COURT OF APPEAL FOR ONTARIO

CITATION: Canada (Superintendent of Bankruptcy) v. 407 ETR Concession Company Limited, 2012 ONCA 569

DATE: 20120905

DOCKET: M40742 & M40925 (C54560)

Weiler, Blair and Rouleau JJ.A.

In the Matter of the Bankruptcy of Matthew David Moore, of the City of Brampton in the Regional Municipality of Peel, Province of Ontario

BETWEEN

The Superintendent of Bankruptcy

Respondent/Applicant (Appellant)

and

407 ETR Concession Company Limited and Matthew David Moore

Moving Party/Respondent (Respondents)

J.T. Curry and Andrew Parley, for the respondent 407 ETR Concession Company Limited

Liz Tinker, for the appellant

Heard: May 16, 2012

Rouleau J.A.:

Introduction

[1] The court is being called upon to rule on two motions. The first is a motion by 407 ETR Concession Company Limited (407 ETR) to quash the notice of appeal delivered by the Superintendent of Bankruptcy (Superintendent) on the basis that the Superintendent does not have the standing necessary to appeal the

decision.

[2] In the event that 407 ETR's motion to quash is successful, the Superintendent seeks leave to appeal and an extension of time to bring the motion for leave.

[3] 407 ETR opposes leave being granted on the basis that the Superintendent was not a party to the underlying dispute, a dispute that has since settled, and there is no basis in law for granting such leave.

[4] The outcome of these motions turns on the proper interpretation of ss. 5(4)(a) and 193(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

Facts

[5] Matthew David Moore (Moore) made an assignment in bankruptcy in November 2007. At the time he had accumulated a debt to 407 ETR of approximately $35,000 in unpaid toll charges.

[6] On June 21, 2011, Deputy Registrar Donaldson made an order granting Moore an absolute discharge from bankruptcy. Moore then sought to obtain valid vehicle permits for two cars. Section 22(4) of the *Highway 407 Act, 1998*, S.O. 1998, c. 28, prevents the Registrar from validating or issuing permits where 407 tolls remain unpaid. Accordingly, the Registrar of Motor Vehicles refused to validate or issue the permits because of the unpaid tolls

[7] Moore brought a motion returnable before a registrar in bankruptcy seeking a declaration that his debt to 407 ETR was released pursuant to his absolute

discharge from bankruptcy. Both 407 ETR and the Superintendent were served with notice of the motion.

[8] Registrar Mills heard the motion on September 8, 2011. Through inadvertence 407 ETR did not appear. Nor did the Superintendent. The Superintendent explained that, based on past experience, such motions were usually granted or settled.

[9] The registrar allowed Moore's motion granting an order that: (i) Moore's discharge on June 21, 2011 released him from all claims provable in bankruptcy, including the debt of 407 ETR; and (ii) directing the Ministry of Transportation to issue licence plates to Moore upon payment of the usual licensing fees.

[10] Upon becoming aware of the registrar's order, 407 ETR took steps to have it set aside. It brought a motion in the Superior Court, rather than before a registrar in bankruptcy.[1] 407 ETR did not give the Superintendent notice of its motion. Moore consented to the motion, which was granted by the motion judge on October 6, 2011.

[11] Moore subsequently amended his motion and filed it with the Superior Court. He moved for the same relief he had sought before the registrar. He also sought a declaration to prevent 407 ETR from using s. 22(4) of the *Highway 407 Act* to stop him from obtaining a vehicle permit.

[12] Additionally, he served 407 ETR and the Attorneys General of Canada and Ontario with a notice of constitutional question. He maintained that the refusal to validate or issue a vehicle permit under the provincial legislation engaged four

conflicts with the *BIA* and that s. 178(2) of the *BIA* provides that an order of discharge releases the bankrupt from all claims provable in bankruptcy.

[13] On October 25, 2011, the motion judge dismissed Moore's motion. He concluded that there was no operational conflict between s. 22 of the *407 Highway Act* and s. 178(2) of the *BIA*. As a result, he declined to grant the relief sought by Moore.

[14] The Superintendent did not receive notice of any of the proceedings before the motion judge, including the constitutional question. It learned of these proceedings after the motion judge's decision dismissing Moore's motion on its merits.

