered into an agreement to purchase a property subject to a receivership. The receiver then obtained an order authorizing it to disclaim the agreement. Tulloch J.A. agreed with the appellant that he had a right to appeal the order under s. 193(c) because the order "purported to finally determine [the appellant's] lack of entitlement to the property": at para. 37.

[35] *C & K Mortgage* is distinguishable from the facts at hand. In *C & K Mortgage*, Tulloch J.A. was deciding the very issue that put into play property valued at more than $10,000, namely, whether the receiver could disclaim the agreement. In contrast, the motion judge in this case was only deciding whether to the lift the stay – she was not deciding whether the respondent could terminate the Project

Agreement. Lifting the stay does not directly put into jeopardy the appellant's property; the respondent's act of terminating the Project Agreement does. In other words, this case is one step removed from *C & K Mortgage*, where the act at issue in the motion (i.e., disclaiming the agreement of purchase and sale) brought into play more than $10,000.

[36] In conclusion, while the appellant's argument has some superficial appeal, the weight of the jurisprudence of this court runs against the appellant's position. This court has consistently held that the appeal must directly involve property exceeding $10,000 in value: *Enroute Imports Inc. (Re)*, 2016 ONCA 247 at para. 5; *Crate Marine Sales Limited (Re)*, 2016 ONCA 140, 33 C.B.R. (6th) 169, at paras. 6-7; *Robson Estate v. Robson* (2002), 33 C.B.R. (4th) 86 (Ont. C.A.), at para. 5; *Pine Tree*, at para. 17; and *Ontario Wealth Management Corporation v. Sica Masonry and General Contracting Ltd.*, 2014 ONCA 500, 17 C.B.R. (6th) 91, at para. 41. The Lift Stay Order is procedural and does not directly bring into play the value of the debtor's property.

(c) The order does not directly result in a loss

[37] Nor do I accept the appellant's assertion that the Lift Stay Order directly results in an economic loss.

[38] First, as noted above, this assertion depends on whether I view the order as something other than a procedural order because of its effect (i.e., termination of

the Project Agreement). As I have explained, I find that the order is procedural. It does not dictate whether the appellant can recover the TIC payment or not – it merely permits the respondent to terminate the Project Agreement.

[39] Second, the argument that there is a loss is speculative. The loss is premised on an assumption that the appellant is entitled to the TIC payment, which the appellant asserts is estimated to be approximately $90 million; however, the motion judge concluded that it was plain and obvious that the appellant's application for the TIC payment could not succeed. She held that not only did the appellant lack standing to pursue the TIC application, but the application could not succeed as constituted. Moreover, she made no findings as to the value of any TIC payment. As a result, even if the appellant succeeds on appeal from the Lift Stay Order, the issue of whether the appellant will recover the TIC payment at all and the quantum of that payment still has to be determined. As Brown J.A. noted in *Hillmount*, at para. 42, a determination of whether an order falls under s. 193(c) requires a critical examination of the evidence – bald assertions of a $90 million loss are not enough.

[40] Third – and most importantly – the purported loss to the appellant results from the Project Agreement, not the Lift Stay Order. This case is somewhat analogous to *Hillmount*, wherein the appellant sought to appeal an order approving the sale of property on an "as is" basis, arguing that the sale would result in an economic loss. The court reasoned that it was the preceding appointment order,

which allowed the receiver to market the property on an “as is” basis rather than after completion of renovations, that put in jeopardy the value of any loss to the appellant, not the approval order. The order approving the sale thus did not result in any loss and there was no appeal as of right under s. 193(c): *Hillmount*, at paras. 51-53. Here, the respondent’s right to terminate the Project Agreement in the event of default similarly arises from the pre-existing Project Agreement, not the Lift Stay Order.

[41] In sum, any loss to the appellant is a result of the parties’ respective contractual rights under the Project Agreement. The Lift Stay Order does not determine the appellant’s right to the TIC payment; it simply lifts the stay and lets the parties’ preexisting contractual rights under the Project Agreement play out.

[42] The appellant does not have a right of appeal. It must be granted leave pursuant to s. 193(e).

