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Bankruptcy and Insolvency Act

Court clarifies appellate review of single-judge rulings on leave requests under bankruptcy act

By **Christopher Guly**

(August 31, 2020, 9:47 AM EDT) -- In a rare and complex ruling on a complicated case involving bankruptcy and insurance coverage, the Ontario Court of Appeal clarified the scope of one of its previous rulings on the court's jurisdiction to review a decision of a single judge regarding requests for leave to appeal under the federal *Bankruptcy and Insolvency Act* (BIA).

Ontario's *Courts of Justice Act* allows a panel of the Court of Appeal to "on motion, set aside or vary the decision of a judge who hears and determines a motion," and while the federal Bankruptcy and Insolvency General Rules "do not contain any specific procedure for reviewing the decision of a single judge of a provincial appellate court that denies leave to appeal under BIA s. 193(e)," the rules acknowledge that "the courts shall apply, within their respective jurisdictions, their ordinary procedure," said Ontario's appellate court in *McEwen (Re)* 2020 ONCA 511, released on Aug. 17.

The same court took a different position in *Business Development Bank of Canada v. Aventura II Properties Inc*. 2016 ONCA 408.

In a six-paragraph ruling, the Court of Appeal concluded that it did not have jurisdiction to review an order by a single judge of the court denying leave to appeal under BIA s. 193(e), relying in part on reasons the appellate court used in a criminal appeal, *R. v. Scherba* [2001] O.J. No. 2235, and held that that there is no right to review a single judge's decision granting or denying leave to appeal a summary conviction.

"However, the provisions of the BIA differ from those in the *Criminal Code* and *Criminal Appeal Rules*," Justice David Brown wrote in his reasons in *McEwen*, agreed to by Justices Eileen Gillese and David Paciocco. "BIA s. 183(2) expressly provides that provincial appellate courts are invested with power and jurisdiction 'according to their ordinary procedures, except as varied by this Act or the General Rules, to hear and determine appeals' … [and] a panel review of the decision of a single judge is part of the ordinary procedure of this court."

Joseph Obagi, Connolly Obagi LLP

However, personal injury lawyer Joseph Obagi, a partner with the Ottawa firm Connolly Obagi LLP who represented the plaintiff-respondent Barbara Carroll et al. in the appeal, said that *Aventura II* "made it abundantly clear in bankruptcy matters that you're entitled to an appeal if you get leave from a single judge of the Court of Appeal."

"We felt that *Aventura* was binding authority."

But while the Court of Appeal does not explicitly state it, *Aventura II* was incorrect, according to Alfonso Nocilla, who teaches and researches bankruptcy and insolvency law at Western University and practises commercial law at Hoffer Adler LLP in Toronto.

"The court has now essentially disagreed with what it said in *Aventura II*, a decision which was wrong because section 183 of the *Bankruptcy and Insolvency Act* says that a three-judge panel of any court of appeal of a province has the same authority that it would under its ordinary procedure, which says that when a single judge refuses leave to appeal, that ruling can be appealed to a three-judge panel," he explained.

"The error in *Aventura II* was in taking the rule for criminal cases and applying them in a bankruptcy context."

Although the appellate court found that *Aventura II* was binding, it relied on an exception set out in one of its earlier decisions: *Hillmond Investments Ltd. v. Canadian Imperial Bank of Commerce* [1996] O.J. No. 1772.

Alfonso Nocilla, Hoffer Adler LLP

As the Court of Appeal summarized, *Hillmond* did not address its power to review the decision of a single judge of the same court, but "dealt with the jurisdiction of a senior appellate court to hear an appeal from the decision of a single judge of an intermediate appellate court that had denied a party leave to appeal the decision of an arbitrator on a question of law."

But as Justice Brown highlighted, the court recognized that "there must be an avenue of redress in exceptional cases," which in *Hillmond* held that if a judge with what is now the Ontario Superior Court "mistakenly declines jurisdiction on a leave motion by acting upon a wrong principle, redress should be had to an appellate court."

To overturn its decision in *Aventura II*, the Court of Appeal would have to convene a five-judge panel.

In this case, the court outlined "the correct approach that when a three-judge panel reviews a single judge's refusal to grant leave it has to apply the *Pine Tree* test," said Nocilla.

In *Business Development Bank of Canada v. Pine Tree Resorts Inc.* 2013 ONCA 282, the Court of Appeal set out three factors to guide the decision on whether to grant leave to appeal under BIA s. 193(e). Under the Pine Tree Resorts, as the court summarized in *McEwen*, a proposed appeal must "raise an issue that is of general importance to the practice in bankruptcy/insolvency matters or to the administration of justice as a whole, and the issue is one that this court should consider and address; be prima facie meritorious; and not unduly hinder the progress of the bankruptcy/insolvency proceedings."

The court found that all three factors were met in *McEwen*, a case that involves an Ottawa woman, Barbara Carroll, who suffered catastrophic head injuries in 2009 after she was struck by a car driven by Robert McEwen, and owned by his wife, Caroline McEwen.

During the spring of 2011, Carroll's representative plaintiffs sued the McEwens, their automobile insurer, Traders General Insurance Company, owned by Aviva Canada Inc., and Carroll's auto insurer, Pilot Insurance Company. In late summer, the McEwens declared bankruptcy, but Carroll's plaintiffs proceeded to trial in 2015 after Traders declined an offer to settle for $1 million. A jury awarded damages, which the court set at $2.4 million, but only $1 million for the McEwens, based on the limit of their insurance policy.

In 2016, the Carroll plaintiffs obtained consent from the McEwen's bankruptcy trustee to proceed with a bad faith action against Traders for failing to settle the remaining amount of the judgment that totalled $624,349.01.

Traders contested the statement of claim, but that was rejected by the Ontario Superior Court last year in *McEwen (Re)* 2019 ONSC 5593, which granted the Carroll plaintiffs leave under s. 38 of the BIA to commence proceedings.

Traders appealed the review order, and late last year the chambers judge of the Ontario Court of Appeal, Justice Bradley Miller, rejected Traders' argument that there was a procedural irregularity in Justice Stanley Kershman's Superior Court ruling and dismissed the motion.

However in the three-judge panel ruling, Justice Brown wrote that Justice Miller's reasons "were not sufficient to explain why he denied Traders leave to appeal, which leads me to conclude that the chambers judge declined jurisdiction by not making a decision on the merits of the leave motion."

In its review ruling in *McEwen*, the Court of Appeal set aside Justice Miller's order and granted Traders leave to appeal Justice Kershman's decision.

"The end result of *McEwen* is that whenever a single judge of the Court of Appeal is reviewing a request to grant leave to appeal in a bankruptcy matter, he or she has to apply *Pine Tree* and give more thorough reasons than the chambers judge did here," said Nocilla.

"The Court of Appeal said the reason it was only able to review his decision, in part, is because he didn't look at the merits of the case. He only considered the procedural issue as to whether he could hear the case."

Obagi said that as a result of *McEwen*, "people involved in a bankruptcy proceeding that get a leave-to-appeal decision from a single judge against them now have another opportunity to go to a full panel."

"But at some point, a five-member panel is going to have to be convened to decide if *Aventura* is still good law or has *McEwen* overtaken it," he explained.

"We hung our hat on the jurisdictional argument, and relied heavily on *Aventura*. That was a mistake obviously because *Aventura* did not have the persuasive authority we thought it would have."

"Now we have to go back to the drawing board and convince the next panel that Justice Kershman's decision was correct and should not be overturned."

Counsel for Traders did not respond to a request for comment.