[15] On November 4, 2011, the day before the end of the appeal period, the Superintendent intervened in this proceeding by serving and filing a notice of appeal. It relied on ss. 5(4)(a) and 193(c) of the *BIA* as its authority to do so. Later that day, Moore advised the Superintendent that he no longer intended to appeal the decision as he had received a "very, very attractive offer" to settle from 407 ETR.

[16] On November 17, 2011, 407 ETR brought a motion to quash the Superintendent's notice of appeal. It took the position that the Superintendent lacks standing to bring an appeal as it was not a party to the proceeding below. Further, if the Superintendent were to request leave, leave should not be granted.

[17] The Superintendent took the position that leave was not required to appeal the motion judge's decision. However, out of an abundance of caution, it brought

a motion requesting leave pursuant to s. 193(e) of the *BIA* and/or the court's inherent jurisdiction and sought an extension of time to do so.

Issues

[18] The issues raised by these motions are as follows:

1. Does the Superintendent have standing to appeal the order of the motion judge as of right?; and

2. If the Superintendent does not have standing as of right:

(a) Can the Superintendent appeal the motion judge's decision with leave of the court?

(b) Should an extension of time for serving and filing a notice of motion requesting leave to appeal be granted?; and

(c) Should leave to appeal be granted?

Analysis

(1) Does the Superintendent have standing to appeal the order of the motion judge as of right?

[19] An appeal from a decision or order made in proceedings instituted under the *BIA* is governed by the *BIA* and the *Bankruptcy and Insolvency General Rules*, C.R.C., c. 368 (*BIA* rules), not by the *Courts of Justice Act*, R.S.O. 1990, c. C-43, and the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[20] *BIA* rule 31(1) provides that an appeal to a court of appeal referred to in s.

183(2) of the *BIA* (which includes the Court of Appeal for Ontario) must be made by filing a notice of appeal at the office of the Registrar of the court appealed from. In the case of Ontario, the court appealed from is the Superior Court of Justice. The appeal must be filed within ten days of the order or decision appealed from.

[21] The Superintendent relies on the broad power granted by s. 5(4)(a) of the *BIA*, as providing it with a right of appeal to this court even where it did not participate in the proceedings at the first instance and none of the original parties are appealing. I do not agree that s. 5(4)(a) grants the Superintendent that right.

[22] The section allows the Superintendent to "intervene in any matter or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto". Although the section gives the Superintendent a broad power to intervene, the ability to do so is restricted to a proceeding in "court".

[23] "Court" is defined in s. 2 of the *BIA*. Except in certain noted sections, it "means a court referred to in subsection 183(1) or (1.1)". Sections. 183(1) and (1.1) list the provincial and territorial trial courts, including the Superior Court of Ontario. The Court of Appeal for Ontario, or any other appellate court for that matter, is notably absent from the list. The scope of intervention by the Superintendent contemplated by s. 5(4)(a)is thus limited to the trial courts, and not the courts of appeal.

[24] The Superintendent further argues that even if s. 5(4)(a) only allows interventions in the Superior Court, technically, its intervention in this proceeding

was filed in the Superior Court within the requisite ten day appeal period. Pursuant to *BIA* rule 31(1), the notice of appeal is to be filed with the Superior Court, not the Court of Appeal. After filing it is transmitted to the Court of Appeal. As a result, the Superintendent contends that the intervention was made before the matter had left the Superior Court.

[25] I would not give effect to this submission. Although *BIA* rule 31(1) provides for the filing of the notice of appeal in the Superior Court, the appeal is taken to the Court of Appeal for Ontario. For all intents and purposes, it is a proceeding taken in the Court of Appeal. It is the Court of Appeal and not the Superior Court that has authority over the proceeding, including the appropriate parties and any proposed interveners.

[26] The Superintendent, therefore, has no standing to bring an appeal to this court as of right. However, that does not dispose of the matter. The Superintendent argues that it has standing to appeal the motion judge's decision with leave of the court.

(2)(a) Can the Superintendent appeal the motion judge's decision with leave of the court?

