FILE NO. AI22-30-09741

IN THE COURT OF APPEAL
IN BANKRUPTCY AND INSOLVENCY

IN THE MATTER OF: THE APPOINTMENT OF A RECEIVER PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C., c.B-3, AS AMENDED, AND SECTION 55 OF *THE COURT OF QUEEN'S BENCH ACT*, C.C.S.M., C. C280, AS AMENDED

BETWEEN:

WHITE OAK COMMERCIAL FINANCE, LLC,

(Applicant) Respondent,

– and –

NYGARD HOLDINGS (USA) LIMITED, NYGARD INC., FASHION VENTURES, INC., NYGARD NY RETAIL, LLC., NYGARD ENTERPRISES LTD., NYGARD PROPERTIES LTD., 4093879 CANADA LTD., 4093887 CANADA LTD., and NYGARD INTERNATIONAL PARTNERSHIP,

(Respondents) Applicants.

MOTION BRIEF OF THE (RESPONDENTS) APPLICANTS

Hearing Date: Thursday, April 7, 2022, at 10:00 a.m.

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PART 1: LIST OF DOCUMENTS

Affidavit of Liam O. Valgardson, affirmed March 25, 2022

PART 2: LIST OF AUTHORITIES

Tab 1 *Bankruptcy and Insolvency General Rules*, CRC, c 368

Tab 2 *Court of Appeal Rules*, Man Reg 555/88 R

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

Tab 4 *Bannerman Lumber Ltd et al v. Goodman*, 2021 MBCA 13 (in Chambers)

Tab 5 *Moss, Re* (1999), 138 Man R (2d) 318 (Man CA (in Chambers))

Tab 6 *Singh v Pierpont*, 2015 MBCA 18

Tab 7 *Flair Construction Ltd., Re*, 1981 CarswellBC (BC CA (in Chambers))

Tab 8 *Siler (Re)*, 2017 ABQB 810

Tab 9 *Atlantic Pressure Treating Ltd. v Bay Chaleaur Construction (1981) Limited*, [1987] NBJ No 528 (NB CA)

PART 3: INTRODUCTION AND BACKGROUND

1. On March 22, 2022, the (Respondents) Applicants filed a Notice of Appeal with this Honourable Court regarding the Judgment of the Honourable Justice Edmond of the Court of Queen's Bench, dated March 10, 2022.

2. The Applicants have now filed a Notice of Motion to be heard by a Judge of this Honourable Court in Chambers, along with the Affidavit of Liam O. Valgardson, affirmed March 25, 2022 (the "Valgardson Affidavit").

3. As set out in its Notice of Motion, the Applicants are seeking an Order extending the time to file the Notice of Appeal.

4. On March 10, 2022, Edmond J. of the Court of Queen's Bench delivered his reasons for Judgment on the Receiver's Net Receivership Proceeds motion regarding substantive consolidation, the proper allocation of revenues generated from the sale of assets, the (Respondents) Applicants' rights of subrogation, the assignment of the (Respondents) Applicants into bankruptcy, and the (Respondents) Applicants' motion regarding the payment of legal fees and disbursements (the "Judgment").

Valgardson Affidavit, at para 2.a., Exhibit "A"

5. When the Motion was argued before Edmond J. on December 22, 2021, as part of the discussion at the end of submissions, and as part of the

argument regarding the payment of fees of the (Respondents) Applicants, the parties referred to the probability that Edmond's J. decision would be appealed by the unsuccessful party.

Valgardson Affidavit, at para 2.b.

6. When the Judgment was pronounced, Peter Nygard, the individual described by Edmond J. as having authority and direction over the (Respondents) Applicants, was in jail in Ontario awaiting a decision on his extradition to the United States, and was in the process of appealing his bail application in Ontario, in addition to needing to review and consider the 87-page decision of Edmond J.

Valgardson Affidavit, at para 2.d.

7. Soon after receiving Edmond's J. Judgment, the lawyers for the Applicants began engaging in discussions, E-mail correspondence and research regarding the prescribed time limits for filing a notice of appeal.

Valgardson Affidavit, at para 2.e., Exhibit "B"

8. At the conclusion of those discussions, the lawyers for the Applicant believed they had 30-days to file an appeal as per Rule 11(1)(c) of the *Court of Appeal Rules*. As a result, the lawyers for the Applicants diarized Friday, April 8, 2022, as the deadline to file a notice of appeal.

Valgardson Affidavit, at para 2.f.

9. On March 10, 2022, the lawyers for the Applicants received instructions to appeal the Judgment, however, the details of the points of the notice of appeal were still being considered.

Valgardson Affidavit, at para 2.g.

10. On March 21, 2022, at 8:56 p.m., Mr. Wayne Onchulenko (lawyer for the Applicants), informed Mr. Bruce Taylor (lawyer for the Receiver), that he had received instructions from his client to appeal Edmond's J. March 10, 2022, Judgment.

Valgardson Affidavit, at para 2.h., Exhibit "C"

11. The next day, on March 22, 2022, at 1:53 p.m., Mr. Taylor informed Mr. Onchulenko that Rule 31(1) of the *Bankruptcy and Insolvency General Rules* creates a 10-day time limit to appeal an order or judgment.

Valgardson Affidavit, at para 2.i., Exhibit "D"

Bankruptcy and Insolvency General Rules, Rule 31(1) **[TAB 1]**

12. Upon receipt of Mr. Taylor's 1:53 p.m. E-mail, the Applicants promptly drafted and filed the Notice of Appeal, which the Court of Appeal Registrar has advised is currently being held in abeyance by the Court of Appeal pending the outcome of this Motion.

Valgardson Affidavit, at para 2.j., Exhibit "E"

13. The Notice of Appeal has not been served on any of the parties, but the lawyers for the Applicants have informed the Receiver of its filing.

Valgardson Affidavit, at para 2.k.

PART 4: LIST OF ISSUES

14. The issue before this Honourable Court is whether an order extending the time for filing the Notice of Appeal is appropriate in the circumstances.

PART 5: ARGUMENT

Authority

15. Rule 42 of the *Court of Appeal Rules* gives this Honourable Court broad authority to grant extensions:

> **Extension of abridgement of time**
>
> **42** Except where these rules otherwise provide, where an application is made, the court or a judge may, by order, extend or abridge the time limits set out in these rules for doing any act or taking any proceeding, and that power may be exercised whether the application is made before or after the expiration of the prescribed time limit.

Court of Appeal Rules, Rule 42 **[TAB 2]**

16. Additionally, Rule 31 (1) of the *Bankruptcy and Insolvency General Rules* gives this Honourable Court the authority to grant an extension:

> **31 (1)** An appeal to a court of appeal referred to in sub-section 183(2) of the Act must me made by filing a notion of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.
>
> [*Emphasis Added*]

Bankruptcy and Insolvency General Rules, Rule 31(1) [Tab 1]

17. Finally, section 187 of the *Bankruptcy and Insolvency Act*, RSC, 1985, c B-3, (the "*BIA*") gives Courts the power to extend time:

> **Formal defect not to invalidate proceedings**
>
> **187(9)** No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.
>
> [...]

Court may extend time

187(11) Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

Bankruptcy and Insolvency Act, RSC, 1985, c B-3, section 187 **[TAB 3]**

The Test

18. The test for granting an extension of time to appeal was recently set out in *Bannerman Lumber Ltd et al v. Goodman*, 2021 MBCA 13, at para 13 where Beard J.A. said:

> [13] [...] In summary, the criteria to be applied in determining whether to extend the time to commence an appeal under r 42 of the CA Rules are:
>
> 1. whether there was a continuous intention to appeal from a time within the period when the appeal should have been commenced;
> 2. whether there was a reasonable explanation for the delay;

3. whether there are arguable grounds of appeal;
4. whether any prejudice suffered by the other party can be addressed; and
5. whether it is right and just in all of the circumstances that the time for commencing the appeal be extended.

[14] This same test was applied by this Court in the context of a motion to extend the time to appeal a decision under the BIA in Western Grain Cleaning and Processing Ltd v LC Taylor & Co Ltd 2005 MBCA 68 at paras 15-21.

Bannerman Lumber Ltd et al v. Goodman, 2021 MBCA 13 at para 13 [*Bannerman*]

[TAB 4]

19. Regarding these factors, at paragraph 17, Beard J.A. cited the reasons of Manilla J.A. in *Delichte v Rogers*, 2018 MBCA 79 (in Chambers) (at para 17):

> These factors are not intended to be a rigid straightjacket as to the exercise of judicial discretion. Regardless of whether or not all four criteria are met, the Court may still grant or refuse the extension of time if it is right and just in

> all of the circumstances to do so .... I agree with the comments of MacPherson JA in *Monteith v Monteith*, 2010 ONCA 78, [in Chambers], that [the fifth criterion] is an "umbrella" (at para 20); the Court must look broadly at the relevant circumstances and do what justice requires.

Bannerman, at para 17 [Tab 4]

20. The Applicants submit that all five questions in the test can be answered in the affirmative.

Analysis

Whether there was a continuous intention to appeal from a time within the period when the appeal should have been commenced?

21. The Applicants submit there was an intention to appeal within the 10-day period when the appeal should have been commenced.

22. On March 10, 2022, within a couple of hours of the Judgment being provided to counsel by the Court, the client confirmed his instructions in writing to appeal.

Valgardson Affidavit, at para 2.g.

23. Additionally, when the motion was argued before Edmond J. on December 22, 2022, the parties referred to the probability that Edmond's J. decision would be appealed by the unsuccessful party.

Valgardson Affidavit, at para 2.b.

24. As part of the submissions regarding the payment of legal fees of the (Respondents) Applicants, the issue of an appeal was contemplated. In the Judgment, Edmond J. said the following regarding the payment of fees in the event of an appeal:

> [138] The same governing legal principle as noted above applies in connection with the second issue. In my view, providing statements of account for legal fees and disbursements are submitted to the Receiver or Trustee in bankruptcy for approval and are reasonable, the fees and disbursements may be paid from the Net Receivership Proceeds. <u>The respondents are entitled to mount a defence and advance legal positions challenging the Receiver and if they elect to do so, the respondents may proceed with an appeal of this decision</u>. If the legal fees and disbursements exceed the remaining balance of the Preserved Proceeds, a portion of the Net

> Receivership Proceeds may be set aside to cover reasonable fees and disbursements incurred by the respondents.
>
> [*Emphasis Added*]

Valgardson Affidavit, at para 2.c., Exhibit "A"

25. The Applicants submit that on the day of the Judgment having been delivered, and before the expiry of the 10-day limit, they had formed the intention and provided instructions to appeal the Judgment.

Whether there was a reasonable explanation for the delay?

26. The Applicants submit the reasonable excuse for the delay is that they were under the mistaken understanding that Rule 11(1)(c) of the *Court of Appeal Rules* applied to an appeal of the Judgment.

27. In *Bannerman*, the Beard J.A. continued the Court of Appeal's consistency towards the issue of 'counsel inadvertence' and noted the following:

> [22] In terms of a reasonable explanation, the courts have accepted inadvertence of counsel as a reasonable explanation. (See, for example, *Branum v Branum*, 1998

> CarswellMan 251 at para 10 (CA (in Chambers)); and *Singh v Pierpont*, 2015 MBCA 18 at para 41).

Bannerman, at para 22 [Tab 4]

28. Additionally, in *Moss, Re* (1999), 138 Man R (2d) 318 (Man CA (in Chambers)), the applicant brought a motion for an extension of time to file an appeal from an order annulling an assignment in bankruptcy. In the brief reasons granting the motion, Monnin J.A. said the following:

> [4] In the case before me, there is evidence that clearly establishes that the failure to file a notice of appeal was due to the applicant's then counsel being under the erroneous impression that the time limit for filing such an appeal commenced running not from the time the annulment was granted, but from the time the order was signed.
>
> [5] I am satisfied, without proceeding to a detailed review of the circumstances of this case, that the applicant meets the test set out in *Flair Construction Ltd., Re*. Accordingly, the applicant is granted an extension of time in which to file her appeal. [...]

Moss, Re (1999), 138 Man R (2d) 318 (Man CA (in Chambers)) **[TAB 5]**

29. In *Singh v Pierpont*, 2015 MBCA 18, the Court dealt with a dispute regarding the physical care and control of a child and the child's residence in either Winnipeg or Hawaii. In 2014, the Manitoba Court ordered the father to return the child to Winnipeg. The father appealed but failed to submit his factum within the prescribed time period. The father brought a motion to extend his time for filing the factum. In granting the father's motion, Beard J.A. said the following:

> [41] [...] the court has an overriding discretion to grant or refuse an extension if it is right and just in the circumstances. [*Citations omitted*]. Further, inadvertence of counsel is an accepted explanation. (See *Arndt v Arndt* (1987), 46 Man. R. (2d) 234 (Man. C.A.) at para. 8; and *Branum v Branum* (1998), 129 Man. R. (2d) 142 (Man. C.A. [In Chambers]) at para. 10.)
>
> [*Emphasis Added*]

Singh v Pierpont, 2015 MBCA 18 **[TAB 6]**

30. Upon receiving the Judgment on March 10, 2022, lawyers for the Applicants engaged in discussions, E-mail correspondence, and research regarding the time constraints for filing and serving a notice of appeal. The

lawyers for the Applicants mistakenly concluded that they had 30 days to file a notice of appeal as per Rule 11(1) of the *Court of Appeal Rules*.

Valgardson Affidavit, at para 2.e-f.

31. Unfortunately, the parties proceeded on the mistaken understanding that the Applicants had until Friday, April 8, 2022, to file their notice of appeal.

32. In addition to the Applicants' lawyers mistaken understanding, logistical limitations existed regarding communication with their clients. When the Judgment was pronounced, Peter Nygard, the individual described by Edmond J. as having authority and direction over the (Respondents) Applicants, was in jail in Ontario awaiting a decision on his extradition to the United States and was in the process of appealing his bail application in Ontario. On top of the above responsibilities, Mr. Nygard needed to review the 87-page Judgment and discuss same with his lawyers.

Valgardson Affidavit, at para 2.d.

33. In *Flair Construction Ltd., Re*, 1981 CarswellBC (BC CA (in Chambers)), counsel for the bank was unaware of the 10-day limitation to bring an appeal and believed, erroneously, that the *Court of Appeal Act* governed, that is, that there was a 45-day period. In granting the application for extension, Craig J.A. noted the following:

> [8] [...] Some considerations should be given to this fact in a case where the client is not immediately available t give appeal instructions. I think, too, that some latitude must be given when we are considering whether the client had a bona fide intention to appeal before the expiration of the appeal period.

Flair Construction Ltd., Re, 1981 CarswellBC (BC CA (in Chambers)) at para 8 **[TAB 7]**

Are there are arguable grounds of appeal?

34. The Applicants intend on filing a supplemental brief that will expand on this section, namely that there are arguable grounds of appeal.

35. In their Notice of Appeal, filed March 22, 2022, the Applicants raise the following grounds:

a. The Court erred in law in finding that substantive consolidation should be applied in the facts and circumstances of this case;

b. The Court made palpable and overriding errors in applying the facts to the law as it relates to the finding of substantive consolidation;

c. The Court erred in law in finding that there was a proper allocation of revenues generated from the sale of assets during the receivership and receivership costs and expenses;

d. The Court made palpable and overriding errors in applying the facts to the law as it relates to finding there was a proper allocation of revenues generated from the sale of assets during the receivership and receivership costs and expenses;

e. The Court erred in law in finding what rights of subrogation apply to the Respondents and what is the correct interpretation of the provisions of *The Mercantile Law Amendment Act*, CCSM c M120;

f. The Court made palpable and overriding errors in applying the facts to the law as it relates to what rights of subrogation apply to the Respondents and what is the correct interpretation of the provisions of *The Mercantile Law Amendment Act*, CCSM c M120;

g. The Court erred in law in finding that NPL and NEL be assigned into bankruptcy, and that the Receiver be appointed as Trustee in bankruptcy;

h. The Court made palpable and overriding errors in applying the facts to the law as it relates to finding that NPL and NEL be assigned into bankruptcy, and that the Receiver be appointed as Trustee in bankruptcy;

i. The Court erred in law in finding that a portion of the Net Receivership Proceeds or the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement not be used to fund legal fees and disbursements incurred to Mr. Nygard in connection with the criminal charges laid against him in Ontario; and

j. The Court made palpable and overriding errors in applying the facts to the law as it relates to finding that a portion of the Net Receivership Proceeds or the Preserved Proceeds held pursuant to the NPL Proceeds Preservation Agreement not be used to fund legal fees and disbursements incurred to Mr. Nygard in connection with the criminal charges laid against him in Toronto, Ontario.

Valgardson Affidavit, at para 2.j. Exhibit X

36. The Applicants intend on filing an amended notice of appeal which will expand on and further specify the grounds of appeal.

37. On the question of whether there are arguable grounds of appeal, the standard is not high. The Applicants must show that there is an arguable case. In *Bannerman*, Beard J.A. said the following on this criterion:

> [15] An important criterion is that of whether there are arguable grounds of appeal. This was described by Steel JA as "a realistic ground which, if established, appears of sufficient substance to be capable of convincing a panel of the court to allow the appeal" (*C(S) v C(AS)*, 2011 MBCA 70 at para 8). As explained by Rothstein J in *Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at paras 72-75, the test will be met where the ground of appeal cannot be dismissed after a preliminary examination of the grounds. It is not a high standard to meet.
>
> [*Emphasis Added*]

Bannerman, at para 15 [Tab 4]

38. In *Siler (Re)*, 2017 ABQB 810, Graesser J. said the following on the standard to be applied when considering whether the applicant has raised an arguable ground of appeal:

> [78] This matter involves counsel apparently missing a somewhat unusual limitation period. The delay between

> the expiry of the limitation period and bringing this application was brief. The Walkers had an intention to appeal within the limitation period, and the grounds for appeal are not without some merit. They are not bound to fail, and have a reasonable chance of success, recognizing that a reasonable chance of success does not equate to a balance of probabilities.

Siler (Re), 2017 ABQB 810 at para 78 **[TAB 8]**

39. In summary, the Applicants submit that Edmond J. erred in the following ways. His Lordship misunderstood the issues before him, which caused him to misdirect himself respecting the order in which those issues should be considered. This resulted in the application of faulty premises, both legal and factual, to those issues, which ultimately led him to erroneous conclusions.

40. The Applicants submit that the analysis Edmond J. was required to perform was as follows:

a. Firstly, his Lordship was required to decide whether NPL had rights of subrogation due to its payments to the Lenders. If so, he was required to find against whom and for how much. To make these findings, his Lordship needed to decide (1) how

much NPL had paid on its guarantee; (2) the legal test for the allocation of the proceeds from the sale of assets in a multi-party receivership; (3) the "just proportion" of the debt for which NPL was liable, and whether NPL's payments had exceeded that proportion; and (4) whether there are rights of set-off against subrogated rights.

b. Secondly, his Lordship had to determine, as a result of the above analysis, whether NPL was solvent, and a creditor of the other respondents. If it was, his Lordship had to decide whether he had the jurisdiction under the *Bankruptcy and Insolvency Act* (Canada) to consolidate solvent companies with the other, insolvent, respondents, or to permit the Receiver to attempt to assign those solvent companies into bankruptcy.

c. If he determined that NPL was insolvent, or if he determined that he had the jurisdiction to consolidate a solvent NPL and NEL with insolvent companies, Edmond J. then had to decide whether the legal test for substantial consolidation of NPL and NEL with the other seven respondents could be met.

41. The Honourable Justice Edmond instead proceeded as follows:

a. He decided that substantial consolidation was appropriate because it was equitable, which is not the established test. Further, in his consideration of the established factors, his Lordship made a series of legal errors, each of which allowed him to decide the sub-issue against the (Respondents) Applicants. As examples:

   i. In paragraph 32 of his Reasons, Edmond J erroneously accepts that a debt for the provision of services is a creditor asset "commingled" with the assets of the debtor. This allows him to decide the point against NPL.

   ii. In paragraph 38, Edmond J erroneously conflates intercompany loan guarantees with intercompany debt. This allows him to decide the point against NPL.

   iii. In paragraphs 43(b) and 44, Edmond J accepts, but does not explain how in law it is possible that, a secured creditor (NPL) can have its assets taken from it and its security disregarded due to the claims of the unsecured creditors of other companies, which unsecured debts NPL did not guarantee. This allows him to decide the issue against NPL.

b. Edmond J decided that the Receiver's allocation of the proceeds from the sale of NPL's assets was "fair and equitable", which the Applicants' respectfully submit is not the legal test. In so doing, his Lordship made a series of other crucial legal and factual errors. For example:

   i. In his paragraphs 54 (and 113), Justice Edmond misstates the argument made by NPL. It was not that NPL had overpaid on its guarantee, it was that it had overpaid the *just proportion* for which they were liable relative to the other co-guarantors. This "unjust proportion" is what should give NPL subrogated rights against the co-guarantor NIP. This misunderstanding (that the issue was whether they overpaid the guarantee, not the relative just proportions) appears to have caused Edmond J to closely examine the issue of what the guarantee was worth, rather than how much NPL had *actually paid* on the guarantee and whether that sum exceeded its just proportion, which was the legal issue that required resolution pursuant to the *Mercantile Law Amendment Act*.

ii. His Lordship accepted without analysis the Receiver's position that, in advance of an order for substantial consolidation, it had the unilateral discretion to allocate the proceeds from the sales of assets belonging to separate corporations as among those corporations. This was an error in law, as it violated the separate personhood of corporations recognized since *Salomon v Salomon*. For example, in his paragraph 64, Edmond J appears to hold that rights of subrogation must yield to the Receiver's discretion to make a fair allocation of assets, which is a proposition contrary to the jurisprudence.

iii. In his paragraphs 70, 74-77, and 117, his Lordship accepts an irrelevant distinction between payments to the relevant credit facility and payment on the Receiver's borrowing charge, and the conclusion that payment of the borrowing charge wasn't payment of the guarantee. In paragraph 87-88, Justice Edmond records NPL's position that payments of the Receiver's Borrowings are payments on the guarantee. In paragraph 90, he agrees with that NPL was liable for "obligations" including costs incurred in debtor

relief proceedings. His Lordship does not explain, however, why payments toward the Receiver's borrowing charge are not payments of obligations for the purpose of the guarantee. Since his Lordship does not analyze or resolve the issue, he leaves open the issue of how much NPL paid on its guarantee, from which should flow the rest of the subrogation analysis. This was erroneous in law.

iv. In paragraph 96, Edmond J reads the word "deducting" into the guarantee (as in "the realized value after deducting all costs and expenses including enforcement costs"). His Lordshio then treats "after" as if it meant "after deducting", which was erroneous.

c. His Lordship decided that, on the basis of the Receiver's purportedly discretionary allocation of the proceeds from the sale of NPL's properties, and his acceptance of an erroneous argument that intercompany debts owed by NPL could be set off against NPL's subrogated rights, that NPL did not have rights of subrogation.

d. Additionally, his Lordship decided on the basis of all the above that the Receiver could seek to put NPL and NEL into bankruptcy

on the basis of their responsibility for the consolidated debts of the other respondents.

