CACV No. 3667

IN THE COURT OF APPEAL FOR SASKATCHEWAN

ON APPEAL FROM THE COURT OF QUEEN'S BENCH

JUDICIAL CENTRE OF SASKATOON
Q.B. No. 1401 of 2019

BETWEEN:

HARMON INTERNATIONAL INDUSTRIES INC.

PROPOSED APPELLANT
(RESPONDENT)

- and -

HARDIE & KELLY INC., Receiver of Harmon International Industries Inc.

PROPOSED RESPONDENT
(APPLICANT)

- and -

PILLAR CAPITAL CORP.

INTERESTED PARTY
(INITIAL APPLICANT)

BRIEF OF LAW ON BEHALF OF PROPOSED APPELLANT, HARMON INTERNATIONAL INDUSTRIES INC.

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TABLE OF CONTENTS

I. INTRODUCTION

1. This Brief of Law is filed in support of various procedural remedies sought by the Proposed Appellant, Harmon International Industries ("**Harmon**"). Although Harmon has applied for leave to appeal, it seeks in the alternative a declaration that it does not require leave in order to file a Notice of Appeal. Harmon has also filed 1) an application for an order granting additional time to file the Notice of Appeal in the event that this Court declares that leave is not required; 2) an application for leave to adduce fresh evidence; and 3) an application for a stay of proceedings in the event that the Court extends the time to file the Notice of Appeal.

II. FACTS

2. To the extent that the issues raised in this Brief of Law require a consideration of substantive (as opposed to procedural) facts, Harmon relies on the facts stated in the Affidavit of Calvin Moneo sworn October 8, 2019, the Affidavit of Calvin Moneo sworn January 10, 2020, the Affidavit of Calvin Moneo sworn June 5, 2020, and the Affidavit of Calvin Moneo sworn July 29, 2020 (the "**July 2020 Moneo Affidavit**"), as well as certain facts alleged in the Affidavit of Kevin Hoy sworn January 8, 2020, the Affidavit of Ken Kreutzwieser sworn January 8, 2020, and the First Report of the Receiver dated May 27, 2020. Unless stated otherwise, this Brief of Law adopts the abbreviations used in the October 2019 Moneo Affidavit.

III. ISSUES

3. This Brief of Law is concerned with the following issues:

1) Is Harmon entitled to an appeal without requiring leave of the Court?
2) If leave to appeal is not required, should the Court grant an extension of time for Harmon to file a Notice of Appeal?
3) Should the Court grant Harmon leave to adduce fresh evidence?

IV. ARGUMENT

Issue 1: Harmon's Entitlement to an Appeal

4. Section 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 (the "***BIA***") provides that:

> Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:
>
> (a) if the point at issue involves future rights;
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
> (c) if the property involved in the appeal exceeds in value ten thousand dollars (emphasis added);
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars; and
> (e) in any other case by leave of a judge of the Court of Appeal.

5. In *MNP Ltd. v Wilkes*, 2020 SKCA 66 at para 61 [*Wilkes*], this Court recently confirmed that section 193(c) of the *BIA* is to be given a broad interpretation, and ruled that in determining whether a person is entitled to rely on this provision the courts must focus on the question of property value, not the question of whether the issues raised on appeal are procedural in nature:

> While it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*, courts should not start with that question. The primary task is to answer the question raised by s. 193(c) and determine whether the property involved in the appeal exceeds $10,000. Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, what is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' ... may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen–Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake ..." (at para 10). All of

> these expressions are consistent with the statutory language present in s. 193(c).

6. It is submitted that section 193(c) of the *BIA*, as interpreted by this Court in *Wilkes*, entitles Harmon to an appeal without requiring that Harmon first obtain leave. The language drawn from the various authorities cited in the above paragraph from *Wilkes* deserves particular attention. This language, including references to "value in jeopardy," a loss that "will entail," and "money at stake," all point to risk or prospective loss, and accordingly convey that a person need not have an actual or crystallized loss in order to rely on section 193(c) of the *BIA*. The fact that the Sales Process Order does not confirm a sale is therefore not relevant: this Order has put a significant amount of Harmon's assets at risk and such risk entitles Harmon to an appeal pursuant to section 193(c).

Issue 2: Extension of Time

7. The Court's jurisdiction to extend time periods for the filing of materials, including a Notice of Appeal, arises from Rule 71 of the *Court of Appeal Rules*, which provides that:

> The court or a judge may enlarge or abridge the time periods fixed by these rules or by order on such terms as the case may require. The order enlarging or abridging the time may be made before or after the fixed time period has expired.

8. In *Patel v Whiting*, 2020 SKCA 49 at para 35 [*Patel*], this Court recently summarized the principles to be applied when considering whether to grant an order extending time:

> The framework for considering an application for an extension of time to appeal applied by Whitmore J.A. in Saskatoon was found in *Bank of Nova Scotia v Saskatoon Salvage Co.(1954) Ltd.* (1983), 29 Sask R 112 (CA). This framework invites consideration of whether: (a) the applicant had a bona fide intention to appeal within the time limited for an appeal; (b) the applicant has at least an arguable case; and (c) the grant of the extension of time is apt to cause prejudice to the respondent. The case law

> emphasizes that the factors are not prerequisites but only customary considerations in the analysis of what is just and equitable. See, for example, *Wallace v Canadian National Railway*, 2010 SKCA 56 at para 11, 350 Sask R 249, and *Sparvier v Lac La Ronge Indian Band*, 2011 SKCA 115 at para 10. In this context, Ryan-Froslie J.A. explained, "[i]n order to succeed in his application, [the applicant] does not need to establish each of the factors .... Rather, he must show that, taking those factors into account, it is just and equitable to extend the time for appeal": *Taheri v Vujanovic*, 2018 SKCA 40 at para 22, 36 CPC (8th) 82 [*Taheri*]. Justice Whitmore wrote in this context in *Fiesta Barbeques Limited v Andros Enterprises Ltd.*, 2018 SKCA 32 at para 21: "These factors and considerations are to be balanced with a view to achieving a just result." See also, *Retail, Wholesale and Department Store Union, Local S-955 v Lilydale Inc.*, 2013 SKCA 56 at para 18, 414 Sask R 303. Each of these cases were decided in the context of a rule of this Court or s. 9(6) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, which allows the extension of time to appeal where it is "just and equitable" to do so.

9. It is submitted that if the Court determines that Harmon is entitled to appeal without obtaining leave, it would be appropriate for the Court to extend the time for Harmon to file a Notice of Appeal as requested by Harmon. A consideration of the three principal factors in *Patel* supports Harmon's position. The fact that Harmon filed its Notice of Motion for leave to appeal and Draft Notice of Appeal on or about June 8, 2020 – just three days after the Sales Process Order issued – indicates that Harmon has had a *bona fide* intention to appeal within the time limit. Harmon also has an arguable case, as set out at paragraphs 8-16 of Harmon's Memorandum of Law filed in support of the application for leave to appeal. Finally, given that Harmon is only seeking an extension to August 4, making the extension period a total of 5 days, Harmon maintains that the grant of the extension of time will not cause significant prejudice to the Respondent or any other party.

Issue 3: Fresh Evidence

10. Rule 59(1) of the *Court of Appeal Rules* provides that:

> A party desiring to adduce fresh evidence on appeal shall, in accordance with existing law, apply to the court for leave to do so by notice of motion returnable on the date fixed for hearing the appeal.

11. In *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9 at para 19, [2019] 2 WWR 452, this Court recently confirmed the four-part test for accepting fresh evidence: (a) the evidence will not be admitted, if by due diligence it could have been used at trial; (b) the evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the action; (c) the evidence must be credible in the sense that it is reasonably capable of belief; and (d) the evidence must be such that if believed could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.

12. It is submitted that Harmon's proposed evidence, an affidavit of William R. I. Brunsdon exhibiting an appraisal completed in July 2020, meets the four-part test for adducing fresh evidence. First, while it may have been possible for Harmon to obtain an updated appraisal at an earlier date, such action did not appear necessary until after Harmon was served with the Receiver's Notice of Application for the Sales Process Order on May 29, 2020 (July 2020 Moneo Affidavit at para 2). Harmon only requested the new appraisal on June 8, 2020. Second, the proposed evidence is relevant as it supports Harmon's principal argument, being that the market value of the Millar Property is much higher than the $3,800,000 list price authorized by the Sales Process Order. Third, the proposed evidence is reasonably capable of belief, as it is an affidavit that is sworn by an experienced commercial property appraiser which exhibits a detailed appraisal of the Millar Property. Fourth, it is submitted that the proposed evidence, if believed, would have affected the result because if the Chambers Judge had the proposed evidence before him, he would not have been able to assign little weight to the Brunsdon Report on account of the date of the report.

V. RELIEF REQUESTED

13. It is respectfully submitted that this Court grant the following relief to Harmon:

(a) A declaration that Harmon is entitled to an appeal without obtaining leave of the Court;

(b) If the Court grants a declaration entitling Harmon to an appeal, an order extending the time to file a Notice of Appeal;

(c) An Order granting Harmon leave to adduce fresh evidence; and

(d) Such further and other relief as counsel may request and this Honourable Court may allow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

DATED at the City of Saskatoon, in the Province of Saskatchewan, this 29th day of July, 2020.

Leland Kimpinski LLP

Per:_____
Solicitor for the Proposed Appellant,
Harmon International Industries Inc.

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VI. LIST OF AUTHORITIES

1. *MNP Ltd. v Wilkes*, 2020 SKCA 66.

2. *Patel v Whiting*, 2020 SKCA 49.

3. *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9, [2019] 2 WWR 452.

TAB 1

Court of Appeal for Saskatchewan
Docket: CACV3427

Citation: *MNP Ltd. v Wilkes*, 2020 SKCA 66
Date: 2020-05-29

Between:

MNP Ltd., receiver of King Edward Apartments Inc. and Atrium Mortgage Investment Corporation

Applicants to Strike/Respondents on Time and Leave/Prospective Respondents

And

Cameron Wilkes, Hee Jung Koh, Allan Hall, and Bonnie Hall

Respondents on Strike/Applicants to Extend Time and for Leave/Prospective Appellants

And

Holly Wilkes, Trent Fraser, Gaye Fraser, Dev Francis, Glenda Francis, Richard Coupal, Joanne Coupal, Ed's Backhoe Service Inc., City Wide Paving Ltd., Superior Homes, LCC, 101141214 Saskatchewan Ltd., Double Star Drilling (Saskatchewan) Ltd., De Integro Investment Group Inc., A-1 Rent-Alls Ltd., Cormode & Dickson Construction (Southern SK) Ltd., Certified Plumbing & Heating Ltd., KF Kambeitz Farms Inc., Rob Seay, and Voltz Electric Inc.