[27] Section 193 of the *BIA* provides for statutory rights of appeal and reads as follows:

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

(a) if the point at issue involves future rights;

(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;

(c) If the property involved in the appeal exceeds in value ten thousand dollars;

(d) From the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and

(e) In any other case by leave of a judge of the Court of Appeal.

[28] The Superintendent argues that s. 193(e) is a catch all provision allowing for the possibility of an appeal in any case that does not otherwise fall under s. 193(a) to (d). Section 193(e) is, therefore, broad enough to permit this court to grant leave and allow the Superintendent to appeal from the motion judge's decision even though it was not a party thereto.

[29] 407 ETR argues that absent a statutory right of appeal, there is no inherent jurisdiction in this court to hear the appeal. 407 ETR submits that s. 193(e) of the *BIA*, does not give this court jurisdiction to grant the leave to appeal sought and has no application in this case.

[30] I agree with the Superintendent's submission. Subsections 193(a-d) grant automatic rights of appeal. Subsection (e), however, is distinct from the preceding sections in that it is discretionary. The wording gives the court broad discretion. It provides that in any case where leave is granted, other than those listed in (a-d), "an appeal lies to the Court of Appeal from any order or decision of a judge of the court".

[31] Although we have not been referred to a reported case where a court of appeal granted leave to the Superintendent where it was not a party in the lower court proceedings, I see nothing in the section that prevents us from doing so. Indeed, reading the provision in the context of the statutory scheme and, in

particular, the unique position of the Superintendent, necessitates this conclusion.

[32] Even where the Superintendent does not intervene as a party in the Superior Court, its statutory position is such that it is not a true stranger to the proceedings. The Superintendent holds a unique position with respect to bankruptcy proceedings. It is the chief government official appointed by the Governor in Council charged with supervising the administration of "all estates and matters to which this Act [the *BIA*] applies": *BIA*, s. 5(2).

[33] To allow the Superintendent to fulfill this role, the *BIA* gives it the power to intervene in any *BIA* proceedings in the Superior Court as if it were a party: *BIA*, s. 5(4). To guide the exercise of that authority, the Superintendent has established an intervention program that has, as its objective:

> identify[ing] those situations in which the Superintendent or a representative of the Superintendent should intervene in the administration of certain cases by applying to the courts *to ensure that the integrity of the insolvency process is maintained.* This may involve cases … where matters of public policy are concerned: Frank Bennett, *Bennett on Bankruptcy*, 14th ed. (Toronto: CCH, 2009), at p. 1471. [Emphasis added.]

[34] Intervention at first instance is therefore crucial to the important role of the Superintendent in maintaining the integrity of the bankruptcy and insolvency system. It follows that in certain exceptional circumstances, for example, where a decision is made to which the Superintendent was not a party, Parliament must have intended that it be permitted to seek the leave of this court to appeal from that decision.

[35] That said, where the Superintendent relies on s. 193(e) to appeal a decision to which it was not a party at first instance, leave to appeal should only be granted

in exceptional circumstances and in accordance with the factors the court relies on when exercising its inherent jurisdiction to grant leave to a non-party, as set out in *Société des Acadiens du Nouveau-Brunswick Inc. v. Assn. of Parents for Fairness in Education, Grand Falls District 50 Branch*, [1986] 1 S.C.R. 549, at p. 594. That is, the applicant should be able to show:

(a) that its interest was not represented at the proceeding;

(b) that it has an interest which will be adversely affected by the decision;

(c) that it is, or can be, bound by the order;

(d) that it has a reasonably arguable case; and

(e) that the interests of justice in avoiding a multiplicity of proceedings would be served by the grant of leave.

[36] In my view, these factors provide a helpful guide to determine when the Superintendent has established exceptional circumstances justifying the granting of leave under s. 193(e) where it has not intervened in the proceedings below.

[37] I therefore conclude that s. 193(e) of the *BIA* permits this court to grant the Superintendent leave to appeal from a lower court decision to which it was not a party where it can establish exceptional circumstances, and meet the standard test that any party must meet to obtain leave of the court.

(2)(b) Should an extension of time for serving and filing a notice of motion requesting leave to appeal be granted?