42. Although Edmond's J. reasons were lengthy, they were insufficient to allow for appellate review on most of the substantive points. Although Edmond J. often commenced a section by quoting from the relevant law, there is typically little or no careful application of that law to the facts, which would allow a reviewing Court to understand *why* the decision was made.

43. For example: Justice Edmond accepted without discussion the Receiver's arguably irrelevant distinction between payments to the "Credit Facility" and payments to the "Receiver's Borrowing Charge". This caused Edmond J. to implicitly decide, but not actually consider, a series of crucial legal and factual issues, such as:

a. Was a payment by NPL of the Receiver's Borrowing Charge a payment pursuant to NPL's Guarantee? (Edmond J seems to accept, without discussion, that it was not. The contract says they were both "Obligations", for which NPL was liable under its guarantee.) If it was, why does such payment *not* give NPL rights of subrogation against the borrowers and co-guarantors?

b. If payment of the Borrowing Charge was not a payment toward the guarantee entitling NPL to subrogation, what was it? On what

legal authority could NPL be compelled to pay to the Lenders if those payments were *not* guarantee payments?

c. If the terms of the Receivership Order are invoked to compel the payments of the Borrowing Charge, how in law is this possible? This would amount to a judgment against NPL in a sum limited only by the maximum value of its assets, granted without pleadings or argument at the outset of a proceeding in which NPL was involved only because of its status as guarantor.

d. In law, is there a right of setoff against subrogated rights? (Edmond J proceeds as if there are. The law is otherwise.)

e. If there are not, how are intercompany debts owed by NPL and NEL, (upon which Edmond J relies in part to conclude that NPL does not have rights of subrogation and should be consolidated), relevant?

f. Are the intercompany debts asserted by the Receiver as set-off part of the security that should be assigned to NPL pursuant to the subrogation? If so, what is the result?

g. If NPL's payments to the Lenders were payments on the guarantee entitling NPL to rights of subrogation against NIP and the other respondents, is NPL (and by extension NEL) solvent

on a balance sheet test, or otherwise? If NPL is solvent, how does Edmond have jurisdiction under either the *BIA* or (by analogy the *CCAA*) to substantially consolidate a solvent company with insolvent companies?

44. In summary, if the order in which Edmond J. decided the issues created an illogical cascade of dispositions, the elements of that cascade are not adequately described or explained, and the conclusions are erroneous.

Whether any prejudice suffered by the other party can be addressed?

45. In the circumstances, the Applicants submits there is no prejudice to the Respondent. The Receiver's counsel was aware that an appeal was likely forthcoming and received confirmation of same one day after the 10-day limit had expired.

Valgardson Affidavit, at para 2.h-i.

46. The Applicants stress that given that it was a late filing by only one day, and not for instance a longer period, this element of the test is met. In *Bannerman*, the motion for extension was filed in excess of the 30-day *Court of Appeal Rules* limit. However, the Court felt that the appellant had pursued his appeal with adequate diligence.

Bannerman, at para 20-21 [Tab 4]

47. Upon learning of their mistake, the Applicants promptly prepared and filed a Notice of Appeal two days after the 10-day limit had expired.

48. In the alternative, in the event there is prejudice to the Respondent, same can be addressed. Given the speed at which the Applicants addressed their error, any prejudice to the Respondent is minimal.

Whether it is right and just in all of the circumstances that the time for commencing the appeal be extended?

49. In *Bannerman*, Beard J.A. said the following on this criterion:

> [16] Scott CJM explained the fifth criterion regarding the justice of the case in *Hunter v Hunter*, 2000 MBCA 134, as follows (at para 11):
>
> > ... In *Frey v MacDonald* (1989), 33 CPC (2d) 13 (Ont CA), it was emphasized, as it were by Freedman C.J.M. in *Children's Aid Society v Lambert* that the justice of the case may lead to a disposition quite independent of the determination of the first two criteria. Thus, in *Frey* leave to appeal was granted even though the court was not persuaded that there was an

> intention to appeal within the appeal period nor any reasonable explanation for the delay, the converse, of course, is also true. …
>
> *Bannerman*, at para 16 [Tab 4]

50. In *Bannerman*, Beard J.A. continued saying:

> [21] […] The 10-day appeal period under the *BIA* is unusually short, and has caused late-filing problems in other cases – see, for example, *Braich (Re)*, 2007 BCCA 641 (in Chambers); and *Moss, Re*, 1999 CarswellMan 482 (CA (in Chambers)).
>
> *Bannerman*, at para 21 [Tab 4]

51. Further, in *Atlantic Pressure Treating Ltd. v Bay Chaleaur Construction (1981) Limited*, [1987] NBJ No 528 (NB CA), Ryan J.A. considered two appeals, one which was filed within the 30-day period prescribed by the Rules of Court but not within the 10 days prescribed by the Bankruptcy Rules. Ryan J.A. made the following comments on the issue of what is just and right in the circumstances:

> [8] Over 100 years ago it was determined that the basic rule to be followed in dealing with an application to extend time for appeal is that leave should be granted if

justice requires that it be given. Brett M.R. in *Re Manchester Economic Building Society* (1883) 24 CH D 488 at 497 said:

> ... I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that leave should be given.

Generally, an intention to appeal must be formulated prior to the time for an appeal expiring. But if any rule is necessary, it would have to be that the judge hearing the motion is bound, above all other considerations, to do justice in each particular case. By extending the times on both motions, the trustee is not prejudiced. Not to extend the times may well prejudice the intended appellant.

[*Emphasis Added*]

Atlantic Pressure Treating Ltd. v Bay Chaleaur Construction (1981) Limited, [1987] NBJ No 528 (NB CA) at para 8 **[TAB 9]**

52. In the event the Applicants are unable to appeal the Judgment, they will suffer significant prejudice. The Judgment contains final orders that impact the rights of the Applicants.

53. Additionally, as set out above, the Applicants' appeal is arguable and is realistically capable of convincing a panel of this Honourable Court to allow the appeal. Given the legitimate concerns the Applicants have with the Judgment, their intention and willingness to appeal, and in light of the fact that the prejudice the Applicants would suffer far outweighs any prejudice suffered by the Respondent, the interests of justice dictate that the Applicants should be allowed to bring their appeal.

54. Accordingly, the Applicants submit they pursued their appeal with reasonable diligence and that it is right and just in all the circumstances that the time for filing the Notice of Appeal be extended.

Conclusion

55. The Applicants submit that all five questions in the test can be answered in the affirmative and that a consideration of all the above factors strongly favour an extension of time for filing the Notice of Appeal.

56. The Applicants submit that their Motion be granted.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 25th day of March 2022.

LEVENE TADMAN GOLUB LAW CORPORATION

Per: _____
Per.
Wayne M. Onchulenko
Lawyer for the (Respondents) Applicants

or decision appealed from, or within such further time as the judge stipulates.

(3) The notice of motion or the motion must set out the grounds of the appeal.

SOR/98-240, s. 1.

Appeal to Court of Appeal

31 (1) An appeal to a court of appeal referred to in subsection 183(2) of the Act must be made by filing a notice of appeal at the office of the registrar of the court appealed from, within 10 days after the day of the order or decision appealed from, or within such further time as a judge of the court of appeal stipulates.

(2) If an appeal is brought under paragraph 193(e) of the Act, the notice of appeal must include the application for leave to appeal.

SOR/98-240, s. 1; SOR/2007-61, s. 63(E).

32 The registrar of the court appealed from shall transmit to the court of appeal the notice of appeal and the file.

SOR/98-240, s. 1.

Official Receiver

33 The official receiver may request instructions from the registrar or, if the official receiver is the registrar, from the judge, in case of doubt respecting any matter arising out of the Act, these Rules or a directive.

SOR/98-240, s. 1.

Code of Ethics for Trustees

34 Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.

SOR/98-240, s. 1.

35 For the purposes of sections 39 to 52, ***professional engagement*** means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act.

SOR/98-240, s. 1.

36 Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.

SOR/98-240, s. 1.

date de l'ordonnance ou de la décision faisant l'objet de l'appel, ou dans tel autre délai fixé par le juge.

(3) L'avis de requête ou de motion ou la requête ou la motion énonce les motifs de l'appel.

DORS/98-240, art. 1.

Appels devant la cour d'appel

31 (1) Un appel est formé devant une cour d'appel visée au paragraphe 183(2) de la Loi par le dépôt d'un avis d'appel au bureau du registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel, dans les 10 jours qui suivent le jour de l'ordonnance ou de la décision, ou dans tel autre délai fixé par un juge de la cour d'appel.

(2) En cas d'application de l'alinéa 193e) de la Loi, l'avis d'appel est accompagné de la demande d'autorisation d'appel.

DORS/98-240, art. 1; DORS/2007-61, art. 63(A).

32 Le registraire du tribunal ayant rendu l'ordonnance ou la décision portée en appel transmet à la cour d'appel l'avis d'appel et le dossier.

DORS/98-240, art. 1.

Séquestre officiel

33 Le séquestre officiel peut demander des consignes au registraire ou, s'il agit en qualité de registraire, au juge, en cas de doute au sujet de toute question relevant de la Loi, des présentes règles ou des instructions.

DORS/98-240, art. 1.

Code de déontologie des syndics

34 Le syndic se conforme à des normes élevées de déontologie, lesquelles sont d'une importance primordiale pour le maintien de la confiance du public dans la mise en application de la Loi.

DORS/98-240, art. 1.

35 Pour l'application des articles 39 à 52, ***activité professionnelle*** s'entend de toute affaire de faillite ou d'insolvabilité dans laquelle le syndic est nommé ou désigné pour exercer ses fonctions dans le cadre de la Loi.

DORS/98-240, art. 1.

36 Le syndic s'acquitte de ses obligations dans les meilleurs délais et exerce ses fonctions avec compétence, honnêteté, intégrité, prudence et diligence.

DORS/98-240, art. 1.

Extension or abridgement of time

42 Except where these rules otherwise provide, where an application is made, the court or a judge may, by order, extend or abridge the time limits set out in these rules for doing any act or taking any proceeding, and that power may be exercised whether the application is made before or after the expiration of the prescribed time limit.

M.R. 177/93; 200/2009

Powers of registrar

43 The registrar has the jurisdiction of a judge sitting in chambers.

M.R. 177/93

Motion before a judge or the court

43.1(1) Except as otherwise provided by a judge or the court, a motion before a judge or the court shall be

(a) brought by notice by the party or the party's counsel;

(b) supported by an affidavit; and

(c) at the discretion of counsel, or when required by the court or a judge, a concise memorandum setting out the submissions in support of the motion.

43.1(2) An applicant shall, not later than four days before the hearing date of the motion,

(a) file the motion and supporting material, in accordance with subrule (2.1), with the registrar; and

(b) serve the motion and supporting material on all other parties.

43.1(2.1) If the motion is

(a) before a judge alone, the original copy of the motion and supporting material shall be filed; and

(b) before the court, the original and three copies of the motion and supporting material shall be filed.

Prorogation ou abrégement du délai

42 Sauf disposition contraire des présentes règles, lorsqu'il est saisi d'une requête, le tribunal ou un juge peut, par ordonnance, proroger ou abréger le délai prévu par celles-ci en vue de l'accomplissement d'actes ou de l'introduction de procédures. Ce pouvoir peut être exercé même si la requête est présentée après l'expiration du délai prescrit.

R.M. 177/93; 200/2009

Pouvoirs du registraire

43 Le registraire a la compétence d'un juge siégeant en cabinet.

R.M. 177/93

Présentation d'une motion devant un juge ou le tribunal

43.1(1) Sauf directive contraire d'un juge ou du tribunal, toute motion présentée devant un juge ou le tribunal :

a) est introduite par un avis que donne la partie ou son avocat;

b) est appuyée d'un affidavit;

c) est rédigée sous la forme d'un mémoire qui expose de façon concise les arguments à l'appui de celle-ci, à la discrétion de l'avocat ou lorsque l'exige le tribunal ou le juge.

43.1(2) Au plus tard quatre jours avant la date d'audition de la motion, le requérant :

a) dépose la motion et les documents à l'appui auprès du registraire, conformément au paragraphe (2.1);

b) signifie la motion et les documents à l'appui aux autres parties.

43.1(2.1) Si la motion est présentée devant un juge seul, l'original et les documents à l'appui sont déposés. Si elle est présentée devant le tribunal, l'original, trois copies et les documents à l'appui sont déposés.

Authority of the Courts

Seal of court

187 (1) Every court shall have a seal describing the court, and judicial notice shall be taken of the seal and of the signature of the judge or registrar of the court in all legal proceedings.

Court not subject to be restrained

(2) The courts are not subject to be restrained in the execution of their powers under this Act by the order of any other court.

Power of judge in chambers

(3) Subject to this Act and to the General Rules, the judge of a court may exercise in chambers the whole or any part of his jurisdiction.

Periodical sittings

(4) Periodical sittings for the transaction of the business of courts shall be held at such times and places and at such intervals as the court directs.

Court may review, etc.

(5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

Enforcement of orders

(6) Every order of a court may be enforced as if it were a judgment of the court.

Transfer of proceedings to another division

(7) The court, on satisfactory proof that the affairs of the bankrupt can be more economically administered within another bankruptcy district or division, or for other sufficient cause, may by order transfer any proceedings under this Act that are pending before it to another bankruptcy district or division.

Trial of issue, etc.

(8) The court may direct any issue to be tried or inquiry to be made by any judge or officer of any of the courts of the province, and the decision of that judge or officer is subject to appeal to a judge in bankruptcy, unless the judge is a judge of a superior court when the appeal shall, subject to section 193, be to the Court of Appeal.

Autorité des tribunaux

Sceau du tribunal

187 (1) Tout tribunal doit avoir un sceau le désignant; le sceau et la signature du juge ou du registraire de ce tribunal sont admis d'office dans toutes les procédures judiciaires.

Les tribunaux ne sont soumis à aucune restriction

(2) Dans l'exercice des pouvoirs que leur confère la présente loi, les tribunaux ne sont soumis à aucune restriction provenant d'une ordonnance d'un autre tribunal.

Pouvoir du juge en chambre

(3) Sous réserve des autres dispositions de la présente loi et des Règles générales, le juge d'un tribunal peut exercer en chambre la totalité ou partie de sa juridiction.

Sessions périodiques

(4) Des sessions périodiques pour l'expédition des affaires des tribunaux sont tenues aux dates, heures, lieux et intervalles que prescrit chacun de ces tribunaux.

Le tribunal peut réviser, etc.

(5) Tout tribunal peut réviser, rescinder ou modifier toute ordonnance qu'il a rendue en vertu de sa juridiction en matière de faillite.

Exécution d'ordonnances

(6) Toute ordonnance du tribunal peut être exécutée comme si elle était un jugement du tribunal.

Renvoi dans une autre division

(7) Sur preuve satisfaisante que les affaires du failli peuvent être administrées d'une manière plus économique dans un autre district ou dans une autre division de faillite, ou pour un autre motif suffisant, le tribunal peut, par ordonnance, renvoyer des procédures, que prévoit la présente loi et qui sont pendantes devant lui, à un autre district ou à une autre division de faillite.

Instruction des causes, etc.

(8) Le tribunal peut ordonner l'instruction de tout litige ou la tenue de toute enquête par un juge ou fonctionnaire d'un des tribunaux de la province, et la décision de ce juge ou de ce fonctionnaire est sujette à appel devant un juge en matière de faillite, à moins que le juge ne soit juge d'une cour supérieure, alors que l'appel doit, sous réserve de l'article 193, être interjeté devant la Cour d'appel.

Formal defect not to invalidate proceedings

(9) No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

Proceedings taken in wrong court

(10) Nothing in this section invalidates any proceedings by reason of their having been commenced, taken or carried on in the wrong court, but the court may at any time transfer the proceedings to the proper court.

Court may extend time

(11) Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

Court may dispense with certain requirements respecting notices

(12) Where in the opinion of the court the cost of preparing statements, lists of creditors or other material required by this Act to be sent with notices to creditors, or the cost of sending the material or notices, is unjustified in the circumstances, the court may give leave to omit the material or any part thereof or to send the material or notices in such manner as the court may direct.

R.S., 1985, c. B-3, s. 187; 1992, c. 1, s. 20, c. 27, s. 66; 2004, c. 25, s. 87.

Enforcement of orders of other courts

188 (1) An order made by the court under this Act shall be enforced in the courts having jurisdiction in bankruptcy elsewhere in Canada in the same manner in all respects as if the order had been made by the court hereby required to enforce it.

Courts to be auxiliary to each other

(2) All courts and the officers of all courts shall severally act in aid of and be auxiliary to each other in all matters of bankruptcy, and an order of one court seeking aid, with a request to another court, shall be deemed sufficient to enable the latter court to exercise, in regard to the matters directed by the order, such jurisdiction as either the court that made the request or the court to which the request is made could exercise in regard to similar matters within its jurisdiction.

Un vice de forme n'invalide pas les procédures

(9) Un vice de forme ou une irrégularité n'invalide pas des procédures en faillite, à moins que le tribunal devant lequel est présentée une opposition à la procédure ne soit d'avis qu'une injustice grave a été causée par ce vice ou cette irrégularité, et qu'une ordonnance de ce tribunal ne puisse remédier à cette injustice.

Procédures prises erronément devant un tribunal

(10) Le présent article n'a pas pour effet d'invalider des procédures pour le motif qu'elles ont été intentées, prises ou continuées devant un tribunal incompétent; mais le tribunal peut, à tout moment, renvoyer les procédures au tribunal compétent.

Le tribunal peut prolonger le délai

(11) Lorsque la présente loi restreint le délai fixé pour accomplir une action ou chose, le tribunal peut prolonger ce délai, avant ou après son expiration, aux termes, s'il en est, qu'il estime utile d'imposer.

Le tribunal peut dispenser de certaines exigences concernant les avis

(12) Lorsque, de l'avis du tribunal, les frais qu'entraîne la préparation de déclarations, de listes de créanciers ou d'autres documents dont la présente loi exige l'expédition avec les avis aux créanciers, ou lorsque les frais d'envoi de pareils documents ou avis ne sont pas justifiables dans les circonstances, le tribunal peut permettre d'omettre ces documents ou d'en omettre une partie ou d'expédier les documents ou avis de la façon qu'il estime indiquée.

L.R. (1985), ch. B-3, art. 187; 1992, ch. 1, art. 20, ch. 27, art. 66; 2004, ch. 25, art. 87.

Exécution d'ordonnances rendues par d'autres tribunaux

188 (1) Une ordonnance rendue par le tribunal, sous le régime de la présente loi, est exécutée dans les tribunaux ayant juridiction en matière de faillite ailleurs au Canada, de la même manière, à tous les égards, que si l'ordonnance avait été rendue par le tribunal tenu par les présentes de l'exécuter.

Les tribunaux doivent s'entraider

(2) Tous les tribunaux, ainsi que les fonctionnaires de ces tribunaux, doivent s'entraider et se faire les auxiliaires les uns des autres en toutes matières de faillite; une ordonnance d'un tribunal demandant de l'aide, accompagnée d'une requête à un autre tribunal, est censée suffisante pour permettre au dernier tribunal d'exercer, en ce qui concerne les affaires prescrites par l'ordonnance, la juridiction que le tribunal qui a présenté la requête ou le tribunal à qui la requête a été présentée, pourrait exercer relativement à des affaires semblables dans sa juridiction.