Interested Parties

Before:	Jackson, Caldwell and Tholl JJ.A.
Disposition:	Application to strike dismissed; application to extend time to appeal granted; application for leave to appeal dismissed as unnecessary
Written reasons by:	The Honourable Madam Justice Jackson
In concurrence:	The Honourable Mr. Justice Caldwell The Honourable Mr. Justice Tholl
On application from:	QB 2905 of 2016, Regina
Applications heard:	October 7, 2019
Counsel:	Curtis Onishenko for Cameron Wilkes et al. Jeffrey Lee, Q.C., for MNP Ltd. Jared Epp for Atrium Mortgage Investment Corporation Jacey Safnuk for Superior Homes, LLC

Jackson J.A.

I. Introduction

[1] These reasons resolve three applications made under s. 193 of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], and the *Bankruptcy and Insolvency General Rules*, CRC, c 368 [the *General Rules*]. The applications play out in the context of the insolvency of a corporation, King Edward Apartments Inc. [KEAI]. At the core of the dispute is the sale of two lawsuits commenced by KEAI [KEAI Lawsuits] to KEAI's principal secured creditor, Atrium Mortgage Investment Corporation [Atrium].

[2] In November of 2016, Atrium applied in the Court of Queen's Bench Chambers under s. 243(1) of the *BIA*, and related provincial statutes, to have MNP Ltd. appointed the receiver of KEAI. Atrium then bought KEAI's principal assets, not including the KEAI Lawsuits, by means of a credit bid, leaving a substantial continuing liability. In December of 2018, the receiver applied for an order approving the sale of the KEAI Lawsuits for $200,000 to Atrium.

[3] Cameron Wilkes, Hee Jung Koh, Allan Hall, and Bonnie Hall [Wilkes Group] are some of the shareholders of KEAI and some of the guarantors of its remaining debt to Atrium. The Wilkes Group values the lawsuits at in excess of $10,000,000 and opposes the receiver's sale of the lawsuits to Atrium. In addition to asserting that the KEAI Lawsuits are worth much more than $200,000, they allege that Atrium bought the KEAI Lawsuits with the intention of compromising them, which will leave the Wilkes Group with no ability to reduce their liability to Atrium under their personal guarantees. They also assert that allowing Atrium to buy the lawsuits has the potential to result in Atrium receiving a windfall.

[4] On April 16, 2019, a judge of the Court of Queen's Bench sitting in Chambers approved the sale of the KEAI Lawsuits to Atrium for $200,000 (*Atrium Mortgage Investment Corporation v King Edward Apartments Inc*. (16 April 2019) Regina, QBG 2905 of 2016 (QB) [*Chambers Decision*]). On May 15, 2019, the Wilkes Group filed a notice of appeal of the *Chambers Decision*. By filing on that date, the Wilkes Group missed the appeal window. Rule 31(1) of the *General Rules* requires all appeals and applications for leave to appeal under s. 193 of the *BIA* to be brought within ten days.

[5] The receiver then applied to strike the notice of appeal on the basis not only that it was out of time, but on the primary basis that the Wilkes Group did not have a right of appeal, and, as leave had not been sought, they should not be granted the double indulgence of being granted leave to appeal and leave to do so beyond the time period stipulated in the *General Rules*.

[6] The receiver's application to strike resulted in the Wilkes Group applying for a determination that they had an appeal as of right. But, if they did not have a right of appeal, they asked that leave to appeal be granted to them. In any event, they sought an order extending the time to appeal under the *General Rules* to the date the notice of appeal was actually filed.

[7] For the reasons that follow, I have concluded that the Wilkes Group have an appeal as of right under s. 193(c) of the *BIA*, which means they did not need to seek leave to appeal and the receiver's application to strike must be dismissed. I have also concluded that their application to extend the time to appeal should be granted.

II. Primary Provisions of the *BIA* and the *General Rules*

[8] The primary provisions under consideration in this appeal are the definition of property in s. 2 and s. 193 of the *BIA*:

Definitions

2 In this Act, …

property means any type of property, whether situated in Canada or elsewhere, and includes money, goods, things in action, land and every description of property, whether real or personal, legal or equitable, as well as obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, in, arising out of or incident to property; (*bien*)

…

Appeals

Court of Appeal

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

Définitions et interprétation

2 Les définitions qui suivent s'appliquent à la présente loi. …

bien Bien de toute nature, qu'il soit situé au Canada ou ailleurs. Sont compris parmi les biens les biens personnels et réels, en droit ou en equity, les sommes d'argent, marchandises, choses non possessoires et terres, ainsi que les obligations, servitudes et toute espèce de domaines, d'intérêts ou de profits, présents ou futurs, acquis ou éventuels, sur des biens, ou en provenant ou s'y rattachant. (*property*)

…

Appels

Cour d'appel

193 Sauf disposition expressément contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal

following cases:

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

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

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

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

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

RS, 1985, c B-3, s 193 1992, c 27, s 68.

(Emphasis added)

dans les cas suivants :

a) le point en litige concerne des droits futurs;

b) l'ordonnance ou la décision influera vraisemblablement sur d'autres causes de nature semblable en matière de faillite;

c) les biens en question dans l'appel dépassent en valeur la somme de dix mille dollars;

d) la libération est accordée ou refusée, lorsque la totalité des réclamations non acquittées des créanciers dépasse cinq cents dollars;

e) dans tout autre cas, avec la permission d'un juge de la Cour d'appel.

LR (1985), ch B-3, art 193 1992, ch 27, art 68.

(Emphasis added)

[9] The applicable provisions from the *General Rules* are as follows:

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)

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 1DORS/2007-61, art 63(A)

III. Background

[10] In 2012, the Wilkes Group, along with others, formed KEAI for the purposes of pursuing the development of a five-building multi-family residential complex on land in Regina [Development]. The cost of the Development was estimated to be $18,000,000. The shareholders of KEAI invested $3,235,000. KEAI obtained financing for the balance of the cost from Atrium

in the amount of $12,800,000 [the Loan]. In addition to the usual mortgages granted to Atrium, the Wilkes Group executed joint and several personal guarantees of the Loan.

[11] According to the affidavit evidence of the Wilkes Group, the general contractor, Cormode & Dickson Construction (Southern SK) Ltd. [general contractor], after having been advanced approximately $11,000,000, failed to pay a significant subcontractor, placing the Development in jeopardy. On July 14, 2016, KEAI issued a claim against Cormode & Dickson Construction (1983) Ltd., the parent company of the general contractor. On November 9, 2016, KEAI issued a second claim against the general contractor and two of its principals. These are the two lawsuits previously referred to in the introduction using the term the "KEAI Lawsuits". These lawsuits claim, *inter alia*, damages for breach of contract, negligence and breach of trust plus an accounting of all funds received by the general contractor. The losses to KEAI are described in detail in the lawsuits, but the exact amount of the loss is not stated.

[12] Meanwhile, on September 1, 2016, KEAI defaulted on its obligations to Atrium under the Loan. On October 6, 2016, Atrium formally demanded payment of the Loan from KEAI.

[13] On November 25, 2016, Atrium applied in the Court of Queen's Bench Chambers for the appointment of MNP Ltd. as the receiver of the assets of KEAI. At that time, KEAI owed $11,958,129.52 to Atrium. The application was granted.

[14] The following chronology recounts the progression of the receivership as it relates particularly to the KEAI Lawsuits:

Date	**Action**
July 19, 2017	Order granted in the Court of Queen's Bench Chambers authorizing the receiver to borrow up to $8,800,000 for the purposes of the receivership, including the completion of the Development. The receiver borrowed this amount from Atrium.
October of 2018	Order granted in the Court of Queen's Bench Chambers approving the sale of the Development to Atrium for a credit bid of $14,500,000.
November 23, 2018	Atrium served a statement of claim in QB 2495 of 2018 on the guarantors of KEAI's debt seeking recovery of $7,102,768.39 as of November 9, 2018, with interest at 8.50% compounded monthly [Guarantee Lawsuit] being the amount remaining from the Loan plus interest.
December 19, 2018	Atrium offered to buy the KEAI Lawsuits from the receiver for $200,000, which amount would be set off against the balance owing from KEAI to the receiver. Atrium reserved the right to enter into a competitive bidding process, if a greater offer were received.

Date	Action
February 7, 2019	The receiver sent Atrium's proposal to buy the KEAI Lawsuits to all parties on the service list in the receivership proceedings. The receiver invited all parties on the service list to submit a superior cash offer to purchase the KEAI Lawsuits on or before February 21, 2019. No bids were forthcoming.
March 22, 2019	The receiver applied in the Court of Queen's Bench Chambers for an order approving the sale of the KEAI Lawsuits to Atrium for $200,000. The Wilkes Group opposed the sale.

[15] As I have indicated, on April 16, 2019, the Chambers judge approved the sale of the KEAI Lawsuits to Atrium for $200,000. The Wilkes Group appealed, resulting in the cross-applications described in the introduction to these reasons.

IV. Issues

[16] The cross-applications before the Court result in the following issues:

(a) Does the Wilkes Group have an appeal as of right under s. 193 of the *BIA*?

(b) If no, should the Wilkes Group be granted leave to appeal under s. 193(e) of the *BIA*?

(c) If the answer to either of the above questions is yes, should leave be granted to allow the Wilkes Group to late file?

V. The Right of Appeal Under s. 193

[17] The receiver's position is that the Wilkes Group was required to obtain leave to appeal under s. 193(e) because none of the other categories contained in s. 193(a) through s. 193(d) of the *BIA* apply. As to the application of s. 193(c) to this case, the receiver asserts that the law has changed. Whereas at one time s. 193(c) may have been given a wide and liberal interpretation, the receiver submits that it now must be construed narrowly. In support of its position, the receiver relies on, *inter alia*, *Alternative Fuel Systems Inc v Edo (Canada) Ltd. (Trustee of)*, 1997 ABCA 273 (CanLII) [*Alternative Fuel*], and *2403177 Ontario Inc. v Bending Lake Iron Group Limited*, 2016 ONCA 225 at para 45, 396 DLR (4th) 635 [*Bending Lake*]. The position of the Wilkes Group is that they have an appeal as of right under s. 193, such that they are not required

to obtain leave to appeal. They do not seriously assert a right of appeal under any of the other clauses of s. 193 other than s. 193(c) – "the property involved in the appeal exceeds in value ten thousand dollars". In support of its position, the Wilkes Group relies on *Trimor Mortgage Investment Corporation v Fox*, 2015 ABCA 44, 26 Alta LR (6th) 291 (in Chambers) [*Trimor*], and the decisions referred to therein.