[38] Before deciding whether the Superintendent should be granted leave in this

case, there is the question of the timing of its motion. The decision the Superintendent seeks to appeal was issued October 25, 2011. The Superintendent's notice of appeal was served and filed November 4, 2011. The notice of motion seeking leave to appeal, however, was not filed until January 17, 2012, after the Superintendent became concerned that leave may in fact be required. By this time, the motion was out of time.

[39] In my view, the extension of time ought to be granted. It is well established that in deciding whether to extend the time to appeal or seek leave, the court will consider:

a) whether the person formed an intention to appeal within the relevant period;

b) the length of the delay and the explanation for the delay;

c) any prejudice to the respondent;

d) the merits of the appeal; and

e) whether the justice of the case requires it.

See *Rizzi v. Mavros*, 2007 ONCA 350, 85 O.R. (3d) 401, at para. 16.

[40] In this case, the Superintendent formed the intention to appeal within the relevant ten day appeal period, as demonstrated by the timely service and filing of its notice of appeal. It has also provided a satisfactory explanation for the delay in bringing the motion for leave. The Superintendent originally believed, and still believes, that it had the right to intervene pursuant to ss. 5(4)(a) and 193(c) of the

BIA and did not require leave to appeal After reviewing the respondent's factum, it determined that it was prudent to request leave as an alternative argument and did so in a timely fashion.

[41] There is no indication of any prejudice to 407 ETR as a result of the timing of this motion. 407 ETR knew early on that the Superintendent was appealing and knew the basis of that appeal. Further, since 407 ETR and Moore have settled their dispute, the timing of the appeal does not delay any receipt of funds.

[42] As to the merits of the appeal and the justice of the case, there are a number of alleged errors of law raised by the Superintendent.

[43] The Superintendent submits that the motion judge mischaracterized key elements of the bankruptcy and insolvency system, and the interplay between section 22(4) of the *Highway 407 Act* and s. 178(2) of the *BIA*. It further argues that the motion judge's statement that the first goal of the bankruptcy system is the equitable distribution of the assets of a bankrupt among the estate's creditors runs contrary to the Supreme Court of Canada's decision in *Husky Oil Operations Ltd. v. Minister of National Revenue,* [1995] 3 S.C.R. 453, at para. 7.

[44] Additionally, the Superintendent has an interest that may be adversely affected in the sense that the decision has the potential to seriously impact the bankruptcy and insolvency system. Arguably, it creates a new class of debts that can be enforced after bankruptcy over and above those set out in s. 178(1) of the *BIA*. With respect to the impact on 407 ETR alone, the Superintendent explains that since 2007, the number of bankrupts and proposals debtors in Ontario who list 407 ETR as a creditor exceeds 6,000.

[45] These issues are significant and at the very least constitute arguable grounds for an appeal. There is, therefore, good reason to grant the extension sought by the Superintendent.

(2)(c) Should leave to appeal be granted?

[46] The remaining question then, is whether this is an appropriate case in which to grant leave to appeal. In my view, even though it was not a party to the proceedings below, the Superintendent has demonstrated that the answer must be yes.

[47] Generally speaking, the factors to be considered on an application for leave to appeal are:

a) whether the point of appeal is of significance to the practice;

b) whether the point raised is of significance to the action itself;

c) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

d) whether the appeal will unduly hinder the progress of the action.

See *Power Consolidated (China) Pulp Inc. v. British Columbia Resources Investment Corp.* (1988), 19 C.P.C. (3d) 396 (C.A.); *Med Finance Co. S.A. v. Bank of Montreal* (1993), 22 C.B.R. (3d) 279, (B.C.C.A.); *Norbourg Groupe financier inc. (Syndic de),* 2006 QCCA 752, 33 C.B.R. (5th) 144; *Medical International Technologies (MIT Canada) Inc. v. V. & G. International Licensing*

Corp., 2010 QCCA 1826, [2010] Q.J. No. 10209; *Re Pope & Talbot Ltd.*, 2011 BCCA 326, 21 B.C.L.R. (5th) 270.