4

2021 MBCA 13
Manitoba Court of Appeal

Bannerman Lumber Ltd et al v. Goodman

2021 CarswellMan 37, 2021 MBCA 13, [2021] 4 W.W.R. 377, 328 A.C.W.S. (3d) 448

BANNERMAN LUMBER LTD. and JEFF BANNERMAN (Applicants / Respondents) and RICHARD NEAL GOODMAN also known as RICHARD NEALE GOODMAN (Respondent / Applicant)

Beard J.A., In Chambers

Heard: August 27, 2020
Judgment: February 18, 2021
Docket: AI 20-30-09480

Counsel: P. Halamandaris, L.L. Gergely, for Applicant
J.D. Kendall, B.E. Roach, for Respondents

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.e Miscellaneous
Headnote
Bankruptcy and insolvency --- Practice and procedure in courts — Appeals — Miscellaneous
Respondent wished to appeal finding under s. 178(1)(e) of Bankruptcy and Insolvency Act that debt owing by him to applicant survived his discharge from bankruptcy — Respondent brought application pursuant to R. 42 of Court of Appeal Rules for extension of time to file and serve notice of appeal — Application dismissed — There was no basis to grant extension either due to prejudice caused by delay or on basis that there was arguable case to support appeal — In considering application under s. 178(1)(e) of Act, courts did not base their decisions on why or how underlying loan transaction failed; they looked to whether there was link between misrepresentations and underlying agreement — Underlying claim in this case included allegation of misrepresentation that arbitrator found to have been proven, and his fact findings were adopted by application judge — Evidence as to connection between false pretences and debt was clear — Respondent espoused very narrow view of interpretation of s. 178(1)(e) of Act that did not fit with either principle that legislation was to be interpreted broadly or objective of legislation as explained in case law .
Table of Authorities
Cases considered by *Beard J.A., In Chambers*:
Agritrans Logistics Ltd., Re (2005), 2005 MBCA 68, 2005 CarswellMan 162, 11 C.B.R. (5th) 1, (sub nom. *Western Grain Cleaning & Processing Ltd. v. Agritrans Logistics Ltd.)* 254 D.L.R. (4th) 454, (sub nom. *Agritrans Logistics Ltd. (Bankrupt), Re)* 195 Man. R. (2d) 47, (sub nom. *Agritrans Logistics Ltd. (Bankrupt), Re)* 351 W.A.C. 47, [2006] 3 W.W.R. 471 (Man. C.A.) — referred to
Bannerman Lumber Ltd. et al. v. Goodman (2020), 2020 MBQB 76, 2020 CarswellMan 210 (Man. Q.B.) — considered

Braich, Re (2007), 2007 BCCA 641, 2007 CarswellBC 3185, (sub nom. *Braich (Bankrupt), Re)* 250 B.C.A.C. 53, (sub nom. *Braich (Bankrupt), Re)* 416 W.A.C. 53 (B.C. C.A. [In Chambers]) — referred to

Branum v. Branum (1998), 1998 CarswellMan 251, 129 Man. R. (2d) 142, 180 W.A.C. 142 (Man. C.A. [In Chambers]) — referred to

Bruno Appliance and Furniture Inc. v. Hryniak (2014), 2014 SCC 8, 2014 CarswellOnt 642, 2014 CarswellOnt 643, 37 R.P.R. (5th) 63, 27 C.L.R. (4th) 65, 47 C.P.C. (7th) 1, 2014 CSC 8, 12 C.C.E.L. (4th) 63, 21 B.L.R. (5th) 311, 128 O.R. (3d) 799 (note), 366 D.L.R. (4th) 671, 453 N.R. 101, 314 O.A.C. 49, [2014] 1 S.C.R. 126 (S.C.C.) — referred to

Buland Empire Development Inc. v. Quinto Shoes Imports Ltd. (1999), 1999 CarswellOnt 2312, 24 R.P.R. (3d) 169, 123 O.A.C. 288, 11 C.B.R. (4th) 190 (Ont. C.A.) — referred to

C. (S.) v. C. (A.S.) (2011), 2011 MBCA 70, 2011 CarswellMan 443, 2 R.F.L. (7th) 30, (sub nom. *A.S.C. v. S.C.)* 268 Man. R. (2d) 282, (sub nom. *A.S.C. v. S.C.)* 520 W.A.C. 282 (Man. C.A. [In Chambers]) — considered

Canada (Attorney General) v. Fairmont Hotels Inc. (2016), 2016 SCC 56, 2016 CarswellOnt 19252, 2016 CarswellOnt 19253, 404 D.L.R. (4th) 201, [2017] 1 C.T.C. 149, 58 B.L.R. (5th) 171, 2016 D.T.C. 5135, [2016] 2 S.C.R. 720 (S.C.C.) — considered

Canada Mortgage and Housing Corp. v. Gray (2014), 2014 ONCA 236, 2014 CarswellOnt 3805, 119 O.R. (3d) 710, 11 C.B.R. (6th) 324, (sub nom. *Gray (Bankrupt), Re)* 317 O.A.C. 286 (Ont. C.A.) — distinguished

Canada Mortgage and Housing Corp. v. Hollancid (2014), 2014 ONSC 911, 2014 CarswellOnt 2646 (Ont. S.C.J.) — distinguished

Canada Mortgage and Housing Corp. v. Hollancid (2015), 2015 ONCA 359, 2015 CarswellOnt 7154 (Ont. C.A.) — distinguished

Creston Moly Corp. v. Sattva Capital Corp. (2014), 2014 SCC 53, 2014 CSC 53, 2014 CarswellBC 2267, 2014 CarswellBC 2268, 373 D.L.R. (4th) 393, 59 B.C.L.R. (5th) 1, [2014] 9 W.W.R. 427, 461 N.R. 335, 25 B.L.R. (5th) 1, 358 B.C.A.C. 1, 614 W.A.C. 1, (sub nom. *Sattva Capital Corp. v. Creston Moly Corp.)* [2014] 2 S.C.R. 633 (S.C.C.) — considered

Cruise Connections Canada v. Szeto (2015), 2015 BCCA 363, 2015 CarswellBC 2346, 28 C.B.R. (6th) 1, 388 D.L.R. (4th) 648, 78 B.C.L.R. (5th) 82, [2016] 3 W.W.R. 756, (sub nom. *Szeto (Bankrupt), Re)* 376 B.C.A.C. 210, (sub nom. *Szeto (Bankrupt), Re)* 646 W.A.C. 210 (B.C. C.A.) — referred to

Delichte v. Rogers (2018), 2018 MBCA 79, 2018 CarswellMan 359, 14 R.F.L. (8th) 1 (Man. C.A.) — referred to

Doyle v. Olby (Ironmongers) Ltd. (1969), [1969] 2 Q.B. 158, [1969] 2 All E.R. 119, [1969] EWCA Civ 2 (Eng. C.A.) — distinguished

F.H. v. McDougall (2008), 2008 SCC 53, 2008 CarswellBC 2041, 2008 CarswellBC 2042, 83 B.C.L.R. (4th) 1, [2008] 11 W.W.R. 414, 60 C.C.L.T. (3d) 1, 61 C.P.C. (6th) 1, (sub nom. *H. (F.) v. McDougall)* 297 D.L.R. (4th) 193, 61 C.R. (6th) 1, 260 B.C.A.C. 74, 380 N.R. 82, [2008] 3 S.C.R. 41, 439 W.A.C. 74 (S.C.C.) — followed

H.Y. Louie Co. v. Bowick (2015), 2015 BCCA 256, 2015 CarswellBC 1539, 25 C.B.R. (6th) 221, 386 D.L.R. (4th) 117, 373 B.C.A.C. 159, 641 W.A.C. 159 (B.C. C.A.) — distinguished

Hunter v. Hunter (2000), 2000 MBCA 134, 2000 CarswellMan 543, 150 Man. R. (2d) 291, 230 W.A.C. 291, [2001] 4 W.W.R. 25 (Man. C.A. [In Chambers]) — referred to

Jerrard v. Peacock (1985), 37 Alta. L.R. (2d) 197, 61 A.R. 161, 57 C.B.R. (N.S.) 54, 1985 CarswellAlta 325 (Alta. Q.B.) — referred to

Lawyers' Professional Indemnity Co. v. Rodriguez (2018), 2018 ONCA 171, 2018 CarswellOnt 3247, 57 C.B.R. (6th) 260, 419 D.L.R. (4th) 520, 139 O.R. (3d) 641 (Ont. C.A.) — referred to

Lawyers' Professional Indemnity Company, et al. v. Mauricio Rodriguez (2018), 2018 CarswellOnt 20644, 2018 CarswellOnt 20645, 68 C.B.R. (6th) 5 (S.C.C.) — referred to

McAteer v. Billes (2006), 2006 ABCA 312, 2006 CarswellAlta 1389, 26 C.B.R. (5th) 119, 397 A.R. 365, 384 W.A.C. 365 (Alta. C.A.) — considered

McAteer, Re (2007), 2007 ABCA 137, 2007 CarswellAlta 730, 75 Alta. L.R. (4th) 129, 34 C.B.R. (5th) 1, (sub nom. *McAteer v. Billes)* 409 A.R. 143, (sub nom. *McAteer v. Billes)* 402 W.A.C. 143 (Alta. C.A.) — considered

Morris Bureau v. Darde (2013), 2013 NSCA 121, 2013 CarswellNS 776, 1060 A.P.R. 378, 335 N.S.R. (2d) 378, 14 C.B.R. (6th) 324 (N.S. C.A.)

Moss, Re (1999), 1999 CarswellMan 482, (sub nom. *Moss (Bankrupt), Re)* 138 Man. R. (2d) 318, (sub nom. *Moss (Bankrupt), Re)* 202 W.A.C. 318, 13 C.B.R. (4th) 231 (Man. C.A. [In Chambers]) — referred to

Motkoski Holdings Ltd. v. Yellowhead (County) (2010), 2010 ABCA 72, 2010 CarswellAlta 403, 89 R.P.R. (4th) 159, 66 B.L.R. (4th) 161, 20 Alta. L.R. (5th) 1, 49 C.E.L.R. (3d) 1, [2010] 5 W.W.R. 603, 474 A.R. 367, 479 W.A.C. 367, 74 C.C.L.T. (3d) 71 (Alta. C.A.) — referred to

Nelson (City) v. Mowatt (2017), 2017 SCC 8, 2017 CSC 8, 2017 CarswellBC 400, 2017 CarswellBC 401, [2017] 3 W.W.R. 1, 74 R.P.R. (5th) 1, 58 M.P.L.R. (5th) 1, 406 D.L.R. (4th) 1, 93 B.C.L.R. (5th) 36, [2017] 1 S.C.R. 138 (S.C.C.) — considered

Peek v. Derry (1889), 38 W.R. 33, 1 Megones Companies Act Cas 292, L.R. 14 App. Cas. 337, [1886-1890] All E.R. Rep. 1, 58 L.J. Ch. 864, 61 L.T. 265, 54 J.P. 148, 5 T.L.R. 625, 14 H. of L. 337, 14 A.C. 337, [1889] UKHL 1 (U.K. H.L.) — referred to

Precision Drilling Canada Limited Partnership v. Yangarra Resources Ltd, (2017), 2017 ABCA 378, 2017 CarswellAlta 2336, 60 Alta. L.R. (6th) 57, [2018] 2 W.W.R. 1, 417 D.L.R. (4th) 666, 76 B.L.R. (5th) 75 (Alta. C.A.) — referred to

Samborski Environmental Ltd v. The Government of Manitoba et al (2020), 2020 MBCA 63, 2020 CarswellMan 232 (Man. C.A.) — considered

Sharma v. Sandhu (2019), 2019 MBQB 160, 2019 CarswellMan 881 (Man. Q.B.) — distinguished

Simone v. Daley (1999), 1999 CarswellOnt 551, 170 D.L.R. (4th) 215, 118 O.A.C. 54, 8 C.B.R. (4th) 143, 43 O.R. (3d) 511, 24 R.P.R. (3d) 1 (Ont. C.A.) — referred to

Singh v. Pierpont (2015), 2015 MBCA 18, 2015 CarswellMan 49, 56 R.F.L. (7th) 1, 315 Man. R. (2d) 189, 630 W.A.C. 189 (Man. C.A.) — referred to

Ste. Rose & District Cattle Feeders Co-op v. Geisel (2010), 2010 MBCA 52, 2010 CarswellMan 185, 68 C.B.R. (5th) 163, [2010] 11 W.W.R. 251, 255 Man. R. (2d) 45, 486 W.A.C. 45, 319 D.L.R. (4th) 694 (Man. C.A.) — considered

Valastiak v. Valastiak (2010), 2010 BCCA 71, 2010 CarswellBC 307, 3 B.C.L.R. (5th) 1, 63 C.B.R. (5th) 188, [2010] 7 W.W.R. 50, 283 B.C.A.C. 204, 480 W.A.C. 204, 82 R.F.L. (6th) 29 (B.C. C.A.) — referred to

Woolf v. Harrop (2003), 2003 CarswellOnt 5073, 50 C.B.R. (4th) 309, [2003] O.T.C. 1101 (Ont. S.C.J.) — distinguished

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

Generally — referred to

s. 178(1) — considered

s. 178(1)(e) — considered

Interpretation Act, S.M. 2000, c. 26

s. 6 — referred to

Rules considered:

Court of Appeal Rules, Man. Reg. 555/88 R

R. 42 — considered

APPLICATION by respondent pursuant to R. 42 of *Court of Appeal Rules* for extension of time to file and serve notice of appeal.

***Beard J.A., In Chambers*:**

I. THE ISSUES

1 This is an application by the respondent (Mr. Goodman), pursuant to r 42 of the MB, Court of Appeal Rules, MR 555/88R (the *CA Rules*), for an extension of time to file and serve a notice of appeal, which is opposed by the applicants (together, Bannerman). Mr. Goodman wishes to appeal a finding under section 178(1)(e) of the Bankruptcy and Insolvency Act, RSC 1985, c B-3 (the *BIA*), that a debt owing by him to Bannerman survived his discharge from bankruptcy.

II. BACKGROUND

2 Mr. Goodman was the president and sole shareholder of R.N.G. Backyard Leisure Inc (formerly, Coleman Backyard Leisure Inc.) (RNG), while Jeff Bannerman (Mr. Bannerman) is the owner and principal of Bannerman Lumber Ltd. (BLL). In 2005, RNG entered into an agreement with BLL, whereby RNG would sell Coleman spas and related products to BLL for retail sale, and BLL would have the exclusive right to market those products in Manitoba (the Agreement).

3 RNG received its spa products from a U.S. spa manufacturer (Maax) pursuant to an agreement that provided that Maax would wholesale spa products to RNG (the Maax Agreement).

4 The Maax Agreement has three provisions that are relevant to this proceeding. According to the arbitration award regarding liability (the Liability Decision), in clause 16 of the Maax Agreement, RNG agreed that it would sell to retail customers only, and in clauses 12 and 30, RNG could not sublease or assign any rights. The Liability Decision reads as follows:

> . . .
>
> ... Clause 16 of the [Maax Agreement] stated:
>
> *Retailer shall not offer Products for sale to any person or entity other than a bona fide retail customer.*
>
> . . .
>
> ... Clause 12 stated:
>
> *MAAX Spas represents and warrants to Retailer that MAAX Spas has the right to use, and to grant Retailer a right and sublicense to use, the trademarks "California Cooperage," "Coleman Spas", "MAAX Collection" and "MAAX Spas" and all other trademarks and trade names used by MAAX Spas in connection with the Products (collectively, the "Marks"). MAAX Spas hereby grants to Retailer a non-exclusive right and sublicense, without the right further to sublicense, to use the Marks in connection with the sale and marketing of the Products during the term of this Agreement.*
>
> . . .
>
> ... Clause 30 of the [Maax Agreement] stated:
>
> *Retailer shall not directly or indirectly assign or subcontract any of its rights or obligations under this Agreement without the prior written consent of MAAX Spas in each instance.*
>
> . . .
>
> [emphasis added]

5 As consideration for the Agreement and grant of rights, BLL agreed to pay (and did pay) $40,000 to RNG.

6 Pursuant to the Agreement, BLL opened a retail store in Brandon, Manitoba in 2005 to sell the hot tubs and related products that were supplied to it by RNG. It proved to be unsuccessful and went out of business in less than a year. BLL and Mr. Bannerman filed a statement of claim against RNG and Mr. Goodman in 2008. The arbitrator found that, when Maax found out, in 2008, about the nature of the Agreement, it terminated its contracts with RNG.

7 Although Bannerman commenced the proceeding by statement of claim, the Agreement had an arbitration clause, so the action was converted into an arbitration. It was later bifurcated into two hearings, the first to determine liability and the second, if necessary, to determine damages.

8 The liability hearing took place before Arbitrator Jewers in 2012, following which he found both RNG and Mr. Goodman liable to Bannerman (the Liability Decision). In fact, RNG had ceased carrying on business prior to the arbitration. An

application by RNG and Mr. Goodman for leave to appeal the Liability Decision was unsuccessful when leave to appeal was refused in 2013.

9 The parties then proceeded to a hearing before Arbitrator Jewers to determine damages. In reasons released in 2014, Arbitrator Jewers awarded damages to Bannerman for business losses of $235,574, interest of $67,971 and costs of $100,000, for a total of $403,545 (the Damages Decision).

10 Mr. Goodman made an assignment in bankruptcy in July 2014, which was discharged in 2017. That led to Bannerman filing this application, pursuant to section 178(1)(e) of the BIA, to have the debt survive the discharge of the bankruptcy. That section states:

> **Debts not released by order of discharge**
>
> **178(1)** An order of discharge does not release the bankrupt from
>
> . . .
>
> (e) any debt or liability resulting from obtaining property or services by false pretences or fraudulent misrepresentation ...
>
> . . .

11 The application judge released her reasons on April 28, 2020, which were provided to Mr. Goodman on May 5, 2020. He contacted his application lawyer within days to inquire about filing an appeal. He was referred to appeal counsel, with whom he spoke on May 20, 2020. It was then that he learned that, under the *BIA*, a party has only 10 days from the pronouncement of a decision to file an appeal, not 30 days, as he was originally advised by his application lawyer. Mr. Goodman missed the time limit, leading to this application to extend the time to file an appeal.

12 Bannerman are opposed to this application. They take the position that Mr. Goodman did not have the required continuous intention to appeal, that he has not provided evidence of a reasonable explanation for the delay and that there are no arguable grounds of appeal.

III. THE TEST FOR AN EXTENSION OF TIME TO APPEAL

13 The test for granting an extension of time to appeal was recently set out in Samborski Environmental Ltd v The Government of Manitoba et al 2020 MBCA 63 at paras 36-38. In summary, the criteria to be applied in determining whether to extend the time to commence an appeal under r 42 of the CA Rules are:

1. whether there was a continuous intention to appeal from a time within the period when the appeal should have been commenced;

2. whether there was a reasonable explanation for the delay;

3. whether there are arguable grounds of appeal;

4. whether any prejudice suffered by the other party can be addressed; and

5. whether it is right and just in all of the circumstances that the time for commencing the appeal be extended.

14 This same test was applied by this Court in the context of a motion to extend the time to appeal a decision under the *BIA* in Western Grain Cleaning and Processing Ltd v LC Taylor & Co Ltd 2005 MBCA 68 at paras 15-21.

15 An important criterion is that of whether there are arguable grounds of appeal. This was described by Steel JA as "a realistic ground which, if established, appears of sufficient substance to be capable of convincing a panel of the court to allow the appeal" (*C (S) v* C (AS) 2011 MBCA 70 at para 8). As explained by Rothstein J in Sattva Capital Corp v Creston Moly

Corp 2014 SCC 53 at paras 72-75, the test will be met where the ground of appeal cannot be dismissed after a preliminary examination of the grounds. It is not a high standard to meet.

16 Scott CJM explained the fifth criterion regarding the justice of the case in Hunter v Hunter 2000 MBCA 134, as follows (at para 11):

> ... In *Frey v. MacDonald* (1989), 33 C.P.C. (2d) 13 (Ont. C.A.), it was emphasized, as it was by Freedman C.J.M. in *Children's Aid Society v. Lambert*, that the justice of the case may lead to a disposition quite independent of the determination of the first two criteria. Thus, in *Frey* leave to appeal was granted even though the court was not persuaded that there was an intention to appeal within the appeal period nor any reasonable explanation for the delay; the converse, of course, is also true. ...

17 Mainella JA stated as follows in Delichte v Rogers 2018 MBCA 79 (in Chambers), (at para 17):

> These factors are not intended to be a rigid straightjacket as to the exercise of judicial discretion. Regardless of whether or not all four criteria are met, the Court may still grant or refuse the extension of time if it is right and just in all of the circumstances to do so .... I agree with the comments of MacPherson JA in *Monteith v Monteith*, 2010 ONCA 78, [in Chambers], that [the fifth criterion] is an "umbrella" (at para 20); the Court must look broadly at the relevant circumstances and do what justice requires.

IV. ANALYSIS

1. Continuous Intention to Appeal and Reasonable Explanation for the Delay

18 Bannerman argue that there is no evidence that Mr. Goodman had a continuous intention to appeal from a time within the appeal period, which ended on May 8, 2020 (see *Samborski* at paras 36, 39). They also point out that the motion to extend the time to appeal was not filed until a significant time after that date, and no explanation has been given for that further delay.

19 I would not dismiss this motion on either of these two bases; if these were the only criteria at issue, I would grant the leave application on the basis that it is right and just in all of the circumstances.

20 The facts, as explained by Mr. Goodman, are as follows. Mr. Goodman received the application judge's decision on May 5, 2020, and contacted his lawyer on May 8, 2020, only three days later, regarding an appeal. He was told that he had 30 days to appeal and that his lawyer, who acted for him for the application, would not do the appeal. He asked for a recommendation for an appeal lawyer and was able to speak to that lawyer on May 20, 2020. He was then told, for the first time, that his appeal period was only 10 days and had already expired. He retained appeal counsel on that day, and that lawyer advised Bannerman's lawyer of his retainer. Due to his difficult financial situation, it took Mr. Goodman until June 3, 2020, to gather together the funds to complete the retainer, at which time his appeal lawyer contacted the application lawyer to get the file, which arrived on or about June 12, 2020. This motion was filed on July 10, 2020.

21 In my view, it cannot be said that Mr. Goodman failed to pursue his appeal with adequate diligence or that he was intentionally delaying the proceedings. The 10-day appeal period under the *BIA* is unusually short, and has caused late-filing problems in other cases — see, for example, Braich (Re) 2007 BCCA 641 (in Chambers); and Moss, Re 1999 CarswellMan 482 (CA (in Chambers)).

22 In terms of a reasonable explanation, the courts have accepted inadvertence of counsel as a reasonable explanation. (See, for example, Branum v Branum 1998 CarswellMan 251 at para 10 (CA (in Chambers)); and Singh v Pierpont 2015 MBCA 18 at para 41.)

23 In my view, Mr. Goodman pursued his appeal with reasonable diligence, and I am of the view that it would be unjust to dismiss his motion to extend time to appeal on either of these bases.

2. Arguable Grounds of Appeal

24 Mr. Goodman's proposed grounds of appeal are: (i) that there was no clear and conclusive evidence of false pretences; and (ii) that the losses awarded did not result from the false pretences.

2.1 No Clear and Conclusive Evidence of False Pretences

2.1.1 The Application Judge's Decision

25 The application judge stated that the parties had agreed that liability was determined by the arbitrator on the basis of obtaining property, and that the issue for her to determine was whether that resulted from false pretences (see 2020 MBQB 76 at para 8). In her analysis, she referred to the following principles:

- in the definition of the concepts of false pretences and fraudulent misrepresentation, "the core content ... is deceitful statements" (at para 9); she thus concluded that an issue of importance in the case would be "the degree of knowledge required to establish deceit" (at para 10);

(Citing Buland Empire Development Inc v Quinto Shoes Imports Ltd 1999 CarswellOnt 2312 at para 14 (CA) as cited in Ste Rose & District Cattle Feeders Co-op v Geisel 2010 MBCA 52 at para 99.)

- that "fraud is proved when it is shown that a false representation has been made (i) knowingly, or (ii) without belief in its truth, or (iii) recklessly, careless whether it be true or false" and that "[t]o prevent a false statement [from] being fraudulent, there must ... always be an honest belief its truth" (at para 10);

(Citing *Derry and others v Peek* at 22 (HL (Eng)), as cited in *Ste Rose* at para 91.)

- "[I]t is sufficient if the defendant did not actually know the statement was false, so long as the statement was made recklessly. 'Recklessly' in this context means that the statement was made 'without caring whether it was true or false'" (at para 11);

(Citing Motkoski Holdings Ltd v Yellowhead (County) 2010 ABCA 72 at para 58 as cited in Precision Drilling Canada Limited Partnership v Yangerra Resources Ltd 2017 ABCA 378 at para 33.)

- where liability has been established in a prior proceeding leading to a judgment debt, the judge can look to material filed in that proceeding, including the facts pleaded in support of that action, any evidence that was presented at the time, and any reasons that might have been given, but the judge cannot consider extraneous evidence not grounded in that process (see para 12);

(See also Lawyers' Professional Indemnity Company v Rodriguez 2018 ONCA 171 at para 6, leave to appeal to SCC refused, 38076 (6 December 2018.)

- even though the prior proceeding did not deal with fraud or similar allegations, the court, on a section 178(1) *BIA* application, can consider whether the underlying order and the related record would support the fraud or similar allegations (see paras 16-18).

(See also Valastiak v Valastiak 2010 BCCA 71 at paras 38-40; and Cruise Connections Canada v Szeto 2015 BCCA 363.)