[18] Unhindered by prior case law, and applying the principles of statutory interpretation, I would conclude that Parliament signaled a right of appeal under s. 193(c) that eliminates only a narrow class of cases from appellate review. Indeed, that is the approach that has been taken by this Court in the few cases from this jurisdiction: *Saskatoon Sound City Ltd. (Bankrupt), Re* (1989), 80 Sask R 226 (CA) at para 1, and *Rocky Meadows Transport Ltd. v Double D Construction Ltd.* (1999), 177 Sask R 264 (CA) at para 5. See also *Wong v Luu*, 2013 BCCA 547, [2014] 4 WWR 504 (in Chambers), where the judge made these *obiter* comments regarding the breadth of s. 193(c): "The right of appeal under the *Bankruptcy and Insolvency Act* is broad, generous and wide-reaching. A right of appeal exists, for example, in respect of any matter if the property in question has a value greater than $10,000. This can hardly be thought of as a limited right of appeal; to the contrary, the bar is set low indeed" (at para 23).

[19] That said, in recent times in particular, there has arisen a large body of case law regarding not only s. 193(c) but the interpretation of s. 193 generally. By way of a broad overview of this case law, there has been a steady narrowing of two of the separate categories of rights of appeal in s. 193. For example, since *Elias v Hutchinson* (1981), 121 DLR (3d) 95 (Alta CA), there have been few cases grounding a right of appeal in future rights under s. 193(a). On this point, see Kenneth David Kraft and Ethan Chang, *The Judge Got It Wrong? A Look at the Appeal Provisions of the BIA*, (2016) Ann Rev Insolv Law 15 at 615–642 (WL). According to these authors, the "only matter that appears unquestionably to be a 'future right' is the grant, or refusal to grant, of a bankruptcy order".

[20] Similarly, the phrase "if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings" in s. 193(b) is now confined to similar cases in the context of the specific bankruptcy before the court: *Camirand Ltée c Gagnon* (1924), 5 CBR 518 (Que CA), see also *Norbourg Asset Management Inc., Re*, 2006 QCCA 752 at paras 9–11, 33 CBR

(5th) 144. Only s. 193(d) is interpreted precisely according to its terms, which provides a right of appeal "from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars".

[21] The overarching issue presented by the applications before the Court is how s. 193(c) should be interpreted; and, in point of fact, whether it should be interpreted in a like manner to s. 193(a) and s. 193(b) so as to narrow access to the appeal court when a decision is made under the *BIA*. On this issue, the jurisprudence reveals two approaches as to how s. 193(c) might be interpreted.

A. Two approaches to interpretation

1. *Orpen–Fallis* line of authority

[22] The Wilkes Group relies on a line of authority stemming from *Orpen v Roberts*, [1925] 1 SCR 364 [*Orpen*]. In *Orpen*, on a preliminary motion, the Registrar of the Supreme Court of Canada had been called upon to interpret s. 39 of *The Supreme Court Act*, SC 1906, c 139, as amended by *An Act to amend the Supreme Court Act*, SC 1920, c. 32, to read as follows:

> **Restrictions.**
> **39.** Except as otherwise provided by sections thirty-seven and forty-three, notwithstanding anything in this Act contained, no appeal shall lie to the Supreme Court from a judgment rendered in any provincial court in any proceeding unless, —
>
> **Value over $2,000.**
> *(a)* the amount or value of the matter in controversy in the appeal exceeds the sum of two thousand dollars; or,
>
> **Special leave.**
> (b) special leave to appeal is obtained as hereinafter special provided.
>
> RS c 139, ss 46, 48 and 49 in part.
>
> (Emphasis added)

[23] In applying this provision to determine whether the Court would have jurisdiction over an appeal from a *quia timet* action, the Registrar held that "in all *quia timet* actions relief can be given in this court, although the damages have not yet been incurred, if in consequence of the judgment in appeal they would amount to more than $2,000" (*Orpen* at 367). The reported decision records the words of the Court dismissing the appeal from the Registrar's decision (at 367):

> An appeal taken from the order made by the registrar was dismissed. The court said the subject matter of the appeal is the right of the respondent to build on the street line on Carlton street in the city of Toronto. "The amount or value of the matter in controversy" (section 40) is the loss which the granting or refusal of that right would entail. The evidence sufficiently shows that the loss – and therefore the amount or value in controversy – exceeds $2,000.
>
> (Emphasis added)

[24] A long line of authority maintained the *Orpen* interpretation of *The Supreme Court Act*, as long as that Court's jurisdiction depended on a monetary limit, and has influenced the interpretation of similar statutes. *Fallis v United Fuel Investments Limited*, [1962] SCR 771 [*Fallis*], is the leading exemplar of this line.

[25] In *Fallis*, the Supreme Court of Canada was interpreting s. 108 of the *Winding-up Act*, RSC 1952, c 296, which provided access to the Supreme Court of Canada in these terms:

> **Appeal to Supreme Court of Canada**
>
> **108.** An appeal, if the amount involved therein exceeds two thousand dollars, lies by leave of a judge of the Supreme Court of Canada to that Court from the highest court of final resort in or for the province or territory in which the proceeding originated.

[26] On an application to quash an order granting leave to appeal to the Court under s. 108, Cartwright J. for the Court held that the "test to be applied in determining whether there is an amount involved in the proposed appeal exceeding $2000 is that set out in the judgment of this Court in *Orpen* …" (at 774), i.e., what is the loss which the granting or refusal of that right would entail. It was accepted in *Fallis* that if the winding-up order were maintained the holders of the class "B" preferred shares would receive no more than $30 per share. In response to this evidence, the appellant, Mr. Fallis, had filed an affidavit "shewing that he is the owner of more than 1200 of the Class 'B' Preference shares and expressing the opinion that but for the order winding-up the company the market price of the Class 'B' shares would now exceed $80 per share" (at 773–774). With no contradiction of this evidence, and applying the *Orpen* test to those facts, the Supreme Court held that the appeal did involve more than $2,000 so as to bring it within the jurisdiction of the Court as fixed by s. 108.

[27] All of the decisions that grant or refuse leave by focussing on the value of the property involved in the appeal as those words are used in s. 193(c) of the *BIA*, as opposed to some other question, are applications of the *Orpen–Fallis* test. A good example of the application of the *Orpen–Fallis* line of cases by provincial appeal courts determining jurisdiction under s. 193(c) is

McNeill v Roe, Hoops & Wong (1996), 71 BCAC 213 (CA) [*McNeill*], which the Chambers judge aptly summarizes in *Galaxy Sports Inc. v Abakhan & Associates Inc.* (2003), 183 BCAC 192 (CA) [*Galaxy*], as follows:

> [12] … Finch J.A. (as he then was) [in *McNeill*] made the following helpful comments on behalf of the Court:
>
> > [11] An appeal lies as of right under s. 193(c) "… if the property involved in the appeal exceeds in value ten thousand dollars". In *Fallis et al. v. United Fuel Investments Ltd.* (1962), 4 C.B.R. (N.S.) 209, the Supreme Court of Canada considered the meaning of the words "amount involved" where they appeared in s. 108 of the *Winding-up Act*, R.S.C. 1952, c. 296. The court adopted the test enunciated in *Orpen v. Roberts*, [1925] S.C.R. 364, [1925] 1 D.L.R. 1101, namely that: "The amount or value of the matter in controversy, … is the loss which the granting or refusal of that right would entail" (*Fallis* at 211). In a comment following the report of this case in the *Canadian Bankruptcy Reports*, it was said that the meaning of "amount involved" in the *Winding-up Act* was substantially the same as the meaning of "property involved" in the *Bankruptcy Act*. That interpretation has been adopted by Mr. Justice Hollinrake in *Ng v. Ng* (3 February 1995), Vancouver CA019800 (B.C.C.A.); by Mr. Justice Macfarlane in *Re Scott Road Enterprises* (1988), 68 C.B.R. (N.S.) 54 at 58 (B.C.C.A.); and by Mr. Justice Macdonald in *Kenco Developments Ltd. v. Miller Contracting Ltd.* (1984), 53 C.B.R. (N.S.) 297 (B.C.C.A.). I can see no reason to do otherwise.
>
> [13] Finch J.A. referred to the definition in s. 2 of the *Act* as including "money" and observed, at para. 13, that "the 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal". He concluded that, since the conditional discharge required the bankrupt to pay $168,750 to the creditors and he sought a variation to require him to pay only $40,000, the loss to the creditors if the appeal should succeed would far exceed the sum of $10,000, and the bankrupt accordingly had an appeal as of right under ss. 193(c) of the *Act*.
>
> [14] Here, in the opinion of the trustee, if the proposal succeeds the creditors will receive substantially more than they will if it is rejected. Further, if the orders made by Madam Justice Brown are not overturned, it is likely that the statutory criteria for acceptance of the proposal by the creditors, which had been met at the creditors' meeting, will not be met at a second meeting, with the result that Galaxy will be deemed to have assigned into bankruptcy. In my view, applying the above test, it follows that there is property of a value in excess of $10,000 involved in the appeals, and Galaxy has an appeal as of right pursuant to ss. 193(c) of the *Act*.
>
> (Emphasis added)

Other British Columbia decisions following *McNeill* and *Galaxy* include *Kostiuk (Re)*, 2006 BCCA 371, [2006] 10 WWR 259 [*Kostiuk*], and *Farm Credit Canada v West-Kana Farms Ltd*., 2014 BCCA 501, 68 BCLR (5th) 333.