[48] However, as Armstrong J.A. noted in *SVCM Capital Ltd. v. Fiber Connections Inc.* (2005), 198 O.A.C. 27, at paras. 19-20, there is no stringent test for determining whether to grant leave to appeal pursuant to s. 193(e) of the *BIA*. There is a variety of factors to consider depending on the circumstances of the case. Armstrong J.A. highlighted the prominence of two such factors: the existence of arguable grounds of appeal and issues of significance to the bankruptcy practice that ought to be considered and addressed by the Court of Appeal.

[49] As previously discussed, the Superintendent has established that the appeal is not without merit and the issues raised are significant to the bankruptcy practice. It has therefore satisfied the standard test for obtaining leave applicable to all parties. The second part of the equation is whether the Superintendent has demonstrated that this is an exceptional case so as to justify granting leave to appeal notwithstanding its absence as a party at first instance. In my view, it has.

[50] This is not a case where the Superintendent made a conscious decision not to intervene at first instance. In the present case, the Superintendent was deprived of the opportunity to exercise its discretionary power to intervene in the Superior Court proceeding because it never received notice of the setting aside of the registrar's order, or Moore's amended notice of motion and notice of constitutional question. All of these issues were before the motion judge and would ordinarily have attracted the attention of the Superintendent, who would

likely have intervened.

[51] Unaware of the proceedings, however, the Superintendent did not intervene. Its interests, thus, went unrepresented. And, as discussed above, the unique interests of the Superintendent – regarding the integrity of the bankruptcy and insolvency system – were, at least arguably, adversely affected. It is worth emphasizing that the interests of the Superintendent are not identical to those of the bankrupt. They are much broader and of a systemic nature. It is therefore no answer to say that the Superintendent's interests were represented below through the submissions of Moore.

[52] The Superintendent is not bound by the order of the motion judge in that it is required to take, or refrain from taking, some action. However, in so far as the motion judge made findings that dictate how certain debts are to be treated under the *BIA*, the Superintendent is bound by those findings in its supervision of the bankruptcy regime. Further, as discussed above, the Superintendent has an arguable case that the motion judge's decision is the product of a misapprehension of the bankruptcy and insolvency system and its relationship with the *Highway 407 Act*. The Superintendent is also concerned that the decision appears to run counter to the interpretation given to s. 178(2) by the court is Saskatchewan in the recent decision of *Gorguis v. Saskatchewan Government Insurance*, 2011 SKQB 132, [2011] 6 W.W.R. 372, a decision presently under appeal.

[53] Finally, given the broader importance of the issues raised on this appeal and, specifically the concern that the decision of the motion judge may result in a

conflict between how s. 178(2) of the *BIA* is interpreted in Ontario and in Saskatchewan, it is in the interests of justice to allow the Superintendent to pursue them before this court, rather than to leave the law in a state of uncertainty until such time as the issue arises in another proceeding.

[54] The importance of the arguable issues in the proposed appeal, combined with the inability of the Superintendent to respond to them at first instance brings this case within the narrow category of exceptional cases where leave to appeal ought to be granted to the Superintendent despite that it was not a party at first instance. I would therefore grant the Superintendent's application for leave to appeal.

Conclusion

[55] The Superintendent's application for an extension of time to file its notice of motion seeking leave to appeal the motion judge's decision is granted, as is its application for leave to appeal that decision. Because I agree with 407 ETR's submission that the Superintendent did not have a right to appeal, I would normally grant the relief sought and strike the appeal. However, as I am granting the Superintendent's application for leave, no useful purpose would be achieved by requiring the filing of a fresh notice of appeal. Costs of both motions are reserved to the panel hearing the appeal.

Released: Sept. 5, 2012 "Paul Rouleau J.A."

"KMW" "I agree K.M. Weiler J.A."

"I agree R.A. Blair J.A."

[1]
The Superintendent suggested that 407 ETR made a deliberate choice to move before a judge of the Superior Court instead of a registrar in bankruptcy. It referred to the bankruptcy of Dean Robert Oliver where 407 ETR failed to appear on a similar motion through inadvertence. In response to a later consent motion brought by 407 ETR to set aside the order obtained, Registrar Nettie advised 407 ETR that although he would allow the consent motion to set aside the order, “such an inadvertence will not be excused in the future”.