26 The application judge recognised that, for Mr. Goodman's misrepresentations to amount to false pretences, Bannerman would have to show that Mr. Goodman had been deceitful, which was not a question that the arbitrator had to answer. She also stated that "the [a]rbitrator's finding that [Mr. Goodman] was careless and 'knew or ought to have known' that RNG did not have the necessary authority on its face leaves [that] question unanswered" (at para 27).

27 The application judge reviewed the arbitrator's findings and, from those, concluded (at paras 29-30):

> From these findings [of the arbitrator] I am able to draw the inference that [Mr. Goodman] lacked an honest belief in the truth of his statements, Lord Herschell's prerequisite for fraud. They are also consistent with the examples of reckless behaviour referred to in ***Precision Drilling***, including:
>
> - a statement by someone who deliberately shuts his eyes to the facts or purposely abstains from making inquiry;
> - a statement made without caring if it was true or false;
> - a statement made in an authoritative way without having bothered to find out if it is true.
>
> In the result, I am satisfied that the Arbitrator's findings demonstrate [Mr. Goodman's] representations regarding RNG's authority were reckless. His conduct was thus deceitful. As a result, the liability set out in the [Liability Decision] arose from [Mr. Goodman's] false pretences as described in section 178(1)(e). [Bannerman] are therefore entitled to the declaration they seek.

2.1.2 The Parties' Positions

28 The parties have not argued that the application judge erred in relation to the principles on which she relied regarding fraud and false pretences.

29 Mr. Goodman's position is that the issues of fraud and false pretences were not before the arbitrator because Bannerman chose not to raise them, and the arbitrator did not make any findings in that regard, so Bannerman should not now be allowed to reconstitute their claim to add those allegations at this stage of the proceedings. For that proposition, he relies upon the decisions in HY Louie Co Limited v Bowick 2015 BCCA 256; and Sharma v Sandhu 2019 MBQB 160, both cases in which an application under section 178(1) was dismissed.

30 Mr. Goodman also argues that the application judge erred when she "drew an inference" that he lacked an honest belief in the truth of his statements. He states that, because the arbitrator did not draw any inferences or conclusions about fraud or whether he had an honest belief that he had the requisite authority to enter into the contract, the application judge was left with an incomplete record and was only able to "infer" fraud. This, he says, falls short of clear and conclusive evidence and, therefore, does not meet "the required standard of clear and conclusive evidence" that he lacked an honest belief.

31 Bannerman's position is that there was sufficient evidence from which the application judge could draw the inference that Mr. Goodman did not have an honest belief, which was a discretionary decision. They argue that Mr. Goodman is essentially asking this Court to draw different inferences, which offends the appellate standard of review for such decisions. They state that, as a result, this ground of appeal has no merit.

2.1.3 The Standard of Clear and Conclusive Evidence

32 I will first address the issue of whether there is a "standard of clear and conclusive evidence" and, if so, what that standard is and how it is to be applied.

33 The determination of the applicable standard of proof in civil cases was settled by the Supreme Court of Canada in FH v McDougall 2008 SCC 53. Prior to that decision, there was a line of jurisprudence that held that there were degrees of probability within the civil standard of proof on a balance of probabilities, and that the higher degree of probability within that range applied in cases involving particularly serious allegations such as fraud, professional misconduct and criminal conduct (see paras 26-30). In other decisions, courts had held that, in such cases, the balance of probabilities required that proof be "clear and convincing and based upon cogent evidence" (at para 31).

34 These propositions were not universally accepted.

35 Rothstein J, for the Court in *McDougall*, rejected those findings and held "once and for all in Canada, that there is only one civil standard of proof at common law and that is proof on a balance of probabilities" (at para 40; see also para 49). He listed and rejected five approaches that had been adopted in civil cases, including that "[n]o heightened standard of proof applies in civil cases, but the evidence must be scrutinized with greater care where the allegation is serious" and the "evidence must be clear, convincing and cogent" (at para 39; see also para 40).

36 Regarding the weighing of evidence, he stated (at paras 45-46, 49):

> To suggest that depending upon the seriousness, the evidence in the civil case must be scrutinized with greater care implies that in less serious cases the evidence need not be scrutinized with such care. I think it is inappropriate to say that there are legally recognized different levels of scrutiny of the evidence depending upon the seriousness of the case. There is only one legal rule and that is that in all cases, evidence must be scrutinized with care by the trial judge.
>
> Similarly, evidence must always be sufficiently clear, convincing and cogent to satisfy the balance of probabilities test. But again, there is no objective standard to measure sufficiency. In serious cases, like the present, judges may be faced with evidence of events that are alleged to have occurred many years before, where there is little other evidence than that of the plaintiff and defendant. As difficult as the task may be, the judge must make a decision. If a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test.
>
> In the result, I would reaffirm that in civil cases there is only one standard of proof and that is proof on a balance of probabilities. In all civil cases, the trial judge must scrutinize the relevant evidence with care to determine whether it is more likely than not that an alleged event occurred.

37 The use of the phrase "clear, convincing and cogent" persisted following *McDougall*, and the Supreme Court of Canada attempted to explain it in Canada (Attorney General) v Fairmont Hotels Inc 2016 SCC 56 at paras 34-37; and in Nelson (City) v Mowatt 2017 SCC 8 at paras 39-40.

38 In *Fairmont Hotels*, Brown J, for the majority, stated (at para 36):

> In my view, the applicable standard of proof to be applied to evidence adduced in support of a grant of rectification is that which *McDougall* identifies as the standard generally applicable to all civil cases: the balance of probabilities. But this merely addresses the standard, and not the quality of evidence by which that standard is to be discharged. As the Court also said in *McDougall* (at para. 46), "evidence must always be sufficiently clear, convincing and cogent". A party seeking rectification faces a difficult task in meeting this standard, because the evidence must satisfy a court that the true substance of its unilateral intention or agreement with another party was not accurately recorded in the instrument to which it nonetheless subscribed. ...

39 In *Nelson*, Brown J, for the Court, explained (at para 40):

> ... The impugned statements [of the Court of Appeal] go not to the standard of proof, but to the quality of evidence by which that standard is to be met. This Court said in *McDougall* (at para. 46) that "evidence must always be sufficiently clear, convincing and cogent". Those are relative, not absolute qualities. It follows that the quality of evidence necessary to meet that threshold so as to satisfy a trier of fact of a proposition on a balance of probabilities will depend upon the nature of the claim and of the evidence capable of being adduced [citations omitted]. In the context of historical adverse possession claims, the quality of the supporting evidence must merely be "as satisfactory as could reasonably be expected, having regard to all the circumstances" [citations omitted].

40 Brown J went on to state that, while the Court of Appeal was critical of the chambers judge's assessment of the evidence, he was of the view that the chambers judge was carefully attuned to the historical nature of the claim and its implications for

the quality and availability of evidence. He found that the chambers judge's finding was untainted by palpable and overriding error and, as a result, the Court of Appeal erred in overturning his decision.

41 It is clear that, at least since *McDougall*, the "standard" of "clear, convincing and cogent" evidence is not a standard of proof; rather, it relates to the weight to be given to the evidence. This is a determination that is to be made by the trial judge, not by the appellate court. To repeat Rothstein J in *McDougall*, "[i]f a responsible judge finds for the plaintiff, it must be accepted that the evidence was sufficiently clear, convincing and cogent to that judge that the plaintiff satisfied the balance of probabilities test" (at para 46).

42 Mr. Goodman argues that the application judge erred in concluding that he did not have an honest belief in the truth of his statements because "she was left with an incomplete record and was only able to 'infer' fraud", which did not meet the "standard of clear and conclusive evidence".

43 To the extent that Mr. Goodman is arguing that an inference is weak evidence and, therefore, cannot constitute "clear and conclusive evidence", that argument is not correct. An inference is a finding based on circumstantial evidence, and is often the only way of proving elements of a claim, like knowledge and intention. Direct evidence and circumstantial evidence can both be strong evidence or weak evidence. That is determined by the evidence itself and the issue to be proved, not by whether it is direct or circumstantial. Eyewitness evidence, while usually direct evidence, is notoriously unreliable, while scientific evidence, while usually circumstantial, is often very strong evidence. As stated in Sidney N Lederman, Alan W Bryant & Michelle K Fuerst, *The Law of Evidence in Canada*, 5th ed (Toronto: LexisNexis, 2018) (at section 2.92):

> In civil cases, the treatment of circumstantial evidence is quite straightforward. It is treated as any other kind of evidence. The weight accorded to it depends on the strength of the inference that can be drawn from it and this is a task for the trier of fact.

44 The application judge considered the findings of the arbitrator, from which she drew the inference that Mr. Goodman lacked an honest belief in the truth of his statements. Whether she erred in making this finding raises both a question of fact and, because knowledge constitutes an element of fraud and false pretences, a question of mixed fact and law. (See para 25 herein; and Bruno Appliance and Furniture Inc v Hryniak 2014 SCC 8 at para 21, regarding the elements of civil fraud.)

45 The standard of review that an appellate court would apply to determine whether the application judge had erred by drawing this inference and making the finding that Mr. Goodman lacked an honest belief would be that of palpable and overriding error. This was explained in *Nelson* (at para 38):

> ... It is certainly possible to weigh parts of the evidence differently than the chambers judge did. The possibility of alternative findings based on different ascriptions of weight is, however, not unusual, and presents no basis for overturning the findings of a fact-finder. It is not the role of appellate courts to second-guess the weight to be assigned to the various items of evidence. Absent palpable and overriding error — that is, absent an error that is "plainly seen" and has affected the result — an appellate court may not upset a fact-finder's findings of fact (*Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at paras. 6 and 10; see also *H.L. v. Canada (Attorney General)*, 2005 SCC 25, [2005] 1 S.C.R. 401, at para. 55). The standard of palpable and overriding error applies with respect to the underlying facts relied upon by the trial judge to draw an inference, and to the inference-drawing process itself (*Housen*, at para. 23). In my respectful view, the Court of Appeal erred by interfering with a factual finding where its objection, in substance, stemmed from a difference of opinion over the weight to be assigned to the evidence. The chambers judge, having held two hearings ... reached findings that were available to him on the evidence. Those findings should not have been disturbed.

46 In my view, this standard applies in this case even though the application judge based her findings on those of the arbitrator, rather than on hearing *viva voce* evidence.

47 I will now address Mr. Goodman's argument, based on *HY Louie* and *Sharma*, that the issues of fraud and false pretences were not before the arbitrator, who did not make any findings in that regard, so Bannerman should not now be allowed to reconstitute their claim to add those allegations.

48 Those cases do not stand for the proposition that a claim of fraud or false pretences has to have been made in the underlying proceeding in order to be proven in an application under section 178(1)(e). The issue, at the end of the day, is whether the evidence, facts and findings in the underlying proceeding are sufficient to make the required finding of fraud or false pretences in the application under section 178(1)(e). (See *Lawyers' Professional Indemnity Company* at para 6, relied upon in *Sharma* at paras 31-34.)

49 I agree with the application judge's finding that *HY Louie* and *Sharma* are distinguishable on their facts. Because the underlying judgment in *HY Louie* was granted on consent without a trial and there was no allegation of fraud or dishonest conduct in the pleadings or in the consent judgment, there was no evidence and no findings for the court to consider on the section 178(1)(e) application. Similarly in *Sharma*, the underlying judgment was granted on summary motion, and the pleadings and affidavit that were filed in support contained no allegations of fraud or dishonest conduct to be considered on the subsequent section 178(1)(e) application.

50 In this case, Bannerman raised three issues that required the arbitrator to consider and make findings regarding Mr. Goodman's actions, knowledge and intention. First, they alleged misrepresentation on the part of both Mr. Goodman and RNG, which was set out as an issue for determination in the arbitrator's mandate. The arbitrator analysed the evidence and found that "[t]he only term of the [Agreement] that was misrepresented was the implied term of authority and that misrepresentation was made both by [Mr. Goodman] acting for [RNG] and by [Mr. Goodman] in his personal capacity."

51 Bannerman's two other issues related to the nature of Mr. Goodman's actions and intentions, being whether the misrepresentation was negligent and whether the arbitrator should pierce the corporate veil and find Mr. Goodman personally liable for the actions of RNG. In determining these issues, the arbitrator considered evidence and made factual findings which led him to conclude that the misrepresentations were negligent and that he should pierce the corporate veil and hold Mr. Goodman personally liable.

52 It is these findings upon which the application judge based her decision. After summarising the arbitrator's decision, she concluded (at paras 28-29):

> ... A review of the entirety of the Arbitrator's findings reveals that he did not consider [Mr. Goodman's] conduct to be mere inadvertence or incompetence. He dismissed outright [Mr. Goodman's] interpretation of RNG's obligations in its agreement with Maax. He found that [Mr. Goodman] "chose to put his own spin on them" and that he never sought clarification from his lawyers or "more important" from Maax. Of significance is his finding that [Mr. Goodman] "did not tell Maax the details of the agreement so as to insure that they would have no objections", and that these were all simple precautions [Mr. Goodman] could have but did not take. Very telling is the Arbitrator's finding that [Mr. Goodman] "concealed" RNG's lack of authority.
>
> From these findings I am able to draw the inference that [Mr. Goodman] lacked an honest belief in the truth of his statements ....
>
> [footnotes omitted]

53 Unlike in *HY Louie* and *Sharma*, in this case, there were evidence, facts and findings from the underlying arbitration proceeding that were relevant and applicable to the issue of false pretences. The application judge was required to weigh the evidence and findings and draw inferences to determine whether she was satisfied that Bannerman had proven their claim of false pretences on a balance of probabilities.

54 To determine an appeal on this ground, this Court would be required to apply the standard of palpable and overriding error to the facts and inferences relied upon by the application judge, to determine whether she erred in finding that Mr. Goodman lacked an honest belief in the truth of his statements.

55 After carefully considering the arguments, I am satisfied that the evidence and findings referred to by the application judge are capable of supporting her inference and conclusions and there is no basis upon which to overturn them; she made no palpable and overriding error. I am satisfied that this ground of appeal is not "a realistic ground which, if established, appears of sufficient substance to be capable of convincing a panel of the court to allow the appeal" (C (S) at para 8). As a result, this ground of appeal has no potential to succeed, and I would not grant leave to appeal on this basis.

2.2 The Losses Awarded Did Not Result From the False Pretences

2.2.1 The Parties' Positions

56 Mr. Goodman's position is that, to succeed on the section 178(1)(e) application, Bannerman was "required to demonstrate the necessary clear link that the entirety of the arbitrator's award was a debt or liability 'because of' or 'as a result of' false pretences." He points out that, while the arbitrator allowed Bannerman's claim for business losses of $235,574, there was only evidence that $40,000 related to the signing of the Agreement, with the rest arising from the failure of the business, and that the arbitrator could not come to a conclusion as to why the business failed.

57 Mr. Goodman argues that, even if Bannerman states that they would never have entered into the Agreement had they known that Maax did not consent, that does not mean that the losses were the result of a misrepresentation of authority.

58 Bannerman's position is that their reliance on the Agreement, which the arbitrator found they would not have entered into but for Mr. Goodman's misrepresentation of authority, resulted in the losses that were awarded.

59 Stated another way, the issue is: when is a connection between the deceitful conduct and the loss too remote to grant an exclusion under section 178(1)(e)?

2.2.2 The Link Between the False Pretences and the Debt

60 The nature of the link between the debt at issue under section 178(1)(e) and the fraudulent representation or false pretences has been variously described as follows:

- "But for the fraudulent misrepresentation by the defendant, Vestel Corporation would not have loaned him $11,000" (see *Woolf v Harrop*, 2003 CarswellOnt 5073 at para 72 (Sup Ct J).

- "The false statement made by the defendant need only be materially connected to the actions of the plaintiff that resulted in damage. In other words, were the misrepresentations made by Mr. Darde connected to the actions of Morris Bureau that resulted in them suffering damages?" (see *Darde v Morris Bureau*, 2013 NSCA 121 at para 18).

- "[I]t is not sufficient to show that there was a false pretence or fraudulent misrepresentation unless it is also shown that the property (in this case the mortgage funding) was obtained thereby" (see *Gray (Re)*, 2014 ONCA 236 at para 40).

- "For the purposes of [section] 178(1)(e), it was not sufficient to find that the debtor made some type of misrepresentation or engaged in some type of false pretence without also finding that the conduct in question led to the judgment debt" (see *Gray* at para 44).

- "The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: 'I would not have entered into this bargain at all but for your representation'" (see *Doyle v Olby Ltd*, [1969] 2 All ER Rep 119 at 122 (CA), cited in *CMHC v Hollancid*, 2014 ONSC 911 at para 76, aff'd 2015 ONCA 359).

61 It is important to keep in mind the policy considerations that underlie section 178(1)(e), which were explained by Freedman JA in *Ste Rose*. He noted first that "legislation is to be construed broadly, not narrowly, and consistently with its overall objectives" (at para 108). (See also section 6 of The Interpretation Act, CCSM c I80.)

62 As to those objectives, he quoted, with approval, at para 109, the statement of Master Funduk in Jerrard v Peacock 1985 CarswellAlta 325 at paras 41-46 (QB), as cited by Blair JA in Simone v Daley(1999), 170 DLR (4th) 215 at para 30 (Ont CA) (at para 109):

> . . .
>
> Paragraphs (*d*) and (*e*) are morality concepts which look at conduct. Those kinds of conduct are unacceptable to society and a bankrupt will not be rewarded for such conduct by a release of liability.

63 Freedman JA also adopted the following statement by Fruman JA in McAteer v Billes 2006 ABCA 312 at para 10 (at para 115):

> . . .
>
> The bankruptcy scheme is intended to benefit honest, but unfortunate, debtors: **Giannotti (Bankrupt), Re** (2000), 138 O.A.C. 316, 51 O.R. (3d) 544 (C.A.). In their own way, courts have taken a purposive approach to interpreting [section] 178(1)(e), to ensure that dishonest debtors do not benefit from their dishonesty.

64 Freedman JA further noted that the motive of the bankrupt is not relevant to a determination under section 178(1)(e), so that it does not matter if the bankrupt did not intend for the plaintiff to lose their property or suffer a loss (see paras 112-114).

2.2.3 Analysis

65 As stated earlier, the underlying claim in this case included an allegation of misrepresentation on the part of both RNG and Mr. Goodman, which the arbitrator found to have been proven, and his fact findings were summarised and adopted by the application judge (see para 52 herein). Further, the evidence as to the connection between the false pretences and the debt is clear. The arbitrator made the following finding in his reasons on damages:

> . . .
>
> [Mr. Bannerman] said that if he had known the true situation when he entered the contract with [Mr. Goodman] he would not have done so. That is virtually certain. [Mr. Bannerman] did not know that [Mr. Goodman] did not have the right to sell the tubs to him, and he would never have risked the venture in those circumstances.
>
> In reliance upon the contract [Mr. Bannerman] expended a great deal of time and money. He used the sale proceeds of [BLL] and borrowed money besides. ...
>
> . . .

66 In his affidavit of August 28, 2017, filed for the damages hearing, Mr. Bannerman stated:

> The transcript of [Mr. Goodman's] cross-examination at the arbitration proceeding ... sets out in detail the features of how he concealed the true nature of his business and pricing. This concealment lead me to pay him and his company $40,000.00 for a right to the Coleman name which I never received a right in, tens of thousands of dollars for unlawfully marked up product, and hundreds of thousands of dollars on this whole venture that I would not have entered into but for the concealment of the true nature of the business venture itself.
>
> . . .
>
> [emphasis added]

67 Mr. Goodman argues that it is not sufficient that the contract was entered into under false pretences; rather, Bannerman also has to show that the losses from the business, which constituted the judgment debt, were the direct result of the false pretences.

He argues that the arbitrator found that he could not determine why the business failed, so there was no finding that the debt from the business failure was the result of the false pretences.

68 Mr. Goodman relies on the decision in *McAteer* to support his position. In that case, McAteer was found liable to two parties, Billes and Newmat, regarding a loan by Newmat, a company in which Billes had an interest. At trial, Billes and McAteer were each found liable on the basis of misrepresentations in relation to that loan. McAteer was also found liable to Newmat regarding a guarantee he had given and to Billes under an indemnification.

69 When McAteer declared bankruptcy following the trial, both Billes and Newmat applied under section 178(1) to have his liability survive the bankruptcy.

70 It is of note that, in considering the section 178(1)(e) application, the courts did not base their decisions on why or how the underlying loan transaction failed; they looked to whether there was a link between the misrepresentations and the underlying agreement.

71 Billes' application under section 178(1)(e) was granted and upheld on appeal because the court found that "Billes' liability arose as a result of McAteer's fraudulent misrepresentation" to her and a third party regarding Billes' legal relationship to Newmat (McAteer v Billes 2007 ABCA 137 at para 17; see also para 5). Newmat's application regarding McAteer's guarantee was dismissed on appeal because the Court of Appeal found that McAteer's representations, although false, did not lead to the loan by Newmat. The trial judge had found that, had his misrepresentation been known, Billes "would have arranged for someone else to provide disclosure to and obtain Mason's consent, or would have done so herself" (at para 21). Thus, the Court of Appeal found that "there [was] no link between the debt and the fraudulent misrepresentation, as required under [section] 178(1)(e)" (ibid).

72 In *Gray*, the trial judge dismissed an application under section 178(1)(e) for an order that Gray's debt would survive his bankruptcy, so the applicant appealed. In dismissing the appeal, van Rensburg JA, for the Court, noted that the trial judge had found that "the mortgage funding was obtained by Roberts' fraudulent misrepresentations, and not as a result of what Gray [had] represented or failed to disclose" (at para 31). She later stated that "it is not sufficient to show that there was a false pretence or fraudulent misrepresentation unless it is also shown that the property (in this case the mortgage funding) was obtained thereby" (at para 40). Again, the focus is not on why the underlying agreement — here, the mortgage — failed, but whether the underlying mortgage agreement was obtained by fraud or false pretences.

73 In conclusion, the cases referred to at para 60 herein do not look at why the losses related to the underlying agreement or contract occurred; rather, they focus on whether that agreement or contract was entered into under false pretences or fraudulent misrepresentation. The question that is asked is whether the false pretences led or induced the applicant to enter into the agreement or contract. Mr. Goodman is espousing a very narrow view of the interpretation of section 178(1)(e) that does not fit with either the principle that legislation is to be interpreted broadly or the objective of the legislation as explained by this Court in *Ste Rose*.

74 The findings of the arbitrator and Mr. Bannerman's evidence meet the test, as it has variously been stated, for the link or connection between the debt, as awarded by the arbitrator, and the false pretences. It is clear that, "[b]ut for" (*Woolf* at para 72) the false pretences, Mr. Bannerman would not have caused BLL to enter into the contract with RNG, and those false pretences were "materially connected to the actions of the plaintiff [Bannerman] that resulted in damage" (*Darde* at para 18). The "property, (in this case, [the contract]), was obtained" by false pretences, and Mr. Goodman's "conduct ... led to the judgment debt" (*Gray* at para 44). Lastly, Mr. Bannerman has stated that he "would not have entered into this bargain at all but for [Mr. Goodman's false pretences]" (*Doyle* at p 122).

