

Ontario Court of Appeal Holds No Leave Required in Appeals of Bankruptcy Orders

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By Sam Babe

On March 6, 2020, the Ontario Court of Appeal (the “OCA”) released its decision in *Royal Bank of Canada v. Bodanis* (“*Bodanis*”),¹ holding that two debtors, each having an estate exceeding \$10,000 in value, had appeals of their bankruptcy orders as of right under section 193 of the *Bankruptcy and Insolvency Act* (the “*BIA*”) and thus did not need to seek leave to appeal.

Section 193 reads as follows:

193 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.

Hearing companion motions for directions brought by the creditor who had obtained the bankruptcy orders (the “**Bank**”), Justice Nordheimer found that only subsection 193(c) could potentially allow the bankrupts to avoid seeking leave under subsection 193(e).

In an earlier OCA decision, *2403177 Ontario Inc. v. Bending Lake Iron Group Limited* (“*Bending Lake Iron*”), Justice Brown had distilled the jurisprudence on the application of subsection 193(c) down to three principles: the section does not apply to orders in bankruptcies or receiverships 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.³ In *Re Crate Marine Sales Limited*, Justice Hourigan of the OCA had held that subsection 193(c) must be interpreted narrowly, only where clearly applicable and only where an appeal directly involves property in exceeding \$10,000 in value.⁴

In *Bodanis*, the Bank argued that subsection 193(c) did not apply because the bankruptcy orders simply preserved the assets of the bankrupts and thus did not “involve” (or in Justice Brown’s terminology, did not “bring into play”) property exceeding \$10,000 in value. The Bank drew a parallel to OCA decisions involving receivership orders including *Bending Lake Iron* and *Business Development Bank of Canada v. Pine Tree Resorts Inc.* (“*Pine Tree Resorts*”), where Justice Blair had held that there was no appeal as of right and leave was required because “an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.”⁵

Justice Nordheimer distinguished those receivership decisions on the basis that sale by a receiver is generally subject to further approval of the court (as Justice Blair noted in the above quote from *Pine Tree Resorts*) whereas a trustee has no court supervision of its liquidation efforts. Justice Nordheimer stated:

“While the facts of each case may determine whether s. 193(c) properly applies, in my view, it clearly applies here where the appellant’s entire property have been taken out of their control and placed into the hands of a Trustee in Bankruptcy, who has the right to dispose of that property and distribute it among the creditors, without further court intervention.”⁶

Justice Nordheimer’s basis for distinguishing receivership orders from bankruptcy orders is, however, undermined by the fact that the typical receivership order will authorize a receiver to sell assets without further court approval up to per transaction and cumulative dollar limits that far exceed the \$10,000 threshold in subsection 193(c) and likely exceed the total estate value of many bankruptcies.

In *Pine Tree Resorts*, Justice Blair observed that a broad interpretation of subsection 193(c) of the *BIA* would, practically speaking, give a right of appeal of a bankruptcy order without leave in almost every case, as few such orders would be appealed where the value of the bankrupt’s property did not exceed the low threshold of \$10,000.⁷ This observation was cited approvingly in *Bending Lake Iron* and in subsequent OCA decisions.⁸ Relying on *Pine Tree Resorts* and *Bending Lake Iron*, the Bank argued that subsection 193(c) should be so narrowly construed in *Bodanis*. In an apparent reversal from the view previously consistently expressed by the OCA, Justice Nordheimer held that a narrow interpretation would, practically speaking, allow no appeal of a bankruptcy order to proceed as of right under 193(c), effectively reading the subsection out of the statute.⁹ That final conclusion is somewhat puzzling because section 193 applies not just to bankruptcy orders, but also to other orders made in bankruptcies (which might “bring into play the value of the property” where an initial bankruptcy order might not) as well as to the myriad types of orders made in every other kind of *BIA* proceeding, leaving plenty of orders to which subsection 193(3) could still apply.

Justice Nordheimer did, however, grant the Bank’s alternate requested relief by cancelling the automatic stays of proceedings resulting from the appeals under section 195 of the *BIA*. Considering the merits of the appeals and the relative prejudice to the parties, Justice Nordheimer found that cancelling the stay would not cause the appellants any prejudice and that the appellants’ chances of success were not very high because they were only challenging the trial judge’s exercise of statutory discretion and findings of facts.

The Financial Services Group at Aird & Berlis regularly advises creditors, debtors and court officers in all types of proceedings under the *BIA*. Details are available at our **Financial Services webpage**.

¹ *Royal Bank of Canada v. Bodanis*, 2020 ONCA 185.

² *Bankruptcy and Insolvency Act*, RSC 1985, c B-3.

³ *2403177 Ontario Inc. v. Bending Lake Iron Group Limited*, 2016 ONCA 225, at paragraph 53.

⁴ *Re Crate Marine Sales Limited*, 2016 ONCA 140, at paragraph 6.

⁵ *Business Development Bank of Canada v. Pine Tree Resorts Inc.*, 2013 ONCA 282, at paragraphs 17 and 18.

⁶ *Bodanis*, *supra* note 1, at paragraph 9.

⁷ *Pine Tree Resorts*, *supra* note 4, at paragraph 17.

⁸ See: *Downing Street Financial Inc. v. Harmony Village-Sheppard Inc.*, 2017 ONCA 611, at paragraph 21; and *First National Financial GP Corporation v. Golden Dragon HO 10 Inc.*, 2019 ONCA 873, at paragraph 16.

⁹ *Bodanis*, *supra* note 1, at paragraph 7.

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