[28] Two decisions outside of British Columbia bear particular mention: *Roman Catholic Episcopal Corporation of St. George's v John Doe - 49 - GBS*, 2007 NLCA 17, 265 Nfld & PEIR 49 (in Chambers) [*John Doe*], and *Trimor*, relied on by the Wilkes Group, and recently receiving favourable commentary in *1905393 Alberta Ltd. v Servus Credit Union Ltd.*, 2019 ABCA 269 at para 26, 72 CBR (6th) 20 [*Servus*].[1]

[29] In *John Doe*, which follows *McNeill* as discussed in *Galaxy*, the Court dealt with a case where victims of sexual abuse had given proofs of claim to the trustee who rejected them on the basis that they had been filed after the claims bar date. On appeal, the issue of s. 193(c) was raised and the Court dealt with the matter as follows:

> [24] With respect to the argument of the Trustee that it is entitled to appeal as a matter of right because the property involved exceeds in value $10,000.00, counsel for the four respondents argues that the decision of the bankruptcy judge is procedural only and does not involve any sum of money. He submits that the bankruptcy judge made no determination as to entitlement of any of the respondents and, therefore, the issue in the appeal is only as to procedure. He also argues that there was no "property in peril" in the decision of the bankruptcy judge, and for that reason also, paragraph (c) is inapplicable.
>
> [25] On examination of the actual words of paragraph (c), I am unable to accept either of the arguments of counsel for the four respondents. Admittedly there was no "property in peril" but, in my view, the statute does not require a prospective appellant to establish property to have been in peril in the decision intended to be appealed. …
>
> …
>
> [27] Relying on that definition, and applying the test adopted in *Fallis*, I can only conclude that "the loss which the refusal of a right of appeal would entail" in this case is clearly more than $10,000.00. From the point of view of Class 1 creditors, Class 3 creditors, and the Corporation, the loss is potentially $2,000,000.00. The Proposal, as noted above, provides that any funds in the Class 4 creditors trust fund not required for Class 4 creditors are to be available: first, for the Class 1 creditors; second, for the Class 3 creditors; and any residue for the Corporation. Unquestionably, refusal of a right of appeal potentially involves their interests in a significant sum of money. The Trustee is obligated to protect the interests of those parties to the Proposal, in the assets realized. In my view, therefore, the Trustee has a right of appeal pursuant to paragraph (c) of section 193.
>
> (Emphasis added)

[30] In *Trimor*, the respondents were preferred shareholders of a debtor that had received a default judgment in the amount of $272,000 arising from a claim alleging breach of their

[1] In *Servus*, among other matters, leave to appeal was granted to determine whether s. 193(a) or s. 193(c) obviated the need to apply for leave to appeal. When the matter was heard, the Alberta Court of Appeal found it unnecessary to address that question (see *Pricewaterhousecoopers Inc v 1905393 Alberta Inc.*, 2019 ABCA 433 at para 19, 98 Alta LR (6th) 1).

shareholders' agreement, a breach of fiduciary duty by the bankrupt, fraud, misrepresentation and unlawful enrichment. The trustee disallowed the claim, taking the position that it had not been adjudicated. On application by the respondents, a Court of Queen's Bench Chambers judge found neither the court nor the trustee had the authority to challenge the default judgment. On the trustee's appeal, the respondents challenged the trustee's assertion that it had an appeal as a matter of right.

[31] Applying *Orpen* and *Fallis*, and the line of authority based on these two decisions, the appeal court Chambers judge determined that the issue on appeal would be whether the trustee had the authority to consider the merits of the claim underlying the default judgment. In finding the appeal fell squarely within s. 193(c), the Chambers judge made these two statements of particular relevance to the applications before this Court:

(a) "the amount or value of the matter in controversy is the loss which the granting or refusal of that right would entail" (at para 8); and

(b) "[t]he focus of the inquiry under s 193(c) is the amount of money at stake" (at para 10).

Since the amount of money at stake was $272,000, the trustee had an appeal as of right.

[32] Other authorities in the *Orpen–Fallis* line, which refer to the principles mentioned in those cases, include *Newfoundland and Labrador Refining Corporation v IJK Consortium*, 2009 NLCA 23, 52 CBR (5th) 8 [*IJK Consortium*], and *Temple Consulting Group Ltd. v Abakhan & Associates Inc.*, 2011 BCCA 540 at paras 7–8, 90 CBR (5th) 155 [*Temple Consulting*].

[33] Particular note should be made of the approach in Quebec. A modern authority in Quebec is *Wener c Groupe Cantrex inc.*, 1993 CanLII 4171 (Que CA) [*Wener*]. *Wener* relies on *Fogel v Grobstein* (1945), 26 CBR 248 (WL) (Que KB) at paras 27–32 [*Fogel*], which preceded *Fallis*. In *Fogel*, a trustee in bankruptcy sold the assets and business of the bankrupt as a going concern, including the unexpired term of the lease and the right of option to renew it for a further period of five years. The landlord objected to the lease being sold. The Court held that the appeal did not come within s. 193(c). Justice Barclay, as part of a five-judge panel, indicated that the Quebec Court of Appeal had interpreted s. 193(c) as meaning "the value in jeopardy" (at para 6).

For similar decisions see *Charron c Charron*, 2020 QCCA 154 at para 6 (in Chambers), and *Pelletier c CAE Rive-Nord*, 2018 QCCA 1070 at para 1 (in Chambers).

[34] In an annotation to the reported decision in *Fallis*, the editors of the *Canadian Bankruptcy Reports* placed *Fogel* in the *Orpen–Fallis* line of authority (4 CBR (ns) 209 (WL)), as per this quote:

> **Annotation**
>
> [*Fallis*] has important implications so far as the *Bankruptcy Act* is concerned. Under s. 150(c) of the *Bankruptcy Act* an appeal lies to the Court of Appeal in bankruptcy matters if the property involved in the appeal exceeds in value $500. Section 108 of the *Winding-up Act* refers to "amount involved" rather than "property involved" but the meaning would appear to be substantially the same. Prior to the 1949 amendment the *Bankruptcy Act* also used the phrase "amount involved". See R.S.C. 1927, c. 11, s. 174(1)(c).
>
> In the case of *In re Andrew Motherwell Ltd.*, 5 C.B.R. 107, 55 O.L.R. 294, 3 Can. Abr. 594 the Ontario Court of Appeal following the *Cushing-Sulphite* [(1906), 37 SCR 427] case held that a monetary sum must be involved. In a number of subsequent cases it was decided that it was not necessary that the amount involved be represented by dollars but it was sufficient if the appellant could show that his rights might be affected in an amount exceeding $500: *Re Maple Leaf Brewery Ltd.* (1938), 20 C.B.R. 137, 65 Que. K.B. 304, 1 Abr. Con. (2nd) 448; *In re Succession Pierre Tetreault* (1947), 28 C.B.R. 224, 1 Abr. Con. (2nd) 448. On this basis "amount involved" or "property involved" means "amount in jeopardy" not that a monetary sum of $500 must be involved: *Fogel v. Grobstein*, 26 C.B.R. 248, [1945] Que. K.B. 571, 1 Abr. Con. (2nd) 447; *Deslauriers v. Brunet (Vermette)*, 30 C.B.R. 77, [1949] Que. K.B. 629, 1 Abr. Con. (2nd) 443.
>
> In Duncan & Honsberger "Bankruptcy in Canada" 3rd ed., at p. 853, it is stated: "The decisions in which it has been held that there is jurisdiction under this subsection cannot all be reconciled." [*Fallis*] would appear to have overcome this difficulty. It would seem that the *Andrew Motherwell* and *Cushing* cases are no longer good law. If the loss, which the granting or refusing of the right claimed, exceeds $500 then there will be an appeal.
>
> (Emphasis added)

See also *Ng v Ng* (1995), 54 BCAC 307 (CA) [*Ng*], where the Chambers judge quoted the above passages from the *Canadian Bankruptcy Reports* in support of a conclusion that an appeal from a decision preventing the spouse of a bankrupt from pursuing an action to enforce a separation agreement was an appeal falling in s. 193(c) because "the property involved in the lawsuit that the appellant seeks to continue by order of the court is in excess of $10,000" (at para 14).

[35] A concise synthesis of much of the above case law may be found in Janis P. Sarra, Geoffey B. Morawetz and the L.W. Houlden, *The 2019-2020 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomson Reuters, 2019), as follows:

> "Property involved" means that the property in jeopardy as a result of the judgment must have a value in excess of $10,000, but it is not necessary that the judgment be for a monetary sum of $10,000: *Fogel v. Grobstein* (1945), 26 C.B.R. 248 (Que. C.A.); *Drislauriers v Brunet (Vermette)* (1949), 30 C.B.R. 77 (Que. C.A.); *Apex Lumber Co. v. Johnstone* (1925), 7 C.B.R. 157 (B.C. C.A.). In *Fallis v. United Fuel Investments Ltd*., [1962] S.C.R. 771, 4 C.B.R. (N.S.) 209, 34 D.L.R. (2d) 175, the court said that the proper test is: What is the loss that the granting or refusing of the right claimed will entail?
>
> (Emphasis added)

2. *Alternative Fuel–Bending Lake* approach to s. 193(c)

[36] As I have indicated, the receiver relies on *Alternative Fuel* and *Bending Lake*. Before considering these decisions, it is convenient to begin with a review of *Coast Shingle Mill Company (Re)*, [1926] 2 WWR 536 (BCCA) [*Coast*], as it is the start of a line of jurisprudence that seems to have been directed at narrowing the type of cases for which there would be a direct right of appeal when the appellant asserts a *claim* of loss, rather than an actual loss. In *Coast*, the issue was whether the judge in the court appealed from had erred by ordering that a matter proceed by way of an action rather than by way of an application brought in Chambers. A five-judge panel of the Court agreed that this was "a question of procedure alone" (emphasis added, at 537) and quashed the appeal. See also *Goupil* (1923), 29 Revue Legale 102, and *Cie de Ste Foye (Re)* (1918), 1 CBR 165 (Que KB).