75 This is the interpretation of section 178(1)(e) that is most consistent with the objective of the legislation and the statutory direction to construe statutory provisions broadly.

76 For these reasons, I am satisfied that there is no arguable case to support this ground of appeal. As a result, I would not grant an extension of time to file an appeal on this basis.

V. DECISION

77 For the reasons set out herein, I am satisfied that neither of the proposed grounds raises an arguable ground of appeal. Further, there is no basis to grant the extension either due to the prejudice caused by the delay (none has been alleged) or on the basis that it would be right and just to do so. I am, therefore, dismissing Mr. Goodman's application to extend the time to file his notice of appeal.

78 Bannerman will have costs under the tariff on this application.

Application dismissed.

5

1999 CarswellMan 482
Manitoba Court of Appeal [In Chambers]

Moss, Re

1999 CarswellMan 482, 138 Man. R. (2d) 318, 13 C.B.R. (4th) 231, 202 W.A.C. 318, 92 A.C.W.S. (3d) 743

The Attorney General of Canada, (Applicant) Respondent and Rachel Leah Moss, (Respondent) Applicant

Monnin J.A.

Heard: October 21, 1999
Judgment: November 3, 1999
Docket: AI 99-30-04354

Counsel: *A.J. Stacey*, for Applicant.
J.D. Pniowsky, for Respondent.

Subject: Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
II Assignments in bankruptcy
II.6 Miscellaneous
Headnote
Bankruptcy --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal
Applicant brought motion for extension of time to appeal order annulling assignment in bankruptcy — Motion granted — Failure to file notice of appeal occurred because applicant's counsel was under erroneous impression that time limit ran from signing of order, not from granting of annulment — Applicant granted extension of time to file appeal.
Table of Authorities
Cases considered by *Monnin J.A.*:
Flair Construction Ltd., Re (1981), 38 C.B.R. (N.S.) 292 (B.C. C.A.) — applied

MOTION seeking extension of time in which to file appeal from order annulling assignment in bankruptcy.

***Monnin J.A.*:**

1 The applicant brings a motion seeking an extension of time in which to file an appeal from an order of Steel J. annulling an assignment in bankruptcy.

2 The facts of this case are very similar to those found in *Re Flair Construction Ltd.* (1981), 38 C.B.R. (N.S.) 292 (B.C. C.A.). In that case, the bank's counsel was unaware that the Bankruptcy Rules provide that an appeal in a bankruptcy matter must be filed and served within ten days from the date that a decision is granted. On a motion to extend the time for filing, Craig J.A. set out that, in order to obtain such an extension, an applicant must demonstrate that special circumstances exist that warrants the granting of the extension.

3 In considering whether such special circumstances existed, the court considered whether 1) the applicant had a *bona fide* intention to appeal before the expiration date of the appeal period; 2) whether the applicant, either expressly or impliedly, informed the respondent of his or her intention to appeal; 3) whether the respondent would be unduly prejudiced by an extension of time; 4) whether there was merit in the appeal in the sense that there was a reasonably arguable ground; and 5) whether it was in the interests of justice that the extension be granted.

4 In the case before me, there is evidence that clearly establishes that the failure to file a notice of appeal was due to the applicant's then counsel being under the erroneous impression that the time limit for filing such an appeal commenced running not from the time the annulment was granted, but from the time the order was signed.

5 I am satisfied, without proceeding to a detailed review of the circumstances of this case, that the applicant meets the test set out in *Flair Construction Ltd., Re*. Accordingly, the applicant is granted an extension of time in which to file her appeal. The extension will be for a period of ten days from the date that the order confirming these reasons is signed.

Motion granted.

6

2015 MBCA 18
Manitoba Court of Appeal

Singh v. Pierpont

2015 CarswellMan 49, 2015 MBCA 18, [2015] W.D.F.L. 1640, 250 A.C.W.S. (3d) 82, 315 Man. R. (2d) 189, 56 R.F.L. (7th) 1, 630 W.A.C. 189

Michiko Natalie Singh, (Applicant/Respondent) Respondent and William Edward Pierpont, (Respondent/Applicant) Appellant

Beard J.A.

Heard: January 7, 2015
Judgment: February 11, 2015
Docket: AF14-30-08211

Counsel: J.W. Feldschmid, for Appellant
C.B. Paul, for Respondent

Subject: Civil Practice and Procedure; Family
Related Abridgment Classifications
Family law
XVII Practice and procedure
XVII.12 Miscellaneous
Headnote
Family law --- Custody and access — Interim custody — Practice and procedure
Parties were married in Hawaii and had one child in 2010 — Parties separated following year — Mother, dual Canadian and American citizen, obtained interim order in Hawaii divorce proceedings permitting her to take child to Winnipeg — Father obtained interim order in Hawaii for physical custody of child and order that child be returned to Hawaii — Mother obtained interim order in Winnipeg for physical care and control of child — Father visited Winnipeg and took child back to Hawaii, in contravention of Manitoba order, but in accordance with earlier Hawaiian order — On June 3, 2014 Manitoba court ordered father to return child — Father appealed, challenging court's decision of May 29, 2014 that child had no real and substantial connection with Hawaii — Only appeal book was filed on time — Father brought motion under Court of Appeal Rules 28.1(b) and 43.1 to extend time for filing his factum — Mother filed motion to dismiss father's notice of appeal — Father's motion granted; mother's motion dismissed — Appeal period ran from date of filing of signed written order — Father was appealing order of June 3, 2014 and underlying decision of May 29, 2014 — Two decisions were clearly part of same hearing, as real and substantial connection decision was preliminary to order that followed — Appeal was not attempt to appeal interim custody order granted in Winnipeg without specifically mentioning it — Notice of appeal was filed within appeal period, so intention to appeal was formed within that time — Father's counsel provided evidence that he became ill and was unable to complete factum by filing date — Father had raised arguable grounds of appeal, particularly with respect to weight to be given to ongoing legal proceedings in Hawaii — Father had met requirements for granting of extension of time to file his factum.
Table of Authorities
Cases considered by *Beard J.A.*:
Arndt v. Arndt (1987), 1987 CarswellMan 284, 46 Man. R. (2d) 234 (Man. C.A.) — referred to
Baird v. Baird (1977), 1977 CarswellMan 66, [1977] 5 W.W.R. 72 (Man. C.A.) — considered
Bohemier v. CIBC Mortgages Inc. (2001), 2001 MBCA 161, 2001 CarswellMan 504, 160 Man. R. (2d) 39, 262 W.A.C. 39 (Man. C.A.) — referred to
Brandt v. Brandt (2000), 7 R.F.L. (5th) 20, 2000 MBCA 46, 2000 CarswellMan 318, 148 Man. R. (2d) 134, 224 W.A.C. 134 (Man. C.A.) — referred to

Branum v. Branum (1998), 129 Man. R. (2d) 142, 180 W.A.C. 142, 1998 CarswellMan 251 (Man. C.A. [In Chambers]) — referred to

Campbell v. Campbell (2011), 268 Man. R. (2d) 8, 520 W.A.C. 8, 2011 MBCA 23, 2011 CarswellMan 86 (Man. C.A. [In Chambers]) — referred to

Cross Lake Indian Band v. Manitoba (1984), 1984 CarswellMan 302, 27 Man. R. (2d) 6 (Man. C.A.) — referred to

Harvey v. Harvey (1989), 60 Man. R. (2d) 302, 23 R.F.L. (3d) 53, 1989 CarswellMan 58 (Man. C.A. [In Chambers]) — considered

Ridout v. Ridout (2003), 2003 MBCA 61, 2003 CarswellMan 173, 173 Man. R. (2d) 226, 293 W.A.C. 226 (Man. C.A. [In Chambers]) — referred to

Rodych v. Rasidescu (2011), 2011 CarswellMan 614, 2011 MBCA 89 (Man. C.A. [In Chambers]) — referred to

Statutes considered:

Child Custody Enforcement Act, R.S.M. 1987, c. C360

Generally — referred to

s. 3 — considered

s. 4 — considered

s. 6 — considered

s. 6(c) — considered

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

Rules considered:

Court of Appeal Rules, Man. Reg. 555/88R

R. 1 "judgment appealed from" — considered

R. 11(1) — considered

R. 11(1)(a) — considered

R. 11(1)(c) — considered

R. 11(3) — considered

R. 11(4) — considered

R. 28.1(b) [en. Man. Reg. 200/2009] — pursuant to

R. 43.1 [en. Man. Reg. 94/2003] — pursuant to

Queen's Bench Rules, Man. Reg. 553/88

Generally — referred to

R. 1.04.1(b) [en. Man. Reg. 127/94] — referred to

R. 59 — considered

R. 59.05 — referred to

R. 70.33 — considered

R. 70.33(15) — referred to

Treaties considered:

Hague Convention on the Civil Aspects of International Child Abduction, 1980, C.T.S. 1983/35; 19 I.L.M. 1501

Generally — referred to

Proceeding: Motion/Application to Dismiss.

MOTION by father to extend time for filing his appeal factum in custody proceedings; MOTION by mother to dismiss father's notice of appeal.

***Beard J.A.*:**

I. The Issues

1 The parties have filed two motions in this appeal. Mr. Pierpont has filed a motion under Court of Appeal Rules 28.1(b) and 43.1 (Man. Reg. 555/88R) to extend the time for filing his appeal factum and Ms Singh has filed a motion to dismiss Mr. Pierpont's notice of appeal for failing to meet the filing requirements in Court of Appeal Rule 11(1)(c).

II. The Facts

2 The underlying proceedings have to do with the custody, care and control of, and visitation with, the child of the parties and, in addition, whether the child will live with his mother, Ms Singh, in Canada or with his father, Mr. Pierpont, in Hawaii.

3 Ms Singh is a dual Canadian and American citizen, while Mr. Pierpont is an American citizen. Ms Singh obtained employment in Honolulu, Hawaii, and moved there in 2000. Mr. Pierpont was also living and working in Honolulu, which is where they met. They were married in Hawaii on March 12, 2010, and their son, W.R.P., was born there on July 13, 2010.

4 Ms Singh was laid off from her employment in 2009, and her employer filed for bankruptcy protection in 2010. She obtained employment in Winnipeg and the family moved here in September 2010, although the exact terms of the move (for example, whether it was a permanent or temporary move) are a matter of contention between the parties.

5 In 2011, the parties and their son went back to Honolulu, although the exact reason is, again, a matter of contention. While there, they separated and Mr. Pierpont filed for a divorce. Each party retained a lawyer and the divorce proceeded through the courts in Hawaii, with the oral hearing taking place on October 1 and 2, 2012, and the written divorce decree and corollary relief order being issued on February 4, 2013.

6 There have been many pre and post-divorce proceedings in Hawaii, with both parties being represented there throughout. The details of those proceedings are more fully listed in Schedule A, attached hereto. The recent post-divorce proceedings are still ongoing and have not been resolved on a final basis.

7 Notwithstanding the ongoing proceedings and outstanding orders in Hawaii, Ms Singh began custody proceedings in Winnipeg by way of an application for relief under *The Child Custody Enforcement Act*, C.C.S.M., c. C360, (the *Act*). The details of these proceedings are more fully set out in Schedule B, attached hereto. Again, both parties have been represented throughout by legal counsel in Winnipeg.

8 In summary, on September 19, 2011, Ms Singh obtained an interim order in the Hawaii divorce proceedings permitting her to take the child to Winnipeg, which she did. According to Mr. Pierpont, Ms Singh was not complying with the Hawaii visitation order and he returned to court in Hawaii to obtain physical custody of the child, which order was ultimately granted on an interim basis on March 12, 2014, and included an order that the child was to be returned to Hawaii.

9 Ms Singh was represented by counsel at that hearing, following which she retained counsel in Winnipeg and the underlying Manitoba application for custody of the child was commenced on April 4, 2014. Mr. Pierpont retained Winnipeg counsel. An interim order granting physical care and control of the child to Ms Singh was made on April 11, 2014, followed by an interim order of visitation to Mr. Pierpont on April 16, 2014. In early May 2014, Mr. Pierpont attended in Winnipeg for a visit pursuant to that interim order. He then took the child back to Hawaii in contravention of the Manitoba interim order but in accordance with the earlier Hawaii interim order.

10 The Manitoba application proceeded on an expedited basis, with the application judge hearing argument on May 21, 2014, regarding the threshold issue of whether the child had a real and substantial connection with Hawaii, and giving an oral decision on May 29, 2014. The parties returned to court on June 3, 2014, to argue the issue of the appropriate relief and the application judge gave an oral decision on that date, setting out the terms of an order which did not deal with custody, but did order that Mr. Pierpont return the child to Manitoba. An unsigned copy of that order was marked "filed" on June 11, 2014, and a copy was subsequently signed by the judge on June 19, 2014.

11 Mr. Pierpont filed a notice of appeal of that order on July 11, 2014, and in the notice has challenged the application judge's May 29, 2014 finding that the child had no real and substantial connection with Hawaii on April 4, 2014, being the date on which Ms Singh filed her application in Manitoba, and the related order of June 3, 2014.

12 On August 20, 2014, the Court of Appeal registrar wrote to Mr. Pierpont's counsel to advise that any required transcript, the appeal book and appellant's factum must be filed with the court no later than October 2, 2014. On October 2, 2014, there was some communication between Mr. Pierpont's counsel and the registry staff and between counsel regarding the filing deadlines. On October 3, 2014, Mr. Pierpont's counsel sent an email to the registrar with a copy to Ms Singh's counsel, the contents of which explain what occurred regarding the filing of those documents:

> This is to confirm that I spoke to a staff member of the Court of Appeal Registry this afternoon to advise that I had not received consent, anticipated in my October-02-14 4:06 PM email below, from opposing counsel for an extension to file the appellant's factum today. I was advised by the Registry staff person I spoke with that the Registry would not accept the factum in the absence of that consent, presumably in accordance with rule 28.1 of the Court of Appeal Rules. Therefore, I have not attempted to file or serve the appellant's factum, nor will I unless consent is forthcoming from counsel for [Ms Singh] or I bring a motion under clause (b) of the rule seeking leave to file and serve the factum.
>
> The Appeal Book was filed yesterday (Thursday, October 2, 2014).
>
> Unrelated to this, counsel for [Ms Singh] has also indicated to me that she has [received] instructions to bring a motion seeking an order to dismiss the appeal on the grounds that it should have been filed 30 days after the reasons for decision of [the application judge] were delivered on May 29, 2014, rather than 30 days after Her Ladyship's June 3, 2014 order (which resulted from both her May 29 and June 3 pronouncements) was filed.
>
> Though I have not seen [Ms Singh]'s motion (I understanding [*sic*] it has yet to be filed or may have only been filed today), I would anticipate cross motions, heard together: [Ms Singh]'s motion to dismiss the appeal and [Mr. Pierpont]'s motion to seek an extension and leave to file and serve his factum.
>
> If you wish to provide any particular direction, please advise.

13 Mr. Pierpont filed his motion to extend the time for filing his factum and an affidavit in support on December 1, 2014, and Ms Singh filed her motion to dismiss the appeal for failing to meet the filing requirements and other relief, together with an affidavit in support, on December 8, 2014.

III. The Motion to Dismiss the Appeal

The Parties' Positions

14 Ms Singh is advancing two positions: (i) that the applicable Court of Appeal rule setting the time for filing and serving the notice of appeal (the appeal period) is Rule 11(1)(c), being that the filing period begins to run from the date of the pronouncement of the judgment appealed from; and (ii) that Mr. Pierpont is really appealing three decisions or rulings, being the interim custody order pronounced on April 11, 2014, the decision regarding real and substantial connection pronounced on May 29, 2014, and the order pronounced on June 3, 2014, each with its own appeal period.

15 She states that the notice of appeal, which was filed on July 11, 2014, was filed more than 30 days after the pronouncement of all of these three judgments/orders and, therefore, failed to meet the requirements of Rule 11(1)(c).

16 On Ms Singh's first position, Mr. Pierpont takes the position that the applicable rule is Rule 11(1)(a), which states that the appeal period begins to run from the date of the filing of the judgment, and not Rule 11(1)(c).

17 On her second position, Mr. Pierpont emphasized that he has not appealed the April 11, 2014 order but, rather, has appealed only the May 29, 2014 decision and the June 3, 2014 order. He argues that the May 29, 2014 decision formed the basis of the order pronounced on June 3, 2014. In support of that position, he points to comments made by the application judge to that effect on May 29, 2014. Further, while that order was marked "filed" on June 11, 2014, it was not signed until June 19, 2014. Thus, his position is that the appeal period commenced on June 19, 2014, or, if not, on June 11, 2014, with the result that the appeal period ended on either July 11, 2014, or July 19, 2014. He asserts that, in either case, the notice of appeal filed on July 11, 2014, was filed in compliance with Rule 11(1)(a).

The Legislation

18 The applicable provisions of the Court of Appeal Rules are as follows:

> **Definitions**
>
> **1** In these rules,
>
> . . .
>
> **"judgment appealed from"** means the judgment of the court or tribunal from which an appeal lies to The Court of Appeal and includes an order, decision, verdict, direction, determination or award;
>
> . . . . .
>
> **Time for service**
>
> **11(1)** Subject to subrules (2) and (2.1), a notice of appeal shall be filed and served within the following time limits:
>
> (a) in a case where the judgment appealed from is required to be filed, within 30 days after that filing;
>
> . . .
>
> (c) in any other case, within 30 days after the pronouncement of the judgment appealed from.
>
> . . . . .
>
> **11(3)** A party who wishes to file a notice of appeal shall, where practicable, file the judgment appealed from in the court appealed from before filing the notice of appeal.
>
> **11(4)** Where the judgment appealed from is not filed in the court appealed from, the party may file a notice of appeal accompanied by a letter by or on behalf of the appellant indicating the reason why the judgment has not been filed.

Analysis and Decision

(i) Rule 11(1)

19 That a written judgment or order must be signed and filed in the court appealed from is made clear in Rule 11(3), which specifically states that the party filing the notice of appeal shall, where practicable, file the judgment in the court appealed from *before* filing the notice of appeal. This engages the appeal period set out in Rule 11(1)(a).

20 The question of whether an appeal period of a court decision runs from the date of pronouncement or entry was the subject of comment by this court in *Baird v. Baird*, [1977] 5 W.W.R. 72 (Man. C.A.), wherein Monnin J.A. (as he then was), for the court, explained why an appeal period should run from the date of "entry" of the order and not from the date of pronouncement. He stated (at pp. 74-75):

> However, in matters pertaining to corollary relief time runs from the date of entry. A trial judge always has the privilege to vary his decision until the moment of entry so that variations in the order can and sometimes do occur at the very last minute. An appellate tribunal should only be requested to review that which is firmly established by a written order of the lower court. On that basis, and on the further basis that in this court the deputy registrar, in the performance of his duties, refused to accept the notice of appeal when tendered [because the order under appeal was not signed and entered], we at the hearing of this case extended the time for the filing of notice of appeal to the date of hearing. ....

21 This decision was followed by Helper J.A. in *Harvey v. Harvey* (1989), 60 Man. R. (2d) 302 (Man. C.A. [In Chambers]), in which she stated (at paras. 10-11):

> As at March 1, 1989, the new **Queen's Bench Rules** were proclaimed. There is no reference whatever in the new rules to entry of orders. Although orders are stated in the rules to be effective from the date they are made (Rule 59.01) [see also Rule 70.31(2)], it is the practice that orders are frequently not signed and filed in court for some considerable time after pronouncement. Court of Appeal Rule 15(3) states orders should be entered before the notice of appeal is filed although rule 15(4) provides for filing notices of appeal in urgent situations. [See current Rules 11(3) and (4).] As was stated in Baird, until such time as an order is entered or, at the present time, signed and filed, it is subject to change and to settlement by the trial judge.
>
> There were no authorities to which I was referred which lead me to conclude that the practice in Manitoba has changed since the **Baird** decision although the **Queen's Bench Rules** have changed.

22 Consistent with Helper J.A.'s comments in *Harvey*, it is important to note that the requirement that an order be "entered" in the court granting the order before a notice of appeal is filed, as referred to in *Baird*, has been replaced with a requirement that an order be signed and filed in the court granting the order before an appeal is filed. (See Court of Appeal Rules 11(3) and (4); and Queen's Bench Rule 1.04.1(b) (Man. Reg. 553/88), enacted in 1994, stating that "entered" in reference to the date of an order or judgment is the date of signing. See also *Ridout v. Ridout*, 2003 MBCA 61 at para. 13, 173 Man. R. (2d) 226 (Man. C.A. [In Chambers]).)

23 Ms Singh argues that the decisions in *Baird* and *Harvey* should be limited to cases dealing with corollary relief orders under the *Divorce Act*.

24 In those cases, a distinction was being made between the appeal period related to a decree nisi, which had a specific statutory appeal period of 15 days after the pronouncement or making of the order, and that related to a corollary relief order, which the court found was not subject to that statutory appeal period. A reading of the cases shows that this court's comments regarding the corollary relief orders were general in nature and would apply to all orders not governed by specific statutory provisions. Regarding the general application of the reasons in *Harvey*, see the Introductory Note to Rule 59 in Professor Karen Busby, *Manitoba Queen's Bench Rules Annotated* (Toronto: Carswell, 2014) (loose-leaf release 60) at p. 2-225.

25 In addition, the requirement to file a signed written order (which includes a judgment) is found in the Queen's Bench Rules, including Rules 59 and 70.33. There was no explanation why an unsigned order was filed on June 11, 2014, but it should be noted that the rules anticipate the filing of a signed order, not the filing of an unsigned order. In that regard, see Rules 59.05 and 70.33(15).

26 Finally, Rule 11(1)(c) begins with the phrase "in any other case." That means that it is a residual clause and it applies only to judgments that are not subject to any other sub-clause within Rule 11(1). In this case, both the Queen's Bench Rules and

the Court of Appeal Rules require that the judgment appealed from be filed in the court being appealed from, so the judgment is clearly within Rule 11(1)(a).

27 I find that, in this case, the parties were required to file the signed judgments (including orders) of the application judge in the Court of Queen's Bench. Given that "the judgment ... is required to be filed," the applicable Court of Appeal rule governing the appeal period in this matter is Rule 11(1)(a).

28 In the result, the appeal period began to run from the date of the filing of the signed written orders and not from the date of pronouncement.

(ii) Rulings Under Appeal

29 Mr. Pierpont's notice of appeal is clear that he is appealing the order of June 3, 2014, and the underlying decision of May 29, 2014, and it makes no mention of the interim custody order of April 11, 2014. This was confirmed by his counsel in his motion briefs and in his oral argument.