(2) Leave to appeal under s. 193(e) is denied

[43] The appellant seeks leave to appeal under s. 193(e) of the BIA. Under s. 193(e), the court must look to whether the proposed appeal:

> (a) 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) is *prima facie* meritorious; and

> (c) would unduly hinder the progress of the bankruptcy/insolvency proceedings: see *Pine Tree*, at para. 29.

[44] The exercise of granting leave to appeal is discretionary and the test must be exercised in a flexible and contextual way: *Pine Tree*, at para. 29.

[45] The following factors weigh against granting leave in this case:

- The appeal is not *prima facie* meritorious. Not only is the motion judge sitting in a specialized court, but she was also the case management judge for the related proceedings. Her decision to lift the stay is discretionary and entitled to great deference: *Pine Tree*, at para. 35. From my review of her reasons, the motion judge fully understood the arguments advanced by the parties. While she found that some prejudice flowed to the appellant from her decision, any prejudice was diminished by her finding that the Lenders did not have standing to bring the TIC application because ProjectCo's entitlement and right to enforce the TIC payment had not been previously assigned (legally or equitably), nor did the respondent did not consent to any such assignment (as required by the Project Agreement). The motion judge's factual and legal analysis appear to be complete, and the appellant would face a difficult task in convincing a panel of this court to interfere with her decision to lift the stay.

- The appeal is from a decision about specific contracts in a unique set of circumstances (e.g., there are only two creditors (the respondent and the Lenders), there is a specific termination right, there is a specific way to avoid termination by stepping in, and the Lenders decided not to step in and knew consequences). Accordingly, it does not raise issues of general importance. I do not agree with the appellant's position that the decision of the motion judge stands for a general proposition that lenders cannot enforce their security which is of interest to lenders involved in similar transactions.

- Since the Project Agreement is ProjectCo's only asset, any delay in termination of the Project Agreement will delay the progress of the insolvency proceedings.

[46] The appellant asks me to consider the jurisprudence of this court that holds that where there are two orders or two parts of an order that are "so interrelated", one of which is an appeal as of right and one of which requires leave, leave should be granted so that appeals should be heard together: see e.g., *Lax v. Lax* (2004), 70 O.R. (3d) 520 (C.A.), at para. 9. It argues that the Lift Stay Order and the Dismissal Order are interrelated such that leave to appeal should be granted so the issues can be heard together.

[47] Respectfully, the appellant's reliance on this caselaw is not apt. In those cases, the court is considering leave to appeal an interlocutory order or the interlocutory aspects of an order (both of which are appealable with leave to the Divisional Court) when they raise issues interrelated with an appeal as of right to this court of a final order or the final aspects of an order. As a matter of judicial economy, justice is sometimes best served by allowing one court to hear both appeals because the disposition of one appeal may dispose of the other.

[48] Here, the jurisdiction to grant leave is carefully proscribed by the BIA. While the test must be approached flexibly and contextually, the court in *Pine Tree* noted that the three considerations noted above are the "prevailing considerations": at para. 29. The appellant's argument, if accepted, would necessarily expand the test for leave. As the respondent points out, to do so would be inconsistent with the jurisprudence of the court that holds that these sections must be narrowly construed.

[49] To conclude, the appellant's appeal is not as of right under s. 193(c), and thus leave to appeal under s. 193(e) is necessary but denied. I recognize that if my decision is final, the appellant loses the chance to claim the TIC payment – but this is a result of the bargain the appellant made with the respondent and the decision of the appellant not to avail itself of remedy that it had to step in and assume ProjectCo's rights and obligations. The parties involved in this case are sophisticated and can be presumed to know this court's narrow construction of the

appeal rights under the BIA. I adopt the following comments of the motion judge in her decision to lift the stay:

> The fact that the Lenders will not be able to pursue the TIC Application if the Stay is lifted, in circumstances where they chose not to exercise their contractual remedy of exercising their Step-in Rights that could have prevented Unity from terminating the Project Agreement, is not an unjust or inequitable outcome.

V. DISPOSITION

[50] For these reasons, the appellant's motion is dismissed. If the parties have not reached an agreement on the costs of this motion, they should exchange submissions and file those submissions with the court within 10 days of this endorsement. The submissions should not exceed 3 pages.

"S. Coroza J.A."