[37] This line of authority was given new life in *Dominion Foundry Co. (Re)* (1965), 52 DLR (2d) 79 (Man CA) [*Dominion Foundry*]. A three-judge panel of the Manitoba Court of Appeal dealt with an appeal of a decision dismissing a motion (a) to set aside a trustee's proposed sale of the debtor's assets, (b) to restrain the trustee from completing the sale, and (c) directing that a further meeting of the inspectors be held to reconsider the method of advertising the sale. The Court expressed concern that a broad reading of s. 193(c), which at that point had set a threshold of only $500, would, in effect, give automatic rights of appeal in every case (at 81):

> When it comes to a matter of a complete disposition of all of the assets of a bankrupt estate, the question is bound to exceed $500 (otherwise there would be no bankrupt). Also, once the assets of the bankrupt have been disposed of, any future rights of creditors are non-existent, as a general rule. Thus, if we were to construe these two subsections in such a way as to authorize an appeal in this case, it seems to me we would have to do so in every case. There would be an automatic appeal from any judgment respecting the decision of a trustee in bankruptcy to sell all the assets of the bankrupt. This is clearly not intended by the *Bankruptcy Act* when read as a whole, because it would defeat the whole purpose of the *Act*, which provides for a trustee and inspectors and imposes a duty on them to dispose of the assets of the bankrupt and distribute the proceeds amongst the creditors.
>
> (Emphasis added)

[38] The appeal court went on to distinguish *Fallis* (at 83–84):

> I am of the opinion that this decision is readily distinguishable from the case at bar. In the [*Fallis*] case, a voluntary winding-up was sought, and Fallis and his associates clearly established that if the company were wound up their interests in the company (greatly in excess of $2,000) would be in jeopardy.
>
> In the motion before us, we have passed beyond the realm of common law civil dispute. We are now under the statute law of the *Bankruptcy Act*. The company is actually found to be bankrupt and has been placed by the Court in the hands of a trustee with his attendant inspectors advising and assisting in the making of decisions relating to the duties imposed upon the trustee. The methods employed by the trustee and his inspectors to dispose of the assets of the bankrupt have been called in question. This is surely a matter of procedure. With respect, I adopt the language of Chief Justice Macdonald of the British Columbia Court of Appeal in *Re Coast Shingle Mill Co., Limited*, 7 C.B.R. 553, where he says, at p. 554:
>
> > There are a number of cases bearing upon different facts, but on this fact they seem to agree, that where the question is a question of procedure it does not fall within either (a) or (c) of subsec. (2) of sec. 74 [6 C.B.R. 208]; that is to say, no question of future rights arises, nor does any question of a specific sum of money.
>
> (Emphasis added)

[39] Two aspects of *Dominion Foundry* are often cited by courts when finding there is no right of appeal under s. 193(c) in the context of a particular case:

(a) s. 193(c) should not be read too broadly, otherwise there would be a right of appeal in all cases; and

(b) questions of procedure do not fall within s. 193(c).

[40] *Alternative Fuel*, relied upon by the receiver in this case, is an example of the second proposition. In *Alternative Fuel*, a judge of the Court of Queen's Bench sitting in bankruptcy

directed the sale of certain equipment to company A, which had been allowed to submit a higher bid outside of the original tendering process. Company B, which had been the highest bidder within the tendering process, applied for a ruling that leave was not required, or alternatively, for leave to appeal. Relying on *Dominion Foundry*, the Chambers judge held that company B had no right of appeal under s. 193(c) because it was challenging "the method by which the equipment is to be sold, namely bypassing the tender procedure" (at para 11). The Chambers judge then went on to grant leave as the question was of significance to bankruptcy practice and to the parties.

[41] *Business Development Bank of Canada v Pine Tree Resorts Inc.*, 2013 ONCA 282, 115 OR (3d) 617 [*Pine Tree*], cites both aspects of *Dominion Foundry*, i.e., the need to narrow access and that matters of procedure do not fall within s. 193(c). In *Pine Tree*, a judge of the Superior Court of Ontario had appointed a receiver to administer all the assets of the debtor. The debtor and the second mortgagee sought to appeal the order appointing the receiver. A judge sitting in Chambers held that neither the debtor nor the second mortgagee had a right of appeal. Relying on *Dominion Foundry* to so hold, the Chambers judge wrote as follows:

> [17] Nor do I accept the argument that the property in the appeal exceeds in value $10,000 for purposes of s. 193(c). As noted by the Manitoba Court of Appeal in *Dominion Foundry Co.*, at para. 7, to allow an appeal as of right in these circumstances would require doing so in almost every case because very few bankruptcy cases would go to appeal where the value of the bankrupt's property did not exceed that amount. More importantly, though, an order appointing a receiver does not bring into play the value of the property; it simply appoints an officer of the court to preserve and monetize those assets, subject to court approval.
>
> (Emphasis added)

[42] That brings the Court to *Bending Lake*, which was an appeal of an order transferring all of the debtor's property to an unrelated purchaser. The Chambers judge determined that two contextual factors "militate against employing an expansive application of the automatic right of appeal contained in s. 193(c)" and "point to the need for an approach which is alive to and satisfies the needs of modern, 'real-time' insolvency litigation" (at para 53). The Chambers judge discussed the two contextual factors:

> [49] First, the predecessor section to the modern s. 193(c) was enacted in 1919, at a time when the then *Bankruptcy Act* did not include the right to seek leave to appeal in the event a decision did not fall within one of the categories giving automatic rights of appeal. As Doherty J.A. observed in *Re Ravelston Corp.* [(2005) 24 CBR (5th) 256 (Ont CA)], the earlier absence in s. 193 of an ability to seek leave to appeal prompted courts to

> give categories of appeals as of right a wide and liberal interpretation in order to avoid closing the door on meritorious appeals. The 1949 inclusion of the leave to appeal right now found in s. 193(e) removes the need for such a broad interpretative approach.
>
> [50] Second, Canada's other major insolvency statute, the *Companies' Creditors Arrangement Act*, R.S.C. 1985, c. C-36 (the "*CCAA*"), contains, in s. 13, an across-the-board requirement to obtain leave to appeal from any order made under that Act. The automatic right of appeal provisions in ss. 193(a) to (d) of the *BIA* do not work harmoniously with the *CCAA*'s appeal regime.

From there, the Chambers judge described the approach he would follow in deciding the case before him:

> [53] In my view, these contextual factors militate against employing an expansive application of the automatic right of appeal contained in s. 193(c) and, instead, point to the need for an approach which is alive to and satisfies the needs of modern, "real-time" insolvency litigation. I shall employ such an approach in applying the following three principles that have emerged from the jurisprudence: s. 193(c) does not apply to (i) orders that are procedural in nature, (ii) orders that do not bring into play the value of the debtor's property, or (iii) orders that do not result in a loss.
>
> (Emphasis added)

[43] The decision in *Bending Lake* has since been extensively followed in Ontario: see *Downing Street Financial Inc. v Harmony Village-Sheppard Inc.*, 2017 ONCA 611, 49 CBR (6th) 173; *First National Financial GP Corporation v Golden Dragon HO 10 Inc*., 2019 ONCA 873, 74 CBR (6th) 1; and *Comfort Capital Inc. v Yeretsian*, 2019 ONCA 1017, 75 CBR (6th) 217.

[44] Outside of Ontario, *Bending Lake* has been followed in *McDonnell Group, LLC v Control Mobile Inc.*, 2018 BCCA 309, [2019] 3 WWR 689 [*McDonnell*]. In *McDonnell*, the debtor filed an action against one of its creditors. After a receivership order was made, the creditor then offered to buy the debtor's assets, including the action. The debtor sought to prevent the sale but was unsuccessful, leading to an appeal. The Chambers judge held that the application did not fall under s. 193(c) as there was no evidence demonstrating the vesting of the action would result in a loss of more than $10,000. See also *7451190 Manitoba Ltd v CWB Maxium Financial Inc.*, 2019 MBCA 95.

B. Approach to follow

[45] *Bending Lake* rests on a line of Chambers decisions that have held that s. 193(c) should be construed narrowly but takes those cases further. It supports a narrow construction of s. 193(c) on the following bases:

(a) by adding what is now s. 193(e) in 1949, Parliament signalled an intention to narrow the other categories in s. 193; and

(b) s. 193 should be interpreted in a manner consistent with the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 [*CCAA*], which permits access to an appeal court by means of a leave provision only.

In place of the *Orpen–Fallis* test, a court applying *Bending Lake* will ask whether the order under appeal is (a) procedural in nature, (b) brings into play the value of the debtor's property, or (c) results in a loss – in order to determine whether there is an appeal as of right. Having examined each of these three principles, and notwithstanding the receiver's arguments in this case, I see no reason to depart from the *Orpen–Fallis* line of authority based on *Alternative Fuel* and *Bending Lake*.

[46] As a preliminary comment, every exercise of statutory interpretation begins with a review of the purposive obligation imposed by the modern principle of statutory interpretation as set out in *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27 at para 21–22 [*Rizzo*], and as noted in Ruth Sullivan, *Driedger on the Construction of Statutes*, 3d ed (Toronto: Butterworths, 1994), and s. 64 of the *Legislation Act, 2006*, SO 2006, c 21, Sch F, and s. 2-10(2) of *The Legislation Act*, SS 2019, c L-10.2. This purposive approach is supported by s. 12 of the *Interpretation Act*, RSC, 1985, c. I-21, which provides that "[e]very enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects". In my respectful view, narrowing the right of access to appellate review is inconsistent with *Rizzo* and s. 12 of the *Interpretation Act*.

[47] I am not certain that the addition of a right to appeal with leave in 1949 should be taken as signalling Parliament's intention that the other rights of appeal conferred by the *BIA* should thereafter be construed narrowly. One might conclude that, after 1949, it would no longer be

necessary to give a strained interpretation to s. 193(a) through s. 193(d) because, with the addition of s. 193(e), it is now possible to grant leave to appeal a meritorious issue that does not fit easily into one of the other four categories for which the *Act* provides an as of right appeal. But, I do not see how adding a requirement to apply for leave on one ground can be used to narrow an existing, unqualified right of appeal on another. As was said recently in *Servus*, "The Parliament of Canada when enacting legislation can be taken to understand its own statute book and the common law and, if it intended therefore by virtue by creating a leave option to eliminate or narrow down the other statutory as of right provisions, it could have done so in a less mysterious way" (at para 25).

[48] In my respectful view, the addition of s. 193(e) should lead neither to a narrow nor an expansive interpretation of the balance of the categories in s. 193. Rather, s. 193(c) and s. 193(e) must be interpreted according to their terms and within their context. As part of this context, it must be understood that prior to the enactment of the *Bankruptcy Act, 1949*, SC 1949, c 7 [*1949 Act*], the equivalent of s. 193 read as follows in s. 74(2) of *The Bankruptcy Act*, SC 1919, c 36 [*1919 Act*]:

Review and Appeal **Appeals in bankruptcy.**	**Revision et appel.** **Appels en matière de faillite.**
74(2) Any person dissatisfied with an order or decision of the court or a judge in any proceedings under this Act may, —	**74**(2) Quiconque est mécontent d'une ordonnance ou d'une décision du tribunal ou d'un juge, dans toutes procédures instituées sous le régime de la présente loi, peut,
(a) if the question to be raised on the appeal involves future rights; or,	*(a)* si la question qui doit être soulevée en appel implique des droits futurs; ou
(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy or authorized assignment proceedings; or,	*(b)* si l'ordonnance ou la décision doivent vraisemblablement influencer d'autres causes d'une nature semblable·dans les procédures de faillite ou de cession autorisée; ou
(c) if the amount involved in the appeal exceeds five hundred dollars;	*(c)* si la somme impliquée dans l'appel dépasse cinq cents dollars; ou
(d) if the appeal is from the grant or refusal to grant a discharge and the aggregate of the unpaid claims of creditors exceeds five hundred dollars;	*(d)* s'il s'agit d'en appeler d'une libération accordée ou refusée et que les réclamations globales des créanciers non payées excèdent cinq cents dollars
appeal to the Appeal Court.	se pourvoir en Cour d'Appel.