30 Ms Singh's counsel argues that, while Mr. Pierpont has not mentioned the April 11, 2014 order, his appeal is really a back-door attempt to challenge that order without mentioning it. Her position is that each of the three decisions — the April 11, 2014 order, the May 29, 2014 decision and the June 3, 2014 order — are separate rulings or decisions by the court that engage separate appeal periods.

31 The several rulings have to be considered in the context of how this matter unfolded. Because this application was being dealt with expeditiously as an emergency matter, each appearance was of short duration, being fit into the application judge's busy schedule. This resulted in a succession of short hearings, rather than fewer, more comprehensive ones. Further, the desire to complete matters quickly may have led to the contents of the orders being less comprehensive than they might have been. That said, what happened is clear from the transcripts.

32 The underlying applications for relief required a determination as to whether the child had a real and substantial connection with Hawaii. On April 11, 2014, the application judge granted interim relief under s. 6 of the *Act* pending a hearing on the real and substantial connection issue. The proceedings were adjourned to May 21, 2014, for argument on that issue, and the application judge gave her decision on May 29, 2014. The parties did not have sufficient time to address the question of what relief should flow from that decision, so the matter was adjourned to June 3, 2014, for further argument. There was, however, a discussion about the interim custody order, and the application judge stated that the existing order (i.e., the interim order under s. 6) did not have an expiration date but was "until further order of the Court," so it would continue.

33 On June 3, 2014, the application judge indicated that, particularly given the competing custody order in Hawaii, there would have to be a custody hearing with *viva voce* evidence in Manitoba before she would make any order under s. 4 of the *Act*. Ms Singh took the position that she wanted the child returned to Manitoba and an assessment completed before any custody hearing, so the application judge made an order for the return of the child. In the transcript it is clear that the order for the return of the child was being made under s. 6(c), the interim order provision of the *Act*, and not under s. 4. Nothing further was said about the interim custody order, but, given the application judge's comments on May 29, 2014, it is clear that that order was to continue indefinitely, "until further order of the Court."

34 Taking these circumstances into account, there is no basis to Ms Singh's argument that the appeal was an attempt to appeal the April 11, 2014 interim custody order without specifically mentioning it. The important finding for Mr. Pierpont's application to enforce his Hawaii order under s. 3 of the *Act* was not the interim custody order but the May 29, 2014 decision regarding real and substantial connection with Hawaii, as his application under s. 3 was dependant on a finding that that connection existed. That was a key decision that should have been referenced in a written order. The hearing and order on June 3, 2014, related to that decision and, but for a lack of time, would likely have been argued on May 29, 2014. These two decisions were clearly part of the same hearing. As the application judge correctly noted, the real and substantial connection decision was preliminary to the order that followed.

35 For these reasons, Ms Singh's position that the May 29, 2014 decision and June 3, 2014 order were separate decisions with separate appeal periods is not correct. Further, there was no need for Mr. Pierpont to appeal the interim custody order in order to appeal the May 29, 2014 decision and the June 3, 2014 order because the interim order was a separate order under a different provision in the legislation and invoked different, although related, principles.

36 For these reasons, I find that the appeal does not include an appeal of the April 11, 2014 interim custody order and that the decision of May 29, 2014, and the order of June 3, 2014, were part of the same proceeding and engaged the same appeal period.

IV. The Motion to Extend the Time to File the Appellant's Factum

The Parties' Positions

37 Mr. Pierpont's position is that the criteria for extending the time for filing a factum are the same as those for extending the time to file a notice of appeal, being: (i) a continuous intention to appeal from a time before the expiration of the filing period; (ii) a reasonable explanation for the delay; and, (iii) arguable grounds of appeal.

38 His position is that he has met all of those criteria. Regarding the first, his position is that he filed his notice of appeal within the appeal period. Regarding the second, his position is that the case law is that inadvertence of counsel alone is sufficient reason. Further, he has adduced evidence that his counsel was ill and unable to comply. Regarding the third, he argues that the grounds of appeal are set out in his draft factum, which discloses arguable grounds.

39 Ms Singh does not dispute the criteria for extending time to commence or perfect an appeal cited by Mr. Pierpont. On the first criterion, she argues that he did not file his notice of appeal in time and, further, that there is no evidence that he formed the intention to appeal within the appeal period. On the second criterion, she argues that the evidence was that his counsel's illness was only sporadic between September 25, 2014 and October 2, 2014, not complete, and it does not explain why the appeal was not perfected before September 25, 2014 (the date that he said he became ill) or why the motion to extend time was delayed from October 2, 2014 to December 1, 2014. On the third criterion, she argues that the appeal has no merit.

Analysis and Decision

40 The criteria for extending the time for filing a factum are the same as those for extending the time to appeal, being the well-known three criteria set out in para. 37 above. (See *Bohemier v. CIBC Mortgages Inc.*, 2001 MBCA 161, 160 Man. R. (2d) 39 (Man. C.A.); and *Campbell v. Campbell*, 2011 MBCA 23 at para. 6, 268 Man. R. (2d) 8 (Man. C.A. [In Chambers]).)

41 In addition, the court has an overriding discretion to grant or refuse an extension if it is right and just in the circumstances. (See *Cross Lake Indian Band v. Manitoba* (1984), 27 Man. R. (2d) 6 (Man. C.A.) at para. 23; *Brandt v. Brandt*, 2000 MBCA 46 at para. 7, 148 Man. R. (2d) 134 (Man. C.A.); and *Rodych v. Rasidescu*, 2011 MBCA 89 (Man. C.A. [In Chambers]) at para. 11.) Further, inadvertence of counsel is an accepted explanation. (See *Arndt v. Arndt* (1987), 46 Man. R. (2d) 234 (Man. C.A.) at para. 8; and *Branum v. Branum* (1998), 129 Man. R. (2d) 142 (Man. C.A. [In Chambers]) at para. 10.)

42 Regarding the first criterion, I have already found that the notice of appeal was filed within the appeal period, so, obviously, the intention to appeal was formed within that time.

43 Regarding the second criterion, Mr. Pierpont's counsel has provided evidence that he became ill and was not able to complete the factum by the filing date. While Ms Singh has questioned the seriousness of the illness, there was no cross-examination on the affidavit to challenge its veracity. Thus, I accept counsel's explanation. While, on the one hand, he may not have been as diligent as he could have been by preparing the material earlier, it is clear that he had essentially completed the factum before the expiration of the appeal period, given that he indicated that he would be in a position to file it only one day late.

44 Regarding the third criterion and, given the standard of review for what is a discretionary decision (i.e. whether there was a real and substantial connection to Hawaii), Mr. Pierpont has a steep hill to climb. That said, I am satisfied that he has raised arguable grounds of appeal. I note, for example, the question of the effect of, or the weight to be given to, the ongoing legal

proceedings in Hawaii in which Ms Singh was participating that led to the granting of custody to Mr. Pierpont immediately before she filed her application in Manitoba. That was not an old, dated and historical order, but one that was made less than one month before Ms Singh commenced proceedings in Manitoba and was the result of proceedings in which Ms Singh was represented by counsel. As this matter will go to appeal, I will say no more.

45 Ms Singh has argued that, due to Mr. Pierpont's delay in filing his motion for the extension from October 3, 2014, to December 1, 2014, thereby delaying the appeal to her detriment, I should exercise my discretion and refuse to grant his motion. Mr. Pierpont's response is that he was waiting for Ms Singh to file her motion to dismiss his appeal, which he thought was imminent, as his motion would become moot if her motion was granted.

46 In response to this position, I note that, if Ms Singh was concerned about having the appeal dealt with as quickly as possible, it was open to her to file her motion at any time after July 11, 2014, as that is the filing that she is challenging, yet she has not explained her delay of some five months.

47 Neither party has followed up this appeal as quickly as possible. That said, I accept Mr. Pierpont's explanation for his delay which, when considered together with Ms Singh's delay, leads me to conclude that I should not exercise my discretion and dismiss Mr. Pierpont's motion on this basis.

48 Thus, I would find that Mr. Pierpont has met the requirements for the granting of an extension of the time period within which to file his factum.

49 Further and in any event, given that Mr. Pierpont's counsel had filed the notice of appeal and appeal book within the required time period and was only one day late in the completion of the factum, I would have exercised my discretion and extended the date for filing the factum.

V. Conclusion

50 For these reasons, I am dismissing Ms Singh's motion to dismiss Mr. Pierpont's notice of appeal and I am granting Mr. Pierpont's motion to extend the time period to file his factum. Mr. Pierpont will have 14 days from the date of this decision within which to file his factum.

51 Each party will pay his or her own costs of these motions.

Father's motion granted; mother's motion dismissed.

ScheduleA

Hawaii Court Proceedings

The details of the Hawaiian court proceedings are follows:

- August 18, 2011 — Mr. Pierpont filed his Complaint for Divorce and a pre-decree motion seeking temporary custody of the child.

- September 19, 2011 — Following a hearing, there was an oral order granting the parties joint legal custody of the child with sole temporary physical custody to Ms Singh and allowing Ms Singh to return to Winnipeg with the child, on specified conditions. A written decision was issued on March 22, 2012.

- The divorce hearing was held on October 1 and 2, 2012, leading to a Decree Granting Absolute Divorce and Awarding Child Custody being issued on February 4, 2013. The divorce decree granted joint legal custody to the parents, sole physical custody to Ms Singh and specified visitation to Mr. Pierpont.

• January 23, 2013 — Mr. Pierpont filed a motion for pre-decree relief requesting a change to the legal and physical custody, which was continued as a motion for post-decree relief. Following a trial on June 3, 2013, the motion regarding custody was dismissed, but Mr. Pierpont's visitation rights were varied. The order was signed and filed on July 16, 2013.

• November 19, 2013 — Mr. Pierpont filed a motion for post-decree relief, alleging that Ms Singh was interfering with his visitation. There was an evidentiary hearing on March 12, 2014, at which both parties were again represented by counsel, although Ms Singh did not appear. The proceeding resulted in an interim order on that date continuing the order of joint legal custody of the child but granting Mr. Pierpont sole physical custody, subject to reasonable visitation to Ms Singh. Ms Singh was ordered to return the child to Hawaii within one month, failing which Mr. Pierpont would be entitled to take possession of him. The authorities in Canada were directed to assist Mr. Pierpont in returning the child to Honolulu. That order was signed and filed in court on April 4, 2014.

• Ms Singh appealed that order, which appeal was dismissed on August 5, 2014, for lack of appellate jurisdiction.

• September 15, 2014 — Ms Singh filed a petition for relief under the Hague Conference on Private International Law, *Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, 28<http://www.hcch.net/> (the *Hague Convention*) for an order compelling Mr. Pierpont to return the child to Manitoba.

• September 17, 2014 — Ms Singh's petition was denied in part and granted in part — the court denied her application that the child be returned to her care and custody, but it did order that neither the child or Mr. Pierpont could leave Oahu unless permitted by the court.

• September 25, 2014 — Mr. Pierpont filed a motion to dismiss Ms Singh's petition.

• November 17, 2014 — The court in Hawaii dealt with the Mr. Pierpont's motion as a summary judgment motion and dismissed it, ordering that the matter go to trial to determine "genuine issues of material fact."

ScheduleB

Manitoba Court Proceedings

The details of the Manitoba court proceedings are as follows:

• April 4, 2014 — Ms Singh filed her underlying application under the *Act*, for primary care and control of the child and for specified periods of care and control to Mr. Pierpont.

• April 4, 2014 — Ms Singh also filed a motion for interim relief, to be heard on either short leave or *ex parte*.

• April 10, 2014 — Mr. Pierpont filed an application in Winnipeg for an order under s. 3 of the *Act* to enforce the Hawaii order pronounced on March 12, 2014.

• April 11, 2014 — Following a hearing, the application judge granted Ms Singh interim custody of the child with an order that the child not be removed from the province, all pursuant to s. 6 of the *Act*, and the underlying applications were adjourned to May 21, 2014. The order pronounced on April 11, 2014 was signed on May 5, 2014.

• April 15 and 16, 2014 — Case conferences were held, in the course of which the parties agreed to a consent order granting Mr. Pierpont specified periods of care and control of the child. Mr. Pierpont acknowledges that, on or shortly before May 9, 2014, during one of his periods of care and control, he removed the child to Honolulu and refused to return him to Winnipeg, contrary to the consent order of April 16, 2014. The child has remained in Honolulu since that time.

• May 13, 2014 — Ms Singh filed an *ex parte* motion to amend her application to include a request for relief under the *Hague Convention*.

• May 21, 2014 — A hearing was held to determine whether the child had a real and substantial connection with Hawaii, as that phrase is used in the *Act*.

• May 29, 2014 — The application judge delivered her oral reasons, finding that the child had no real and substantial connection with Hawaii on April 4, 2014, the date on which Ms Singh filed her application.

• June 3, 2014 — The application judge heard submissions on the order that should follow her finding of May 29, 2014, and ordered, among other things, that Mr. Pierpont immediately return the child to Winnipeg.

• June 19, 2014 — The written order from June 3, 2014, was marked "filed" with the date of June 11, 2014, but it was not signed by the application judge until June 19, 2014.

• July 7, 2014 — Ms Singh completed a Request for Return under the *Hague Convention*.

• July 11, 2014 — Mr. Pierpont filed his notice of appeal, appealing the application judge's finding that the child had no real and substantial connection with Hawaii on April 4, 2014, and failing to find whether the child had a real and substantial connection with Hawaii on March 12, 2014, asking, firstly, that the court overturn the application judge's order of June 3, 2014 and, secondly, that it enforce the Hawaii order of March 12, 2014.

7

Most Negative Treatment: Distinguished
Most Recent Distinguished: Garritty, Re | 2006 ABQB 545, 2006 CarswellAlta 950, 398 A.R. 123, 152 A.C.W.S. (3d) 199, [2006] A.W.L.D. 2828, [2006] A.W.L.D. 2829, [2006] 11 W.W.R. 459, [2006] A.J. No. 890, 25 C.B.R. (5th) 95, 62 Alta. L.R. (4th) 96 | (Alta. Q.B., Jul 21, 2006)

1981 CarswellBC 493
British Columbia Court of Appeal

Flair Construction Ltd., Re

1981 CarswellBC 493, 38 C.B.R. (N.S.) 292, 9 A.C.W.S. (2d) 316

Re FLAIR CONSTRUCTION LTD.; VENABLES v. BANK OF MONTREAL

Craig J.A. [in Chambers]

Heard: June 18, 1981
Judgment: June 23, 1981
Docket: Vancouver No. CA810466

Counsel: *G. Davis*, for appellant.
D. Bellwood, for respondent.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.iii Time for appeal
Headnote
Bankruptcy --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal
Practice and procedure — Appeals — Time for appeal — Bankruptcy matters — Application to extend time for appeal from order of judge in chambers — Applicant required to show special circumstances — Bona fide intention to appeal before expiration of appeal period — No prejudice to respondent — Arguable case — Extension of time to appeal granted.
A bank applied for an order extending the time for an appeal from an order of a judge in chambers. The local bank manager was dissatisfied with the decision but an appeal required the approval of the bank's head office. Counsel for the bank was unaware of s. 49(1) of the Bankruptcy Rules, which provides that an appeal in a bankruptcy matter must be filed and served within ten days after the decision appealed from.
Held:
Extension of time to appeal granted.
The applicant was able to establish special circumstances. In considering whether such special circumstances existed, the court considered whether (1) the applicant had a bona fide intention to appeal before the expiration date of the appeal period, (2) he informed the respondent, either expressly or impliedly, of his intention, (3) the respondent would be unduly prejudiced by an extension of time, (4) there was merit in the appeal in the sense that there was a reasonably arguable ground, and (5) it was in the interests of justice, i.e., the interest of the parties, that an extension be granted.
Table of Authorities
Cases considered:
Robinson v. Rouse (1957), 22 W.W.R. 89 (B.C. C.A.) — *applied*

Statutes considered:

Bankruptcy Act, R.S.C. 1970, c. B-3, s. 73.

Court of Appeal Act, R.S.B.C. 1979, s. 15.

Law and Equity Act, R.S.B.C. 1979, c. 224, s. 32.

Rules considered:

Bankruptcy Rules, s. 49(1).

APPLICATION for order extending time for appealing from order of judge in chambers.

***Craig J.A.*:**

1 This is an application under s. 49 of the Bankruptcy Rules for an order extending the time within which the bank may appeal from an order of a judge in chambers, pronounced 31st March 1980.

2 On 14th June 1979 the bankrupt made an absolute assignment in writing of all moneys then due, or to become due, on (1) a mortgage of certain real estate, and (2) an agreement for sale of certain real estate. The bank did not give notice of the assignments to the mortgagor or to the purchaser. Some years previously, the bankrupt had executed a general assignment of book debts to the bank. On 23rd August 1979 the bankrupt executed an assignment of the mortgage and of the agreement for sale in order to put the "specific securities into a form registerable in the land registry offices". On 3rd October 1979 the bankrupt made an assignment in bankruptcy. On 4th October 1979 the official receiver appointed the respondent as trustee. The respondent, taking the position that the two assignments on 23rd August were fraudulent preferences within the meaning of s. 73 [Bankruptcy Act, R.S.C. 1970, c. B-3], applied for an order setting aside the two assignments and requiring the appellant to pay any moneys received to the trustee. On 31st March the chambers judge made the order requested.

3 Section 49(1) of the Bankruptcy Rules provides that a notice of appeal in a bankruptcy matter must be filed "and served within 10 days after the day of the order or decision appealed from or within such further time as a judge of the Court of Appeal allows." Counsel for the bank (who is not counsel on this application) was unaware of this provision and believed, erroneously, that s. 15 of the Court of Appeal Act, R.S.B.C. 1979, c. 75, governed, that is, that there was a 45-day period. He has sworn an affidavit stating that immediately following the hearing before the chambers judge he advised the counsel for the trustee that the bank was "considering an appeal", and that the following day he advised him that "in all likelihood" the bank "would be appealing the Order". The manager of the bank has sworn an affidavit stating that he wanted to appeal immediately after the judge gave his decision but that he instructed his counsel "to obtain a legal opinion from a specialist in the field of bankruptcy as to the grounds for an appeal." Near the end of April, as a result of the opinion received from the solicitor who had been consulted on the bankruptcy matter, the bank counsel had a discussion with the manager of the local bank in which he recommended an appeal. The bank then obtained authorization from its head office "confirming" the appeal instructions. Counsel who appeared for the trustee on the application has sworn an affidavit in which he denies that the counsel for the bank ever discussed an appeal with him or hinted that an appeal might be filed.

4 It is always regrettable when opposing counsel file affidavits contradicting each other. Both counsel on the application before me agreed with this view and said that they would prefer to have me decide the application without having to resort to credibility. Fortunately, I am able to do so.

5 Counsel for the trustee concedes that if I extend the time there will be little, if any, prejudice but contends that on his view of the law, including s. 32 of the Law and Equity Act, R.S.B.C. 1979, c. 224, the appeal is without merit.

6 The governing principle upon which this court acts on applications to extend time for doing an act is that the applicant must establish special circumstances. I think that the same principle governs an application under s. 49(1) of the Bankruptcy Rules. In considering whether there are special circumstances, this court has always considered such factors as whether (1) the applicant had a bona fide intention to appeal before the expiration date appeal period, (2) he informed the respondent, either expressly or impliedly, of his intention, (3) the respondent would be unduly prejudiced by an extension of time, (4) there is

merit in the appeal in the sense that there is a reasonably arguable ground, (5) it is in the interests of justice, i.e., the interest of the parties, that an extension be granted. How much weight will be given to any of these factors in determining whether there are special circumstances will depend on the circumstances of each case. I think the remarks of Davey J.A. (as he then was) in *Robinson v. Rouse* (1957), 22 W.W.R. 89 at 90 (B.C. C.A.), are very apt. He said,

> Little purpose will be served in discussing the circumstances in which leave has been granted or refused in other cases; they have turned in many instances upon the notions of the times and nice distinctions in the facts.

7 From the material before me, I conclude that the local bank manager was dissatisfied with the decision, that he wanted to appeal but that he wanted, also, to have some independent assurance that an appeal was justified. The final decision was not, obviously, in his hands. I conclude, too, that the counsel who appeared for the bank in the application was dissatisfied but that although he may have intimated his dissatisfaction with the deci sion to counsel for the respondent he did not definitely state, either expressly or impliedly, that the bank intended to appeal (and I do not think that he so asserts in his affidavit). I am satisfied, also, that although counsel for the respondent may have been aware that counsel for the bank was "unhappy" with the decision he was not aware that the bank intended to appeal and that he was justified in concluding, as he ultimately did conclude after the expiration of the ten-day period, that the bank did not intend to appeal.

8 While there are good reasons, doubtless, why the rules stipulate that a bankruptcy appeal must be brought within ten days from the date of the decision, ten days allows little time for all the matters which may relate to the decision to take an appeal. Generally, a lawyer should not bring an appeal without authorization from his client. Some consideration should be given to this fact in a case where the client is not immediately available to give appeal instructions. I think, too, that some latitude must be given when we are considering whether the client had a bona fide intention to appeal before the expiration of the appeal period. I am satisfied that although the local bank manager wanted to appeal he had not given — and could not give — definite instructions to launch an appeal without instructions from head office. While counsel for the appellant did not expressly inform counsel for the respondent that an appeal would be brought, I do not think that the respondent would be prejudiced, let alone unduly prejudiced, by an extension of time, and I think that counsel for the respondent concedes this. Without specifying the reasons for my view, I think that the appeal has merit in the sense that there is an arguable case and that, in the circumstances, it is in the interests of the parties that an extension be granted. I would, therefore, extend the time for bringing the appeal to 15th July. In the circumstances, however, the respondent will have the costs of this application in any event of the cause.

Application granted.

8

2017 ABQB 810
Alberta Court of Queen's Bench

Siler (Re)

2017 CarswellAlta 2813, 2017 ABQB 810, [2018] A.W.L.D. 372, 287 A.C.W.S. (3d) 423, 67 Alta. L.R. (6th) 162

In the Matter of the Bankruptcy and Insolvency Act RSC 1985, C. B-3

And In the Matter of the Bankruptcy of James Elmo Siler

Robert Walker and Rita Walker (Applicants) and James Elmo Siler (Respondent)

Robert A. Graesser J.