[49] In 1949, in addition to adding a right to apply for leave, Parliament also changed *amount* in s. 150(c) to *property*, as follows:

Appeals **Court of Appeal** **150** Unless otherwise expressly provided, an appeal lies to the Court of Appeal from any order or decision of a judge of the court in the following cases:	**Appels.** **Cour d'appel** **150.** Sauf disposition expresse à l'effet contraire, appel est recevable à la Cour d'appel de toute ordonnance ou décision d'un juge du tribunal dans les cas suivants :
(a) if the point at issue involves future rights;	*a)* si le point en litige concerne des droits futurs;
(b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;	*b)* si l'ordonnance ou la décision doit vraisemblablement influer sur d'autres ·causes de, nature semblable dans les procédures en faillite;
(c) if the property involved in the appeal exceeds in value five hundred dollars;	*c)* si les biens en question dans l'appel dépassent en valeur la somme de cinq cents dollars;
(d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred;	*d)* si est accordée ou refusée la libération lorsque la totalité des réclamations non acquittées des créanciers dépasse cinq cents dollars;
(e) in any other case by leave of a judge of the Court of Appeal.	*e)* dans tout autre cas, avec la permission d'un juge de la Cour d'appel.
(Emphasis added)	(Emphasis added)

[50] In the annotation to *Fallis*, above-mentioned, and in *Dominion Foundry* and *McNeil*, it is stated that the *property involved* in the appeal means the same thing as the *amount involved* in the appeal. If this means that the change brought about by the *1949 Act* was of no consequence, I would respectfully disagree. The changes to the *Bankruptcy Act* in 1949, to provide a right of appeal when the property, rather than the amount, exceeds $500 (but currently $10,000), aligned itself with the balance of the *Act*, which had from the enactment of the first *Bankruptcy Act* turned on a definition of *property* in the English version and *bien* in the French (see *The Bankruptcy Act*, SC 1919, c 36, s 2(dd), and *Loi concernant la faillite*, SC 1919, c 36).

[51] On this point, L.W. Houlden, Geoffrey B. Morawetz and Janis P. Sarra, *Bankruptcy and Insolvency Law of Canada*, loose-leaf (Rel 2020-03) 4th ed (Toronto: Carswell, 2005) (WL), commented on the amendment: "Presumably the amendment was made to make it clear that it is unnecessary to have a monetary sum involved for an appellant to be entitled to appeal under s. 193(c)" (at para I§60). I agree. At the very least, the change from the *amount involved* to the *property involved* signalled that the law that had been developing with respect to access to the Supreme Court of Canada, i.e., in the 1925 decision of *Orpen*, was intended to apply to statutes

that were in *pari materia*. The change was not intended to be a reversion to the law that existed prior to *Orpen*, i.e., *Cushing Sulphite-Fibre Company v Cushing* (1906), 37 SCR 427, which was expressly overruled by *Fallis*, albeit after the 1949 amendments.

[52] This interpretation is supported by comments made before the Standing Committee of the House of Commons that was struck to review the proposed *1949 Act* (on December 1, 1949, nine days prior to the *1949 Act* receiving royal assent). With T.D. MacDonald as a witness, the following exchange occurred with Charles-Arthur Dumoulin Cannon, member for Îles-de-la-Madeleine, and Donald Fleming, member for Eglington (*Standing Committee on Banking and Commerce*, 21th Parl, 1st Sess, No 1 (1 December 1949) at 149 (Hon. Charles Cannon, Hon. Donald Fleming, and T.D. MacDonald)):

> **Mr. Cannon**: … What about (b), Mr. Chairman, that is new?
>
> **The Vice-Chairman**: Yes.
>
> **Mr. Cannon**: Is there any particular reason given for that requirement?
>
> **The Witness**: That is 149 (1)(b)?
>
> **Mr. Cannon**: No, 150 (e).
>
> **The Witness**: Just to cover any case that might be worthy of appeal which does not fall within the enumeration. When the bill was first introduced in 1949, section 150 read like this: "Unless otherwise provided in this Act an appeal lies from the order or decision of a judge of a court to the Court of Appeal with leave of a judge thereof"; and that is all that was said. Now, the trouble when it was left that way was this, that it seemed to us that it was left too much up in the air as to the principles upon which a judge would proceed. I can very well see a judge of the court saying; well, you have not given me very much guidance to help me in determining when I should permit an appeal; so it was thought it would be well to leave it substantially as in the present section of the Act, which is now done in clause 150 of the bill, and then somewhat in line with clause 150 of the original draft bill, to put in paragraph (e) so that if the enumeration is not sufficient you provided that the judge can exercise a discretion.
>
> **Mr. Fleming**: It is a residuary right?
>
> **The Witness**: Yes. The enumeration is quite complete, but by adding this subclause (e) you afford the court a discretion so that he may permit an appeal should there be other cases in which justice is not covered by the enumeration.
>
> **Mr. Fleming**: Is this a residual jurisdiction?
>
> **The Witness**: Exactly.
>
> **The Vice-Chairman**: Does clause 150 carry?
>
> Carried
>
> (Emphasis added)

[53] As a final observation in relation to the effect of the addition of a right to apply for leave to appeal under s. 193(e) on the interpretation of s. 193(c), Professor Russell describes what is meant by an appeal with leave (Peter H. Russell, "The Jurisdiction of the Supreme Court of Canada: Present Policies and a Programme for Reform" (October 1968) 6 Osgoode Hall Law Journal 1 at 23):

> The appeal with leave represents a fundamentally different conception of the Supreme Court's function than that embodied in *de plano* appeals. From the litigant's point of view it is both broader and narrower than the appeal as of right. It is broader in the sense that it is available in situations where there is no right to appeal; but it is narrower in that whether or not it is granted depends in the final analysis on the court's discretion and not on the litigant's right. This suggests that the basic rationale for appeals with leave has to do not with the rights or interests of private litigants but with the public interest in the authoritative resolution of difficult and important legal problems.

This provides a further clarification as to how s. 193(e) functions within legislation that, in addition to providing an avenue to apply for leave to appeal, also establishes rights of appeal.

[54] I also question whether it is necessary or possible to construe s. 193 of the *BIA* so as to bring it into harmony with the *CCAA*. Parliament has provided different appeal rights in each of these statutes and must be taken to have done so for a reason. I will not repeat the *BIA* provisions, but the *CCAA* provisions are as follows:

Leave to appeal	**Permission d'en appeler**
13 Except in Yukon, any person dissatisfied with an order or a decision made under this Act may appeal from the order or decision on obtaining leave of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.	**13** Sauf au Yukon, toute personne mécontente d'une ordonnance ou décision rendue en application de la présente loi peut en appeler après avoir obtenu la permission du juge dont la décision fait l'objet d'un appel ou après avoir obtenu la permission du tribunal ou d'un juge du tribunal auquel l'appel est porté et aux conditions que prescrit ce juge ou tribunal concernant le cautionnement et à d'autres égards.
R.S., 1985, c C-36, s 13; 2002, c 7, s 134.	LR (1985), ch C-36, art 132002, ch 7, art 134.

[55] This is a distinctly different right of appeal than what exists in s. 193 of the *BIA*, which establishes four categories where an applicant has a right of direct access to the appeal court, plus an appeal with leave. The difference in statutory language is justified by the differing application of the two Acts. The *BIA* concerns both individual *and* commercial bankruptcies and insolvencies, sometimes including the remedy of a receivership, where the acting official is a

receiver, with powers conferred by the security agreement, and supervised only to some extent by the courts.

[56] The differing application of the *CCAA* and the *BIA*, even in the commercial context, has recently been made plain in *9354-9186 Québec inc. v Callidus Capital Corp*., 2020 SCC 10 [*Callidus*]:

> [39] The *CCAA* is one of three principal insolvency statutes in Canada. The others are the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 ("*BIA*"), which covers insolvencies of both individuals and companies, and the *Winding-up and Restructuring Act*, R.S.C. 1985, c. W-11 ("*WURA*"), which covers insolvencies of financial institutions and certain other corporations, such as insurance companies (*WURA*, s. 6(1)). While both the *CCAA* and the *BIA* enable reorganizations of insolvent companies, access to the *CCAA* is restricted to debtor companies facing total claims in excess of $5 million (*CCAA*, s. 3(1)).
>
> (Emphasis added)

[57] Quite clearly, where a corporation is the insolvent entity, the distinctions between the operational aspects of the two statutes narrow considerably. In particular, where a debtor corporation will never emerge from bankruptcy, the equitable distribution of the bankrupt's assets among its creditors is the *BIA's* only relevant purpose and it is a purpose shared with the *CCAA* (see *Callidus* at para 46).

[58] Nonetheless, the *BIA* does not lose its character as being a statute that serves commercial as well as individual interests. The tension to provide flexibility and less supervision in the context of a commercial undertaking is in direct opposition to the need to protect more vulnerable debtors or multiple small and large creditors in the bankruptcy context. In my view, this explains the differing approaches to the rights of access to appellate courts.

[59] As others have noted, s. 193 of the *BIA* is ripe for reform: see Frank Bennett, *Bennett on Bankruptcy*, 16th ed (Toronto: CCH Canadian, 2013) at 607. The interpretative problem represented by the conflicting jurisprudence is further exacerbated by two aspects of the *General Rules*: a short time period for appeal (ten days) and a requirement that the application for leave to appeal be brought and filed at the same time as the notice of appeal. These restrictions on the right of appeal regularly catch out counsel and then result in the type of cross-applications that exist in this case, thereby increasing cost, decreasing efficiency and affecting access to justice. To that extent, any attempt to provide a definitive interpretation of s. 193(c) is to be applauded.

The issue is whether Parliament or the courts should be the instrument of change. On this point, see *Royal Bank of Canada v Bodanis*, 2020 ONCA 185 at para 8.

[60] Even if the courts are the proper place for reform, I do not believe the solution lies in construing s. 193(c) narrowly so as to reduce more appeals under the *BIA* to the need to apply for leave to appeal. It is also important not to move the analysis from interpreting the legislation to interpreting the judicially imposed criteria for access to the appellate courts. With much respect, it is preferable to construe the words of the statute and apply them to the context of a specific case, without applying either a narrow or broad interpretation of the statute.

[61] While it is solidly established in the jurisprudence that there is no right of appeal under s. 193(c) from a question involving procedure *alone*, courts should not start with that question. The primary task is to answer the question raised by s. 193(c) and determine whether the property involved in the appeal exceeds $10,000. Courts have used different ways of giving meaning to s. 193(c), but it is still the words of the statute that govern. Thus, in *Fallis*, by its adoption of what the Court had said in *Orpen*, the test is stated as, What is the loss which the granting or refusing of the right claimed will entail? In *Fogel*, the Court asked what is "the value in jeopardy" (at para 6). In *McNeil*, the Chambers judge observed that "[t]he 'property involved in the appeal' … may be determined by comparing the order appealed against the remedy sought in the notice of appeal" (at para 13). In *Trimor*, the Chambers judge added to the *Orpen–Fallis* test by stating "[t]he focus of the inquiry under s. 193(c) is the amount of money at stake …" (at para 10). All of these expressions are consistent with the statutory language present in s. 193(c).

[62] In answering any of those questions, an appeal court may determine that there is no property involved in the appeal exceeding in value $10,000 but rather that the question in issue is procedural only. But merely because the question in issue is procedural, does not necessarily mean there is not property involved in the appeal that exceeds in value $10,000. An issue can be procedural while also having more than $10,000 at stake. In examining this principle further, it is helpful to look again at the three leading cases that put forward the proposition that the property involved in the appeal did not exceed $10,000 because the question in issue was procedural:

(a) *Coast* – the issue was whether the Chambers judge had erred by permitting the bringing of an action rather than requiring the matter to be heard in Chambers;

(b) *Dominion Foundry* – the issue pertained to the manner of sale; and

(c) *Pine Tree* – the issue was whether a receiver should have been appointed or not.

It should be noted that the reported decisions do not show that the proponent of a right of appeal in these cases put forward evidence to show that the procedural issue in question had resulted in or could result in a loss.

[63] It is one thing to say there is no appeal as of right under s. 193(c) from an order that directs a receiver as to the *manner* of sale because the "property involved in the appeal [does not exceed] in value ten thousand dollars" where no claim of loss is alleged. Classifying such an order as procedural appears to have no consequence because the complaint is about the *choice* of procedure that the trustee or receiver made rather than about the value of the property (*Dominion Foundry*). It is quite another matter to say there is no *right* of appeal under s. 193(c) from any order that is procedural in nature when there is a claim of loss in excess of $10,000. In short, courts must be careful not to extrapolate from decided cases to reduce every choice that a trustee or a receiver makes to a question of procedure so as to deny a proposed appellant a right of appeal. The issue in s. 193(c) is whether based on the evidence there is at least $10,000 at stake, not whether the order is procedural.

[64] According to the *Orpen–Fallis* line of authority, which I believe this Court should follow, an appellate court's task is to determine first and foremost whether the appeal involves property that exceeds in value $10,000, i.e., to answer the question posed by s. 193(c). It is not necessary that recovery of that amount be guaranteed or immediate. Rather the claim must be sufficiently grounded in the evidence to the satisfaction of the Court determining whether there is a right of appeal. As the Court in *Fallis* indicated, the determination of the amount or value may be proven by affidavit. It may be that a court will conclude that the appeal does not involve property that exceeds in value $10,000, but rather involves a question of procedure alone, but one does not begin with the second question first. In my view, this is an important distinction.

C. Applying s. 193(c) to this appeal

[65] The notice of appeal filed on behalf of the Wilkes Group indicates that the appeal is taken on the following grounds:

(a) That the learned Chambers Judge erred by approving the sale and assignment of the two actions to Atrium.

(b) That the Learned Chambers Judge erred by failing to apply the proper legal test;

(c) That the Learned Chambers Judge erred by concluding that the Receiver made sufficient efforts to get the best price for the two actions and that the Receiver has not acted improvidently;

(d) That the Learned Chambers Judge erred by failing to consider the interests of all parties that would be impacted by the sale and assignment of the two actions to Atrium.

(e) That the Learned Chambers Judge erred by failing to conclude that the interests of the Applicants, other guarantors and KEAI in the two actions, were a sufficient reason to deny the sale and assignment of the two actions to Atrium.

(f) That the Learned Chambers Judge erred by failing to appropriately consider the efficacy and integrity of the process by which the offers for the two actions were made;

(g) That the Learned Chambers Judge erred by failing to conclude that Atrium's motives were a sufficient reason to deny the sale and assignment of the two actions to Atrium.

(h) That the Learned Chambers Judge erred by failing to appropriately consider if there was an unfairness in the working out of the process.

(i) And on such further and other grounds as counsel may advise and this Honourable Court may allow.

[66] In my view, the Wilkes Group has placed this case squarely within such case law as *Fogel*, *Ng*, *McNeill*, *Kostiuk*, *IJK Consortium*, *Temple Consulting*, *John Doe*, *Trimor* and other cases relying on the *Orpen–Fallis* line of authority. According to the memorandum of law filed on behalf of the Wilkes Group, as of September 1, 2018, Atrium was owed $20,660,012.65. After the sale of the Development, KEAI continued to owe Atrium in excess of $7,000,000. Under the Guarantee Lawsuit, Atrium seeks to recover this amount from the guarantors of KEAI's debt. The Wilkes Group has defended this claim and the mandatory mediation session was completed on August 28, 2019.

[67] Specifically, the Wilkes Group submits that the approval of the offer to sell the KEAI Lawsuits for $200,000 undervalued the asset and exposed them to liability under the Guarantee Lawsuit, without the shield of the potential recovery obtainable from the KEAI Lawsuits. The Wilkes Group makes these independent claims:

(a) In light of their unopposed claim that the KEAI Lawsuits were worth in excess of $10,000,000, and their exposure under the Guarantee Lawsuit, the sale to KEAI's secured creditor for $200,000 was improvident.

(b) If the sale of the KEAI Lawsuits to Atrium were to be approved, the order approving sale should have been made conditional on the guarantors' release from the Guarantee Lawsuit.

(c) Since the receiver had not acted on the KEAI Lawsuits during the two years of the receivership, and in light of the Guarantee Lawsuit, and the undervaluation of the KEAI Lawsuits, the Chambers judge erred by lending a court's approval to the sale, when the receiver's application should have been dismissed. If the receiver were uncomfortable with selling the KEAI Lawsuits without the Court's approval, which is a possibility under the order appointing the receiver, then the receiver should have proceeded to discharge.

[68] In written submissions, the receiver put forward three arguments in support of its position that s. 193(c) does not apply. These arguments track the three categories in *Bending Lake*. For the first argument, the receiver, relying on *Alternative Fuel*, states the order is procedural in nature:

> 37. … The Receiver had the choice of prosecuting the Subject Actions to maximize recovery or selling its right, title and interest in the Subject Actions. Either way, the Receiver had a duty to maximize recovery and the Receiver determined that the process of marketing and selling the Subject Actions was the most efficient and desirable means to maximize recovery. The Subject Order approved of the Receiver's exercise of professional judgment regarding the most appropriate means of maximizing the value of the Subject Actions.

[69] The receiver's second argument is that the order under appeal "does not bring into play the value of KEAI's property in the relevant sense". The third argument is the order under appeal "does not result in or create a loss for the Appellants" for these reasons:

> 39. … The Receiver sought to obtain the best price for the Subject Actions and did not act improvidently. The Receiver took appropriate efforts to obtain the maximum recovery possible for the Receivership estate by selling the right, title or interest of the Receiver in the Subject Actions to Atrium (after testing the market value of the Subject Actions through an informal tender process involving all other interested parties). In the result, the Receiver proceeded with a course of action which immediately monetized the Subject Actions for the highest available fair market value. Rather than creating a loss for the

> Appellants, the Subject Order reduced their exposure as guarantors of the Loan and advanced their economic interests.

[70] To my mind, the receiver's submissions combine a standard of review argument with the question of whether there is a right of appeal. Even applying the most restrictive notion of what constitutes a right of appeal under s. 193(c), the receiver's decision was not procedural in nature alone. Granted, it is not apparent from the order that a particular amount is involved, but, in my respectful view, the property involved in the appeal is the KEAI Lawsuits. The claim of the Wilkes Group exceeds $200,000, but it is not that number alone that must be considered. The sale, if approved, leaves them exposed to the Guarantee Lawsuit, with no ability to minimize their liability while, at the same time, conferring on Atrium the potential for double recovery.

[71] This potential loss to the Wilkes Group brings their appeal within s. 193(c). The central issue on appeal will be whether the receiver was entitled to assign the KEAI Lawsuits for $200,000 in the face of these assertions:

(a) the lawsuits were worth in excess of $10,000,000;

(b) the receiver had undertaken no independent evaluation of them; and

(c) the loss to KEAI and its shareholders, and therefore the guarantors, could extend to the amount of the company's continuing indebtedness to the purchaser of the asset.

In my view, the affidavit evidence sufficiently supports these assertions for the purposes of the applications at hand.

[72] Applying the approach from the *Orpen–Fallis* line of authorities, if one compares the order appealed against, an order approving the sale if the KEAI Lawsuits for $200,000, with the remedy sought in the notice of appeal, which is that the sale not be approved or be approved with conditions, it is clear that the appeal involves property that exceeds in value $10,000. The appeal is not only about the procedure used to sell the asset; it is about whether the asset should have been sold for $200,000 in all of the previously outlined circumstances of this case. Thus, the Wilkes Group has an appeal as of right under s. 193(c).

VI. Leave to File Late

[73] When counsel for the Wilkes Group filed his clients' notice of appeal, he believed that the 30-day appeal period fixed by s. 9 of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, applied rather than the 10-day appeal period fixed by Rule 31(2) of the *General Rules*. As a result, the appeal was filed 19 days late. He has accepted full responsibility for the error.

[74] In *Paulsen & Son Excavating Ltd v Royal Bank of Canada*, 2012 SKCA 101, 399 Sask R 283, Richards J.A. (as he then was) dealt with a late appeal of an order approving a taxation of accounts of the receiver. Justice Richards applied the traditional test for extending time to file a notice of appeal, stating as follows:

> [18] I turn, therefore, to Paulsen's application to extend the time for filing a notice of appeal. This issue is governed by the factors identified in *Bank of Nova Scotia v. Saskatoon Salvage Co*. (1954) 29 Sask. R. 285 (Sask. C.A.). They were summarized as follows in *Dutchak v. Dutchak*, 2009 SKCA 89, 337 Sask. R. 46 at para. 12:
>
> > [12] According to these decisions, in determining whether leave should be granted the applicant must persuade the Court that: (i) there is a reasonable explanation for the delay; (ii) he or she possessed a bona fide intention to appeal within the time limited for appeal; (iii) there is an arguable case to be made to a panel of the Court; and (iv) there will be no prejudice to the respondent, if leave is granted beyond what would be incurred in the usual appeal process. In any given case, one or more factors may be more important than another.