Heard: October 23, 2017
Judgment: December 22, 2017
Docket: Edmonton 24-1758499

Counsel: Mathieu LaFleche, for Applicants
Kyle Kawanami, for Respondent, Siler
Jordan Day, for Trustee for Estate of James Elmo Siler

Subject: Civil Practice and Procedure; Insolvency
Related Abridgment Classifications
Bankruptcy and insolvency
XV Discharge of bankrupt
XV.13 Practice and procedure
XV.13.g Appeal
Headnote
Bankruptcy and insolvency --- Discharge of bankrupt — Practice and procedure — Appeal
Creditors obtained judgment against bankrupt in relation to construction dispute — Bankrupt assigned himself into bankruptcy, and judgment amounted to almost entirety of his debts — Creditors unsuccessfully applied to registrar for order permitting them to take proceedings against bankrupt's wife in their own names and at their own expense and risk — At that time, registrar denied bankrupt's application for discharge but granted him conditional discharge — Appeal period was 10 days from pronouncement of decision appealed from, but parties had not agreed on form of order for 21 days, and creditors had not attempted to file notice of appeal for another eight days — Creditors brought application for extension of time to file notice of appeal — Application granted — Matter involved counsel apparently missing somewhat unusual limitation period — Delay between expiry of limitation period and bringing this application was brief — Creditors had intention to appeal within limitation period, and grounds for appeal were not without some merit — Creditors' appeal was not bound to fail and had reasonable chance of success, recognizing that reasonable chance of success did not equate to balance of probabilities — While bankrupt might be prejudiced by delay, this prejudice related to uncertainty of bankruptcy continuing to hang over his head and not sort of prejudice contemplated by test.
Table of Authorities
Cases considered by *Robert A. Graesser J.*:

AFG Industries Ltd. v. Pricewaterhousecoopers Inc. (2003), 2003 ABCA 13, 2003 CarswellAlta 39, 8 Alta. L.R. (4th) 221, 39 C.B.R. (4th) 168, 320 A.R. 292, 288 W.A.C. 292 (Alta. C.A.) — referred to

Adderley v. 1400467 Alberta Ltd. (2014), 2014 ABCA 291, 2014 CarswellAlta 1558, 580 A.R. 319, 620 W.A.C. 319, 15 Alta. L.R. (6th) 92 (Alta. C.A.) — considered

Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd. (2015), 2015 ABCA 257, 2015 CarswellAlta 1501, 78 C.P.C. (7th) 14, 606 A.R. 309, 652 W.A.C. 309 (Alta. C.A.) — referred to

Cairns v. Cairns (1931), [1931] 3 W.W.R. 335, 26 Alta. L.R. 69, [1931] 4 D.L.R. 819, 1931 CarswellAlta 52 (Alta. C.A.) — considered

Edmonton (City) v. Edmonton (City) Subdivision and Development Appeal Board (2016), 2016 ABCA 129, 2016 CarswellAlta 737, 49 M.P.L.R. (5th) 211, 34 Alta. L.R. (6th) 42 (Alta. C.A.) — referred to

Elford (Re) (2017), 2017 ABQB 433, 2017 CarswellAlta 1238 (Alta. Q.B.) — referred to

Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of) (2006), 2006 CarswellOnt 1523, (sub nom. *Impact Tool & Mould Inc. (Bankrupt), Re)* 208 O.A.C. 133, (sub nom. *Impact Tool & Mould Inc. (Estate Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 79 O.R. (3d) 241, 20 C.B.R. (5th) 220, (sub nom. *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Interim Receiver of))* 266 D.L.R. (4th) 192 (Ont. C.A.) — referred to

Kubota Canada Ltd. v. Case Credit Ltd. (2004), 2004 ABCA 41, 2004 CarswellAlta 230, (sub nom. *DCD Industries (1995) Ltd. (Bankrupt), Re)* 346 A.R. 166, (sub nom. *DCD Industries (1995) Ltd. (Bankrupt), Re)* 320 W.A.C. 166, 4 C.B.R. (5th) 174, 34 Alta. L.R. (4th) 1, 4 C.B.R. (4th) 174 (Alta. C.A.) — considered

Lofstrom v. Radke (2017), 2017 ABCA 211, 2017 CarswellAlta 1115, 56 Alta. L.R. (6th) 52 (Alta. C.A.) — referred to

Lofstrom v. Radke (2017), 2017 ABCA 287, 2017 CarswellAlta 1605 (Alta. C.A.) — referred to

Paesch, Re (2008), 2008 ABQB 357, 2008 CarswellAlta 853, 44 C.B.R. (5th) 73, 452 A.R. 232 (Alta. Q.B.) — referred to

Ramsdell v. Elliott (1936), [1937] 1 W.W.R. 37, 4 I.L.R. 44, [1937] 1 D.L.R. 269, 1936 CarswellAlta 65 (Alta. C.A.) — considered

Rassell, Re (1998), 220 A.R. 292, 1998 CarswellAlta 377, 5 C.B.R. (4th) 97, 1998 ABQB 479 (Alta. Q.B.) — referred to

Saban, Re (2012), 2012 ONSC 223, 2012 CarswellOnt 1337, 90 C.B.R. (5th) 146 (Ont. S.C.J. [Commercial List]) — referred to

Saban, Re (2012), 2012 ONSC 6700, 2012 CarswellOnt 15015, 99 C.B.R. (5th) 285 (Ont. S.C.J. [Commercial List]) — referred to

Siler, Re (2017), 2017 ABQB 534 (Alta. Q.B.) — considered

Travis v. D & J Overhead Door Ltd. (2016), 2016 ABCA 319, 2016 CarswellAlta 2033, 92 C.P.C. (7th) 259, 43 Alta. L.R. (6th) 238 (Alta. C.A.) — referred to

Walker v. Siler (2013), 2013 BCSC 107, 2013 CarswellBC 167 (B.C. S.C.) — considered

Way (Trustee of) v. Beothuck Trailers Ltd. (2010), 2010 ABQB 667, 2010 CarswellAlta 2705, 79 C.B.R. (5th) 37, (sub nom. *BDO Canada Ltd. v. Beothuck Trailers Ltd.)* 507 A.R. 398 (Alta. Q.B.) — referred to

Statutes considered:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3

s. 30(4) — considered

s. 38 — considered

s. 96 — considered

s. 173 — considered

Divorce Act, R.S.C. 1985, c. 3 (2nd Supp.)

Generally — referred to

Rules considered:

Alberta Rules of Court, Alta. Reg. 124/2010

R. 6.14 — referred to

R. 12.59 — referred to

R. 12.61 — referred to

R. 14.8 — referred to

Bankruptcy and Insolvency General Rules, C.R.C. 1978, c. 368

R. 30 — considered

Criminal Appeal Rules, SI/93-169

Generally — referred to

Words and phrases considered:

reasonable chance of success

[A] reasonable chance of success does not equate to a balance of probabilities.

APPLICATION by creditors for extension of time to file notice of appeal.

***Robert A. Graesser J.*:**

Introduction

1 Robert and Rita Walker apply for an extension of time within which to file their notice of appeal from the decision of Registrar Schulz dated September 1, 2017.

2 Registrar Schulz denied the Walkers' application under section 38 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (BIA). She also denied James Elmo Siler's application for a discharge from Bankruptcy and instead granted him a conditional discharge, requiring payment of $30,000 as either a lump sum or in to-be-agreed-upon monthly payments.

3 Counsel negotiated over the form of order resulting from Registrar Schulz's decision, and the form of order was agreed on September 22. The filed order was served on the Walkers' solicitor on September 27.

4 A notice of appeal was prepared by the Walkers' former solicitor, and it was filed on September 29, 2017. A copy of the filed notice of appeal was served on the Trustee on September 29, 2017.

5 Counsel for Mr. Siler immediately notified former counsel for the Walkers that the notice of appeal had been filed out of time.

6 On October 5, 2017 the Walkers filed an application to extend the time for appeal. The application was supported by the affidavit of Robert Walker, sworn October 12. Mr. Walker was cross-examined on his affidavit on October 16.

7 Rule 30 of the Bankruptcy and Insolvency General Rules provides that appeals are to be filed within 10 days from pronouncement of the decision appealed from. The appeal period thus expired on September 11.

Background

8 The background to this matter is set out in Registrar Schulz's decision *Siler, Re*, 2017 ABQB 534 (Alta. Q.B.). I need not repeat it here, other than to say that the Walkers are unsecured creditors of Mr. Siler. Their claim amounts to 96.4 percent of the approved claims in Mr. Siler's bankruptcy. Mr. Siler's bankruptcy resulted from a judgment of nearly $500,000 the Walkers obtained against Mr. Siler arising out of a construction dispute over the Walkers' home. That dispute is detailed in *Walker v. Siler*, 2013 BCSC 107 (B.C. S.C.).

9 The bankruptcy proceedings have essentially been a fight between the Walkers and Mr. Siler and his wife.

10 At the time of the bankruptcy, Mr. Siler owned 50 percent of the shares in two corporations, water bottling business and a bottled water delivery business. Mrs. Siler owned the other 50 percent, and was each corporation's sole director. Mr. Siler was the sales manager. During the course of the bankruptcy, Mrs. Siler offered to purchase the Estate's interest in these two corporations. Mr. Walker, as inspector, rejected the offer. The Estate continues to own 50 percent of the shares in these companies. The shares have now been valued at $13,937.50, which is significantly less than Mrs. Siler had offered.

11 In the proceeding before Registrar Schulz, the Walkers alleged that Mrs. Siler had appropriated a corporate opportunity, being the purchase of another water distribution business. The second water distribution business was a significant customer of the water bottling business. The Walkers believe that this transaction will significantly impact the value of the Estate's 50 percent interest in the first water distribution business.

12 The Walkers wanted the Trustee to pursue a claim against Mrs. Siler for appropriating this opportunity. The Trustee refused, so the Walkers brought an application under section 38 of the *BIA* to allow them to take the proceeding in their own names, and at their own expense and risk.

13 The Walkers also wanted the Trustee to pursue Mrs. Siler for participating in a scheme to remove or reduce the value of the Estate by converting the Bankrupt's dividends from these corporations to salary.

14 At the same time, Mr. Siler brought an application for discharge.

15 With respect to the section 38 application, Registrar Schulz dismissed it on the basis that it had not been demonstrated that the opportunity had come to Mr. and Mrs. Siler in their personal capacities or as representatives for their corporations. Mr. Siler declined the opportunity, but Mrs. Siler pursued it and arranged for financing from the vendor. No funds were provided by Mr. Siler or by their corporations.

16 Registrar Schulz's ruling is at paragraph 35 of her decision:

> [35] Given the uncontradicted evidence of the Silers, I find this is a situation where the key employee/director/shareholder has obtained this opportunity with the consent and full knowledge of Trickle Creek and WPS, and most notably, the 50% shareholder. This is not a situation where a person divested himself of an asset just prior to declaring bankruptcy. This is a situation where a person was exercising his previously expressed desire to retire or cut back on his work and expressly rejected the business opportunity. The key employee/director/shareholder acted in a manner consistent with the historical practice of the corporations and the individuals and acted to preserve the business of WPS. I do not find that Ms. Siler seized a corporate opportunity without the consent of the corporation; rather I find that she had the consent of the corporation. It does not make a difference that the key employee/director/shareholder is married to the other shareholder. She is a separate individual entitled to pursue her own business interests.

17 Registrar Schulz also concluded that there was no merit to the argument that Mrs. Siler had participated in a scheme to harm the Estate. She noted that "suspicions are not sufficient to establish threshold merit" (at paragraph 42).

18 With respect to Mr. Siler's discharge from bankruptcy, Registrar Schulz balanced Mr. Siler's position as a first time bankrupt with the concern that bankruptcy not be used as a mechanism for allowing a debtor to escape a single judgment.

19 Ultimately, she directed that Mr. Siler be entitled to retain his shares in the two water companies on paying the Trustee $13,937.50 (being the value of his shares in the corporations under the valuation obtained by the Trustee, and that he be discharged on paying the Trusee $30,000.

20 Registrar Schulz ordered the Walkers to pay the costs incurred by the Estate.

Law

21 The parties agree that the factors for determining whether an appellant should be permitted to file an appeal after the filing time has expired are those from *Cairns v. Cairns* [1931 CarswellAlta 52 (Alta. C.A.)],1931 CanLII 471 (ABSCAD). In *Kubota Canada Ltd. v. Case Credit Ltd.*, 2004 ABCA 41 (Alta. C.A.), Russell JA stated at paragraph 10:

> The governing factors for such applications in this province were established by this Court in Cairns v. Cairns, 1931 CanLII 471 (AB CA), [1931] 3 W.W.R. 335 (C.A.) (Cairns). They include whether:
>
> 1. There was a bona fide intention to appeal while the right to appeal existed, and some special circumstance that would excuse or justify the failure to appeal;
>
> 2. There is an explanation for the delay and the other side was not so seriously prejudiced by the delay that it would be unjust to disturb the judgment, having regard to the position of both parties;
>
> 3. The appellant has not taken the benefits of the judgment from which the appeal is sought; and
>
> 4. The appeal has a reasonable chance of success if allowed to proceed.

22 The parties referred to a number of cases dealing with the various factors, being:

a) *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.);

b) *Lofstrom v. Radke*, 2017 ABCA 211 (Alta. C.A.);

c) *Lofstrom v. Radke*, 2017 ABCA 287 (Alta. C.A.);

d) *Edmonton (City) v. Edmonton (City) Subdivision and Development Appeal Board*, 2016 ABCA 129 (Alta. C.A.);

e) *Impact Tool & Mould Inc. (Trustee of) v. Impact Tool & Mould (Windsor) Inc. (Receiver of)* [2006 CarswellOnt 1523 (Ont. C.A.)], 2006 CanLII 7498;

f) *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 257 (Alta. C.A.);

g) *Saban, Re*, 2012 ONSC 223 (Ont. S.C.J. [Commercial List]);

h) *AFG Industries Ltd. v. Pricewaterhousecoopers Inc.*, 2003 ABCA 13 (Alta. C.A.);

i) *Saban, Re*, 2012 ONSC 6700 (Ont. S.C.J. [Commercial List]);

j) *Way (Trustee of) v. Beothuck Trailers Ltd.*, 2010 ABQB 667 (Alta. Q.B.);

k) *Rassell, Re*, 1998 ABQB 479 (Alta. Q.B.);

l) *Paesch, Re*, 2008 ABQB 357 (Alta. Q.B.); and

m) *Elford (Re)*, 2017 ABQB 433 (Alta. Q.B.).

Analysis

23 It is clear that analyzing the tests in *Cairns v. Cairns* is essential. Where the Alberta Court of Appeal decisions appear to be at odds with each other is in relation to the effect of not satisfying one or more of the *Cairns* criteria. For the purposes of my analysis here, I am going to restrict my comments to Alberta decisions. The *Cairns* criteria are described in the cases as being four or five tests; that results from combining "bona fide intention to appeal" and "special circumstances" together in some of the cases.

24 In this case, tests 2 and 3 have been satisfied; the delay has been explained, and there is no serious prejudice to the Walkers by the delay, and the Walkers have not taken any benefit from the decision they seek to appeal from. While Mr. Siler argues that any delay will prejudice him noting that it is already more than three years from his assignment into bankruptcy, and he is 71 years old, I do not see that those factors amount to the sort of prejudice contemplated by the test.

25 I will thus only deal with tests 1 and 4.

Bona fide intention and special circumstances

26 The appeal period for appeals from Registrars in bankruptcy is a short one. Ten days from pronouncement is considerably shorter than the "normal" appeal periods, which are one month from pronouncement to the Court of Appeal in civil matters (Rule 14.8), 30 days from pronouncement to the Court of Appeal in *Divorce Act* matters (Rule 12.59), one month from pronouncement for appeals from Provincial Court to the Court of Queen's Bench (Rule 12.61), and 30 days from the date of sentence in criminal matters (Criminal Appeal Rules).

27 Only appeals to a judge from decisions of Masters in Chambers are short, being 10 days from filing and service of the order (Rule 6.14). Ten days from pronouncement is a very short appeal period, and is a trap for the unwary.

28 Here, the uncontradicted but uncorroborated evidence of Mr. Walker was that he formed an intention to appeal immediately after he received a copy of Registrar Schulz's decision on or about September 1. Cross-examination established that Mr. Walker was of the belief that they had 30 days to appeal. The intention to appeal was more of a wish to find out what was involved in appealing, as opposed to committing to an appeal and formally instructing counsel to do so.

29 Discussions with counsel appear to have taken place on September 14, and instructions to appeal were given no later than September 25.

30 In my view, that satisfies the first branch of the test. Mr. Walker received the decision within the appeal period and formed the necessary intention to appeal within the appeal period. The fact that instructions were not given to the Walkers' lawyer until after the appeal period had expired, or that the intention to appeal had not been communicated to the Trustee or Mr. Siler's counsel until after the appeal period had expired, are not relevant to this test.

31 Mr. Siler was under the mistaken belief that he had 30 days from September 1 to launch the appeal. He learned of that time frame from former counsel. Mr. Siler formed an immediate intention, within the real appeal period, to explore the possibility of an appeal, and instructed former counsel to file an appeal within the time Mr. Siler believed he had to make a final decision on appealing Master Schulz's decision.

32 It was not unreasonable for Mr. Siler to take time to consider their position, especially as he had not heard back from former counsel within the real appeal period. It cannot be said that Mr. Siler was himself guilty of any delay on the evidence before me.

33 The real issue is whether or not a mistake of counsel in calculating the relevant appeal period amounts to "special circumstances that would excuse or justify the failure to appeal."

34 In *Travis v. D & J Overhead Door Ltd.*, 2016 ABCA 319 (Alta. C.A.), Wakeling JA says no. In *Lofstrom v. Radke*, 2017 ABCA 211 (Alta. C.A.), Slatter JA says yes, referencing *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, 2015 ABCA 257 (Alta. C.A.). In *Adderley v. 1400467 Alberta Ltd.*, 2014 ABCA 291 (Alta. C.A.), Brown JA (as he then was) says no.

35 *Travis v. D & J Overhead Door Ltd.* was an application to extend time to file appeals, heard by Wakeling JA sitting as a single judge. Mr. Travis had two lawsuits arising out of motor vehicle accidents in 2003 and 2004. The lawsuits proceeded very slowly. The lawsuits were both dismissed for delay under Rule 4.31. The applications had been served on Mr. Travis's then lawyer. No one appeared on the applications and they were granted. Defence counsel immediately notified Mr. Travis's lawyer that the orders dismissing the actions had been granted. Mr. Travis's lawyer advised that he "expected to appeal the orders."

36 Mr. Travis had learned of the orders within two weeks from them being granted, but not from his lawyer. He immediately called his lawyer, who told him "he had the matter under control."

37 Some seven months later, with nothing having been done in the meantime, Mr. Travis's new lawyer filed an application seeking an order extending the time for filing an appeal.

38 Wakeling JA did an extensive review of the case law on extending time to appeal, and concluded that the lawyer's failure to act in a timely manner did not constitute special circumstances and denied the application, largely on the basis that the *Cairns v. Cairns* criteria had not all been met.

39 If I understand Wakeling JA's decision correctly, he differentiates between situations involving brief delays in filing a notice of appeal from those involving more substantial delays. According to Wakeling JA, the first brief category is itself divided into two subcategories. The first is where the *Cairns* criteria are met. In that situation, the granting of an extension of time is presumptive.

40 The second subset is where not all of the *Cairns* criteria have been met. Wakeling JA suggests that so long as the applicant demonstrates a reasonable chance of success on the appeal, an applicant who has moved quickly in the face of a brief delay may be granted leave.

41 Where longer delays have taken place, all of the Cairns criteria must be met, following *Ramsdell v. Elliott* (1936), [1937] 1 W.W.R. 37 (Alta. C.A.) (SCAD).

42 Thus, while *Travis v. D & J Overhead Door Ltd.* stands for the proposition that lawyer error does not constitute special circumstances, the case also holds that the absence of special circumstances is not of itself fatal to an extension application where the delay has been a short one, and the applicant moves quickly to apply for the extension.

43 In *Adderley v. 1400467 Alberta Ltd.*, Brown JA (as he then was) considered an extension application in the context of an error made by a student-at-law as to the appeal period, a fairly brief delay and a prompt application. He stated at paragraph 10:

> I accept that the student's evidence is sufficient to negate any inference that the failure to appeal in time was the product of a deliberate decision or game-playing on the part of the applicants. That, however, goes to demonstrate the applicants' bona fide intention to appeal is not at issue here. What matters is whether his misunderstanding of the pertinent rule, and its effect of delaying the filing of the Notice of Appeal discloses a special circumstance which reasonably explains that delay.

44 In that case, the delay was solely the result of an error on the part of a student-at-law. Brown JA noted at paragraph 12:

> A misunderstanding of the effect of a rule does not constitute a "special circumstance" that qualifies as furnishing a reasonable explanation . . .

45 Ultimately, Brown JA dismissed the application because there were no special circumstances, and there was no reasonable prospect of success on the appeal, stating at paragraph 19:

> [19] The reason this Court occasionally agrees to extend time limits is to allow for the flexibility which is sometimes necessary to see that justice is done: Samson Cree Nation v O'Reilly & Associés, 2014 ABCA 268 (CanLII) at para 185. Where applicants can establish, inter alia, that a special circumstance reasonably explains their delay in filing a Notice of Appeal, and that their proposed appeal has a reasonable prospect of success, then the interests of justice can support granting relief to ensure that an appeal does not fail for want of compliance with a technicality that caused no prejudice to a respondent. Here, however, because the applicants cannot establish either of those things, the interests of justice do not support granting relief.

46 This decision is not inconsistent with *Travis v. D & J Overhead Door Ltd.*. Here, Brown JA recognized some discretion in the absence of full compliance with the *Cairns* criteria "to see that justice is done." From my reading of *Travis v. D & J Overhead Door Ltd.*, Wakeling JA would limit that discretion to situations involving brief delays and prompt responses.

47 An earlier case, *AFG Industries Ltd. v. Pricewaterhousecoopers Inc.*, 2003 ABCA 13 (Alta. C.A.), dealt specifically with the 10-day appeal period under the Bankruptcy Rules. Côté JA, sitting as a single judge on the extension application, declined to "declare federal legislation to be unreasonable, and routinely override it" (at paragraph 2). In that case, more than a month had passed from the expiry of the appeal period until the extension application was filed. He declined to extend the time, with no consideration of the merits of the appeal.

48 I do not view *AFG Industries Ltd. v. Pricewaterhousecoopers Inc.* as being inconsistent with either *Travis v. D & J Overhead Door Ltd. or Adderley*, at least in the context of short delays.