[75] The Wilkes Group bring themselves easily within these criteria. Indeed, to his credit, Mr. Lee for the receiver did not strenuously argue to the contrary. Solicitor error does not always justify extending the time to appeal, but I see no reason to depart from the general tenor of the case law, which is to grant an extension of time if it can be done without serious prejudice to the other side: see *Daniels v Canada (Attorney General of)*, 2003 SKCA 25 at para 5, 232 Sask R 64, and *Taheri v Vujanovic*, 2018 SKCA 40 at para 30, 36 CPC (8th) 82. As to the intention to appeal, Mr. Wilkes attested to the intention of the Wilkes Group to appeal virtually from the outset. I have no reason not to accept this evidence. The receiver has not provided any argument or evidence as to any potential prejudice caused by the late filing. With respect to the need to establish an arguable case, as I have indicated, the issue will be whether the Chambers judge erred by not taking into account the factors and issues listed above. It is an arguable case. Having considered and applied the relevant criteria, it is appropriate to extend the time to appeal to the date the notice of appeal was actually filed.

VII. Conclusion

[76] Since the Wilkes Group have an appeal as of right under s. 193(c) of the *BIA*, the receiver's application to strike their notice of appeal is dismissed and the application to apply for leave to appeal filed on behalf of the Wilkes Groupe is dismissed as being unnecessary. The application to extend the time to file the notice of appeal to the date of actual filing is granted. In the circumstances, there will be no order as to costs.

"Jackson J.A."

Jackson J.A.

I concur. "Caldwell J.A."

Caldwell J.A.

I concur. "Tholl J.A."

Tholl J.A.

TAB 2

Court of Appeal for Saskatchewan **Citation: *Patel v Whiting*, 2020 SKCA 49**

Docket: CACV3594 **Date: 2020-04-22**

Between:

Nilesh Patel

Applicant/Prospective Appellant
(Respondent)

And

Ariane Whiting

Respondent/Prospective Respondent
(Petitioner)

Before:	Leurer J.A. (in Chambers)
Disposition:	Application allowed in part
Written reasons by:	The Honourable Mr. Justice Leurer
On application from:	DIV 210 of 2019, Regina
Application heard:	March 25, 2020
Counsel:	Foster Weisgerber, Q.C. for the Appellant Jim Vogel, Q.C. for the Respondent

C. If leave to appeal is not granted, should Mr. Patel be granted an extension of time to file a notice of appeal?

[32] The conclusion that Mr. Patel's application for leave to appeal should be dismissed does not end the matter. Section 21(3) of the *Divorce Act* requires that an appeal must be made within 30 days of an order under that act. However, s. 21(4) confers jurisdiction of a judge of this Court to extend this time:

> **21 (4)** An appellate court or a judge thereof may, on special grounds, either before or after the expiration of the time fixed by subsection (3) for instituting an appeal, by order extend that time.

[33] In each of *Kotelmach*, *Felker*, and *Saskatoon*, the Court of Appeal Chambers judge dismissed the application for leave to appeal and went on and considered an application made by the proposed appellant for an extension of time to appeal the decision. In *Saskatoon*, Whitmore J.A. did this without formerly dismissing the application for leave to appeal, but I do not see this as affecting his determination that he could grant an extension notwithstanding his conclusion that the applicant had "not made a formal application for extension of time to serve and file a notice of appeal" (at para 30). I recognize that, in *Belmore*, after concluding that an appeal lied as of right, Lane J.A. simply dismissed the application for leave to appeal. However, nothing on the face of his decision suggests that the appellant sought an extension of time to appeal in exercise of the right to appeal as of right. The conduct in *Iron* that the majority found to offend principles of approbation and reprobation and *res judicata* occurred when the appeal was continued before a panel of three judges of this Court. However, nothing in *Iron* suggests that the applicant for leave to appeal had requested an extension of the time to file a notice of appeal when their application for leave to appeal was heard and decided.

[34] In this case, Mr. Patel stated that, if I agreed with Ms. Whiting's submission that leave to appeal was not required and his request for leave to appeal could not be granted on that basis, he applied for leave for an extension of time to file his notice of appeal. Other than the fact that this request was made orally in Chambers before me, Mr. Patel's request for an extension of time is no different than what frequently occurs in litigation when relief is requested in the alternative.

[35] The framework for considering an application for an extension of time to appeal applied by Whitmore J.A. in *Saskatoon* was found in *Bank of Nova Scotia v Saskatoon Salvage Co.*

(1954) Ltd. (1983), 29 Sask R 112 (CA). This framework invites consideration of whether: (a) the applicant had a bona fide intention to appeal within the time limited for an appeal; (b) the applicant has at least an arguable case; and (c) the grant of the extension of time is apt to cause prejudice to the respondent. The case law emphasizes that the factors are not prerequisites but only customary considerations in the analysis of what is just and equitable. See, for example, *Wallace v Canadian National Railway*, 2010 SKCA 56 at para 11, 350 Sask R 249, and *Sparvier v Lac La Ronge Indian Band*, 2011 SKCA 115 at para 10. In this context, Ryan-Froslie J.A. explained, "[i]n order to succeed in his application, [the applicant] does not need to establish each of the factors …. Rather, he must show that, taking those factors into account, it is just and equitable to extend the time for appeal": *Taheri v Vujanovic*, 2018 SKCA 40 at para 22, 36 CPC (8th) 82 [*Taheri*]. Justice Whitmore wrote in this context in *Fiesta Barbeques Limited v Andros Enterprises Ltd*., 2018 SKCA 32 at para 21: "These factors and considerations are to be balanced with a view to achieving a just result." See also, *Retail, Wholesale and Department Store Union, Local S-955 v Lilydale Inc*., 2013 SKCA 56 at para 18, 414 Sask R 303. Each of these cases were decided in the context of a rule of this Court or s. 9(6) of *The Court of Appeal Act, 2000*, SS 2000, c C-42.1, which allows the extension of time to appeal where it is "just and equitable" to do so.

[36] Section 21(4) of the *Divorce Act* allows for an extension of time "on special grounds". The meaning of this phrase was considered by Cameron J.A. in *Wood v Wood*, 2001 SKCA 2, 203 Sask R 82 [*Wood*]. Justice Cameron noted first that the applicant "grounded his application not in subsection 21(4) of the *Divorce Act* but in Rule 71" of *The Court of Appeal Rules*, which was "obviously" not applicable because the statute governed (at para 3). Justice Cameron then reasoned as follows:

> [7] This expression does not lend itself to meaningful exposition in the abstract, except to the extent "special" usually means of a peculiar, not general kind. To that extent, subsection 24(1) is to be more rigorously applied, perhaps, than is Rule 71. The case law does not shed much light on the principle of the matter, though the application of the subsection from time suggests the courts look for something in the circumstances of a sufficiently compelling nature to warrant extension—something in the reasons why an appeal was not taken on time or something in the proceedings or about the judgment that would tend to work injustice were the time not extended. See, *Canadian Divorce Law and Practice*, MacDonald and Ferrier, (2nd ed.) Vol. 1 at 21-7 to 21-9.

TAB 3

Court of Appeal for Saskatchewan
Docket: CACV3023

Citation: *Risseeuw v Saskatchewan College of Psychologists*, 2019 SKCA 9
Date: 2019-01-24

Between:

Brenda Risseeuw

Appellant
(Applicant)

And

Saskatchewan College of Psychologists

Respondent
(Respondent)

Before:	Ottenbreit, Whitmore and Schwann JJ.A.
Disposition:	Appeal dismissed
Written reasons by:	The Honourable Madam Justice Schwann
In concurrence:	The Honourable Mr. Justice Ottenbreit The Honourable Mr. Justice Whitmore
On Appeal From:	2017 SKQB 8, Saskatoon
Appeal Heard:	January 11, 2018
Counsel:	The Appellant appearing on her own behalf Merrilee Rasmussen, Q.C. for the Respondent

III. ISSUES

[18] Ms. Risseeuw appeals the *QB Decision* to this Court. Fundamentally, she contends the Chambers judge erred by (i) dismissing her application on the basis of undue delay, (ii) misinterpreting s. 20(2) of the *Act* and thereby committing an error in principle, and (iii) failing to conclude the College had breached its duty of procedural fairness. She asks this Court to set aside the *QB Decision* and for an order compelling the College to approve her application for full-practicing membership.

IV. FRESH EVIDENCE APPLICATION

[19] As a preliminary matter, Ms. Risseeuw applies to this Court pursuant to Rule 59 of *The Court of Appeal Rules* to adduce fresh evidence in relation to her appeal. The governing principles with regard to the introduction of fresh evidence on appeal are well known. In *Wal-Mart Canada Corp. v Saskatchewan (Labour Relations Board)*, 2006 SKCA 142, 289 Sask R 20 [*Wal-Mart*], Vancise J.A., referring to *Maitland, Maitland, and Maitland v Drozda*, [1983] 3 WWR 193 (Sask CA), set out the following requirements:

> [4] The test for the admission of fresh evidence is well known and was articulated by this Court in *Maitland v. Drozda*. The Court identified four factors which must be satisfied before fresh evidence would be accepted. Those factors are:
>
> > (a) The evidence will not be admitted, if by due diligence it could have been used at trial;
> >
> > (b) The evidence must be relevant in the sense that it bears upon a decisive or potentially decisive issue in the action;
> >
> > (c) The evidence must be credible in the sense that it is reasonably capable of belief; and,
> >
> > (d) It must be such that if believed could reasonably, when taken with the other evidence adduced at trial, be expected to have affected the result.
>
> (Footnote omitted)

[20] This Court's approach to fresh evidence has been affirmed on a number of occasions subsequent to *Wal-Mart* (see, for example: *Haug v Haug (Estate)*, 2017 SKCA 92 at para 12, 32 ETR (4th) 189; *Pederson v Saskatchewan (Minister of Social Services)*, 2016 SKCA 142, 408 DLR (4th) 661; *Onion Lake Cree Nation v Stick*, 2018 SKCA 20, [2018] 5 WWR 111; *Gadd v Busse*, 2011 SKCA 32, 366 Sask R 291).