49 *Lofstrom v. Radke*, 2017 ABCA 211 (Alta. C.A.), is cited for the proposition that lawyer error may constitute exceptional circumstances. In that case, Slatter JA, sitting alone on an extension application, considered *Travis v. D & J Overhead Door Ltd.*. While Slatter JA dismissed the extension application, he disagreed with the approach taken by Wakeling JA in *Travis v. D & J Overhead Door Ltd.*, stating at paragraph 6:

> [6] The suggestion in the single judge Travis decision that there is a more stringent test does not reflect the law, and should not be followed to the extent that it conflicts with Cairns and the many other full panel judgments of this Court: see Royal Bank of Canada v Morin, 1977 ALTASCAD 209 (CanLII), 1977 AltaSCAD 209 at paras. 4-9, 6 AR 341; Sohal v Brar, 1998 ABCA 375 (CanLII) at para. 1, 223 AR 141; Stoddard v Montague at para. 7; R. v Canto, 2015 ABCA 306 (CanLII) at para. 13, 28 Alta LR (6th) 49, 607 AR 298; Duzs v Duzs, 1973 ALTASCAD 9 (CanLII), [1973] 3 WWR 394 at p. 396, 35 DLR (3d) 310 (Alta SCAD); Petryga v Alberta, 1980 ABCA 323 (CanLII) at para. 11, 26 AR 290; Mayer (Guardian of) v Wolski (Guardian of), 1983 ABCA 198 (CanLII) at para. 2, 52 AR 390; Smoky Lake General and Auxiliary Hospital & Nursing Home District No 73 v Higdon, 1983 ABCA 331 (CanLII) at paras. 12-16, 50 AR 185, 29 Alta LR (2d) 215; Royal Bank of Canada v Lane, 1990 ABCA 181 (CanLII) at para. 7, 107 AR 144; Bank of Montreal v Grotski (1991), 120 AR 149 at para. 6, 4 CPC (3d) 197 (CA); Little v Little, 1998 ABCA 400 (CanLII) at paras. 10-12, 228 AR 344; Hebert v Canada, 2004 ABCA 36 (CanLII) at paras. 7-9; Heffernan v Korman, 2006 ABCA 262 (CanLII) at para. 3; Leibel (c.o.b. D and D Enterprises) v Cedarglen Group Inc., 2007 ABCA 73 (CanLII) at para. 6, 404 AR 36. There is no basis on which the law can now be rolled back to 1937.

50 Slatter JA refers to his own decision in *Attila Dogan Construction and Installation Co. v. AMEC Americas Ltd.*, where he stated at paragraph 7:

> [7] There are undoubtedly cases where an error by counsel, or a misunderstanding of the pertinent rule, was found not to be a sufficient excuse in the particular context, but that does not mean that there is a fixed rule to that effect. The various factors in the Cairns test must be weighed together, and whether to permit a late appeal is ultimately in the discretion of the Court: Cairns at p. 829; Stoddard v Montague, 2006 ABCA 109 (CanLII) at para. 8, 412 AR 88. Because there is an overriding discretion to permit a late appeal even if the Cairns test is not met, it does not advance the analysis to say that certain explanations can "never" be acceptable under that test. The Court could theoretically grant an extension even if none of the Cairns factors were met.

51 *Lofstrom v. Radke* was appealed to a full panel of the Court of Appeal (2017 ABCA 287 (Alta. C.A.)). The appeal was dismissed, with no discussion about the *Cairns* factors. It is not of assistance on this application.

52 These are the cases that were cited to me. There are several other cases from Court of Appeal judges sitting alone on leave applications or extension of time applications. They generally confirm a residual discretion to see that justice is done, but the difference between *Travis* and *Lofstrom* has not been reconciled by a full panel.

53 It is difficult for a Queen's Bench judge to choose between competing Court of Appeal decisions. To determine this application, I do not think I have to choose. These competing decisions will ultimately require a full panel of the Court of Appeal to weigh in and provide a binding decision for judges below, and presumably its own members.

54 What I glean from the most recent cases, *Adderley*,*Travis* , and *Lofstrom*, is that despite *Cairns v. Cairns* and *Ramsdell v. Elliott*, there is a residual discretion on an extension application to grant an extension in circumstances where not all of the *Cairns* criteria have been met. That discretion may be broad enough to ensure that justice is done, or it may be limited to cases where at a minimum, the delay is brief, remedial steps are taken promptly, and there is a reasonable prospect of success on appeal.

55 Here, Mr. Siler argues that the delay was not brief, at least in the terms described in *Travis* as "one or two days." In my view, the discretion described in *Travis* is not limited to several days. It does not extend as long as five weeks (as in *AFG Industries Ltd. v. Pricewaterhousecoopers Inc.*). I will not attempt to create any narrower bookends. Here, I would observe that the notice of appeal was attempted to be filed within the "usual" appeal period and within the time the Walkers understood to be the appeal period, and the application to extend the time was made immediately after the Walkers learned of the timing error.

56 In these circumstances, I am satisfied that the delay was relatively brief, remedial steps were taken quickly. Because of these factors, I am satisfied either that the error in recognizing the appropriate appeal period in the context of a 10-day appeal period constitutes exceptional circumstances, or if no exceptional circumstances are made out, the failure to satisfy that Cairns criteria does not prevent me granting leave if I am satisfied that there is a reasonable prospect of success on the appeal itself.

Reasonable Chance of Success

57 I do not think that the standard of review should play much of a role in determining whether the appeal has a reasonable chance of success. On this application, I am not going to weigh in as to whether the errors alleged are errors of law attracting a correctness standard, or are errors of fact or mixed fact and law, attracting the palpable and overriding error standard.

Arguments

58 Here, the Walkers allege three errors:

a) The Registrar erred with respect to the valuation of the shares owned by Mr. Siler in the two corporations involved in the water business in that (a) the Registrar did not consider the factors under section 30(4) of the BIA; (b) the Registrar relied on a flawed valuation; and the valuation and "sale" to Mr. Siler has the potential to create mischief;

b) The Registrar erred in denying the section 38 application on the basis that the Walkers had not established threshold merit to the application because the corporation agreed to allow Mrs. Siler to pursue the opportunity herself to acquire the competing business; and

c) The Registrar failed to properly consider the factors under section 173 of the *BIA* in granting Mr. Siler a conditional discharge.

59 Mr. Siler responds in his brief to each of these arguments. Regarding the share valuation, Mr. Siler notes that the Walkers presented no alternative evidence to the Court. Only the valuation obtained by the Trustee was provided, and the Registrar was alive to the problems of selling 50 percent of the shares in a corporation where the other 50 percent are owned by a non-bankrupt party. Registrar Schulz was also aware that there had been offers to purchase the shares (albeit from Mrs. Siler) which were in excess of the valuation but which had been rejected by Mr. Walker in his capacity as Inspector.

60 With respect to the section 38 application, the Walkers note that Mr. Siler expressly declined the opportunity himself, and the corporation consented to it. Mr. Siler argues that any claim against Mrs. Siler is bound to fail because he consented to the purchase by her. He also notes that the claim is hopeless because it is statute-barred.

61 With respect to the argument that the purchase of 169 was a reviewable transaction under section 96 of the *BIA*, Mr. Siler notes that this argument was not raised by the Walkers before the Registrar, and it cannot now be a valid ground for appeal.

Analysis of reasonable prospect of success

62 The "net effect" of the Registrar's decision is to allow Mr. Siler to retain his shares in the two water companies on payment of $13,937, and to be discharged from bankruptcy on payment of a further $30,000.

63 The $13,937 for the shares is significantly less than Mrs. Siler was prepared to pay following Mr. Siler's bankruptcy. The value of the shares has been significantly reduced because WPS did not acquire the business of one of its wholesale customers. Mrs. Siler acquired the shares, and that company, and not Trickle Creek, profits from the retail sale of Trickle Creek's products. The purchase of this business by Mrs. Siler, not WPS, took place on September 7, 2012, some two and a half weeks before the commencement of the Walkers' trial against Mr. Siler in Cranbrook, BC. The effect of that sale was to eliminate any value in WPS. Mr. Siler went bankrupt as a result of the decision against him resulting from that trial.

64 According to Mr. Walker, after obtaining the BC judgment against Mr. Siler, Mr. Siler proposed settlement, telling Mr. Walker that if he didn't accept the settlement offer, Mr. Siler would "take my best five (water) customers and start a new company." While Mr. Siler denies saying that, the acquisition of the customer's company by Mrs. Siler essentially did just that.

65 Wakeling JA describes the test for a "reasonable chance of success" as a low standard. He says at paragraph 57 in *Edmonton (City) v. Edmonton (City) Subdivision and Development Appeal Board*, 2016 ABCA 129 (Alta. C.A.), that it "is enough if the applicant's position is arguable. A position is arguable if it is not frivolous."

66 In *Saban, Re*, 2012 ONSC 6700 (Ont. S.C.J. [Commercial List]), Newbould J described the standard of review from the Registrar to superior court at paragraph 5:

> 5 So far as the appeal is concerned, an appeal is not a trial de novo and a judge can consider only the evidence before the Registrar. The appellant must establish that the Registrar erred in principle, erred in law or failed to take into account a proper factor or took into account an improper factor that demonstrably led to a wrong conclusion. See Re Borden (2010), 69 C.B.R. (5th) 251 per Hoy J. (as she then was). If an appeal is based on an alleged error in a finding of fact, the error must be palpable and overriding. See Clarke v. Caister (2000), 17 C.B.R. (4th) 49 (B.C.C.A.) and Houlden, Morawetz and Sarra, 2012-2013 Annotated Bankruptcy and Insolvency Act (Carswell) at Is.61.

67 In looking at the Registrar's reasons and the grounds for appeal cited by the Walkers, I do not see that they are frivolous.

68 The valuation of the water companies is essentially a question of fact. It is troublesome that the Walkers did not provide some evidence to contradict the valuation obtained by the Trustee. Nevertheless, the Registrar did not have to accept the Trustee's valuation, and could have directed some further investigation by the Trustee. Or she could have adjourned the application so that the Walkers could have obtained their own valuation.

69 It is not frivolous for the Walkers to argue that the Registrar should have considered the section 30(4) factors in permitting Mr. Siler to purchase the shares from his estate. There is an arguable position in regard to this issue.

70 The section 38 application is a challenging one. The timing of the purchase by Mrs. Siler of 169 is suspicious, as it was on the eve of the trial that resulted in Mr. Siler's bankruptcy. It may have followed a threat (albeit denied) by Mr. Siler to accomplish just that. It was also a sale that involved no down payment by Mrs. Siler and was paid for out of the ongoing profits from that company. The explanation that Mr. Siler didn't want to get involved rings a bit hollow because WPS could presumably have acquired 169 itself with no down payment. No activity on Mr. Siler's part was required, and no funds from him (or Mrs. Siler) were necessary.

71 While the Registrar is right when she says that suspicions are not enough to find threshold merit, someone else looking at the circumstances might conclude that the suspicions are more than just suspicions and are inferences that can properly be drawn from the facts.

72 I do not see the Walkers' argument on this issue to be frivolous. More challenging, however, is the limitation argument. The request for a section 38 order is long past the time of the impugned transaction. The normal two-year limitation period is extended by discoverability, although the corporation, WPS, knew of the circumstances when they occurred.

73 It is unclear when the Trustee learned of the transactions. It may have been when Mrs. Siler was questioned on September 8, 2016. If section 96 of the *BIA* applies to the transaction, then it may be attackable by the trustee, or under section 38, within five years.

74 Again, these are not frivolous arguments, and I do not think it can be said that there is no reasonable prospect of success, as defined by Wakeling JA.

75 Mr. Siler argues that the section 96 issue was not specifically raised before the Registrar. That appears to be the case from her reasons, although section 96 in the context of a section 38 application would appear to relate to defences that might be raised by Mrs. Siler.

76 Appeals are based on the evidence before the Registrar. Arguments are not evidence. New arguments are frequently raised on appeal and while that may seem unfair, late arguments can always be addressed in costs. The fact that an argument was not raised before the Registrar is not a bar to it being raised on appeal.

77 With respect to the terms of Mr. Siler's discharge, it is not frivolous to argue that the Registrar overemphasized one or more factors, or underemphasized others. This ground of appeal is not a reasonable prospect of success.

Conclusion

78 This matter involves counsel apparently missing a somewhat unusual limitation period. The delay between the expiry of the limitation period and bringing this application was brief. The Walkers had an intention to appeal within the limitation period, and the grounds for appeal are not without some merit. They are not bound to fail, and have a reasonable chance of success, recognizing that a reasonable chance of success does not equate to a balance of probabilities.

79 While Mr. Siler may be prejudiced by the delay resulting from the appeal proceeding, most of the delay relates to this attempt to "cure" the former lawyer's error. The delay relates to the uncertainty of bankruptcy continuing to hang over Mr. Siler's head, and nothing specific.

80 As a result, I grant the application for an extension in time to file the notice of appeal. The notice should be filed forthwith, and the appeal prosecuted diligently.

81 I am grateful to all counsel for the quality of their written and oral arguments.

Costs

82 While the Walkers have been successful on this application, it was not unreasonable for Mr. Siler to oppose it. The law in this area is unsettled and they were entitled to resist this application. There should be no costs payable to the Walkers in regard to this matter. Mr. Siler's costs of resisting this application should be assessed on the hearing of the appeal.

Observations

83 There is a saying "be careful what you wish for, you might get it." That may well apply here. Registrar Schulz recognized that the Walkers are angry and bitter about the loss they suffered at Mr. Siler's hands relating to the construction of their home in BC. They are also angry and bitter about the bankruptcy process and the results of it.

84 They have already experienced a much lower return from the bankruptcy than they could have realized through the offer made to them by Mr. Siler before bankruptcy, the proposal made before bankruptcy, and the offer by Mrs. Siler during the bankruptcy.

85 The Walkers may well lose the appeal I have permitted by this decision. I am in no way critical of Registrar Schulz, and her decision may well be upheld as being a reasonable one. Even if the Walkers succeed in being able to pursue a section 38 claim against Mrs. Siler, there are defences available to her both on the merits (consent) and because of limitation periods.

86 The Walkers complain that they spent more pursuing Mr. Siler than they recovered by way of the unsatisfied judgment against him. If they are successful on the appeal, they will undoubtedly expend a lot more pursuing Mrs. Siler and continuing to oppose Mr. Siler's discharge, and they may not succeed. That would make them liable for significant costs, plus their own legal fees. Even if they succeed, it is unclear what a successful judgment might look like, and collectability is frequently an issue. I would not want this decision to be seen as any encouragement to them in pursuing their claims against Mr. Siler.

Application granted.

9

1987 CarswellNB 29
New Brunswick Court of Appeal

Atlantic Pressure Treating Ltd. v. Bay Chaleur Construction (1981) Ltd.

1987 CarswellNB 29, [1987] N.B.J. No. 528, 205 A.P.R. 165, 65 C.B.R. (N.S.) 122, 81 N.B.R. (2d) 165

ATLANTIC PRESSURE TREATING LTD. v. BAY CHALEUR CONSTRUCTION (1981) LIMITED

Ryan J.A.

Heard: May 28 and June 12, 1987
Judgment: June 23, 1987
Docket: No. 128/87/CA

Counsel: *B.R. Bell* and *B. Buchanan*, for appellant.
P. Glennie and *C.D. Whelly*, for respondent.

Subject: Corporate and Commercial; Insolvency; Civil Practice and Procedure
Related Abridgment Classifications
Bankruptcy and insolvency
XVII Practice and procedure in courts
XVII.7 Appeals
XVII.7.b To Court of Appeal
XVII.7.b.iii Time for appeal
Headnote
Bankruptcy --- Practice and procedure in courts — Appeals — To Court of Appeal — Time for appeal
Appeals — Time for appeal — Extensions — Court to do justice in each particular case — Extension granted where trustee not prejudiced.
A motion was brought to extend the time to appeal two orders. In one case an appeal had been filed within the 30-day period prescribed by the Rules of Court but not within the 10 days prescribed by the Bankruptcy Rules. In the other case, the intention to appeal the order was not formed until 3 months after the order was made.
Held:
Application granted.
Generally, an intention to appeal must be formulated prior to the expiration of the time for appealing. However, the judge hearing the motion is bound, above all other considerations, to do justice in each particular case. In this case, extension of the time to appeal would not prejudice the trustee, but not to refuse an extension might well prejudice the intended appellant.
Table of Authorities
Cases considered:
Manchester Economic Building Society, Re (1883), 24 Ch. D. 488 (C.A.) — *applied*
Statutes considered:
Bankruptcy Act, R.S.C. 1970, c. B-3

s. 49(1)

s. 73

Garnishee Act, R.S.N.B. 1973, c. G-2

Income Tax Act, S.C. 1970-71-72, c. 63

s. 159(2) [re-en. 1985, c. 45, s. 90]

Rules considered:

Bankruptcy Rules, C.R.C. 1978, c. 368

R. 49

New Brunswick Rules of Court

R. 3.02

Applications to extend time to appeal.

Ryan J.A.:

1 The bankruptcy of the garnishee, Bay Chaleur Construction (1981) Limited, has caused the intended appellant to lose the benefit of an attaching order for $42,378.89. The intended appellant, Atlantic Pressure Treating Ltd., seeks leave to extend time for filing two notices of appeal. The first is a notice of appeal from a decision dated 20th January 1987 about which it had not formed an intention to appeal until more than three months after the decision was given. The second is for an extension of time for an appeal which had been filed within the 30-day period prescribed by the Rules of Court but not within the 10 days prescribed by the Bankruptcy Rules.

2 On 20th January 1987 the intended appellant, a judgment creditor, obtained an order in the Court of Queen's Bench at Fredericton attaching certain moneys owed by a receiver to a judgment debtor, Bay Chaleur Construction (1981) Limited. In making his decision in the garnishee application, the judge of the Court of Queen's Bench referred to s. 159 of the Income Tax Act, S.C. 1970-71-72, c. 63, which requires that the receiver obtain a certificate from the minister under certain circumstances before distribution of moneys. He said:

> I'm going to order that the receiver, Collins, Barrow, Maheu, Noiseux Inc., pay into court at the office of the clerk of the Court of Queen's Bench in the judicial district of Fredericton the sum of $42,779.89, and that any of the Atlantic Pressure, the receiver, or any other interested party will be at liberty to make an application to the court at Fredericton for direction as to payment out of that money following the disposition of the interpleader proceeding that has been commenced in the judicial district of Bathurst...

3 The receiver held a surplus of $95,533.43. An affidavit filed at the January hearing disclosed that Revenue Canada had notified the receiver that it had a claim against Bay Chaleur Construction for $29,016.38. Payment to Revenue Canada of its claim would still have left ample funds to cover the garnishee order.

4 Before the interpleader proceeding at Bathurst had been disposed of, other creditors of Bay Chaleur Construction petitioned for a receiving order under the Bankruptcy Act, R.S.C. 1970, c. B-3. This froze the assets. The intended appellant moved for an order in the Court of Queen's Bench at Fredericton that the money paid into court on the garnishee application be paid to it. The trustee, Touche Ross Limited, opposed the application and moved that the money be paid to it. On 30th April 1987 the judge hearing the motion directed the clerk of the court to pay the $42,379.89 to the trustee [64 C.B.R. (N.S.) 260].

5 The January and April decisions of the judge of the Court of Queen's Bench are directly related to one another: the first attaches the money and orders it paid into court, and the second is an order for payment of the moneys.

6 The intended appellant has filed a notice of appeal from the decision of the hearing judge of 30th April 1987 which directed payment of the money to the trustee. The respondent trustee concedes that the intended appellant promptly formed an intention to appeal the second decision. This notice of appeal is dated 30 days after the decision, which puts it within the time prescribed by the Rules of Court, but beyond the 10-day period for filing notices of appeal as set out in R. 49 of the Bankruptcy Rules. It subsequently occurred to the intended appellant that the January decision in the Court of Queen's Bench attaching the money might not be covered by the later decision directing payment to the trustee instead of to the intended appellant. The intended

appellant moves under R. 3.02 of the Rules of Court of New Brunswick for two extensions of time to file notices of appeal. During the hearing of the motions to extend time the parties have agreed that a consent application will be made to a judge of the Court of Queen's Bench for an order nunc pro tunc granting leave to the appellant to continue with these appeal proceedings under s. 49(1) of the Bankruptcy Act. But the trustee opposes the motion to extend time to file an appeal from the earlier January decision on the ground that the intended appellant did not have a bona fide intention to appeal and in fact took a fresh step by relying upon the earlier decision when it subsequently applied for payment out of court of the moneys.

7 Was it necessary for the intended appellant in this case to form an intention to appeal the earlier favourable decision of the court within the time prescribed by the Bankruptcy Rules or the Rules of Court? I think not. The intended appellant had been successful in its application to garnishee the moneys following a judgment against the debtor. One must relate the intention to appeal to the merits of the results at the time of the decision. To do otherwise in this case would mean that the intended appellant would have had to predict that other creditors would petition the judgment creditor into bankruptcy, as they did, after the 30-day time for appeal had expired. The success of the intended appellant in its garnishee application may have precipitated the dilatory creditors to petition. But the two decisions, for garnishee and for payment, are bonded to each other. Formulation of the intention to appeal within the time limited for appeal is therefore not the predominant criterion which must be considered in these two motions. The inextricable connection between the two decisions is the determining factor along with the equally impor tant factor of whether the intended appellant has an arguable case in this situation where one minute it appeared assured of having its money and the next minute the money was beyond reach.

8 Over 100 years ago it was determined that the basic rule to be followed in dealing with an application to extend time for appeal is that leave should be granted if justice requires that it be given. Brett M.R. in *Re Manchester Economic Building Society* (1883), 24 Ch. D. 488 at 497, said:

> ... I know of no rule other than this, that the Court has power to give the special leave, and exercising its judicial discretion is bound to give the special leave, if justice requires that leave should be given.

Generally, an intention to appeal must be formulated prior to the time for an appeal expiring. But if any rule is necessary, it would have to be that the judge hearing the motion is bound, above all other considerations, to do justice in each particular case. By extending the times on both motions, the trustee is not prejudiced. Not to extend the times may well prejudice the intended appellant.

9 The intended appellant claims that it is not bound by the Bankruptcy Act because its application was under the Garnishee Act and that the moneys were preserved for it prior to bankruptcy. It says further that there was a distribution by the receiver in January under s. 159(2) of the Income Tax Act when the receiver paid the moneys into court, and that the judge misinterpreted the section. The trustee says that, regardless of the outcome, any payment would be a preference under s. 73 of the Bankruptcy Act. Without commenting in depth on the merits, I conclude that the intended appellant has an arguable case. Leaves to extend time to appeal the two decisions of the judge of the Court of Queen's Bench are granted. There will be one appeal in which the appellant will forthwith file an amended notice of appeal setting forth all its grounds.

10 The parties have agreed that if leaves are granted they will consent to a motion that the Minister of National Revenue be added as a party appellant. Any such motion, if in satisfactory form and if in accordance with the Rules of Court, will be considered. In the meantime the parties have agreed that the moneys in question will be invested pending the outcome of the appeal. Costs on these motions will be costs in the appeal. In view of the appellant's contention that it is not bound by the Bankruptcy Act, there will be no order with respect to security for costs as requested by the trustee.

Application granted.

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