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

The Superintendent of Bankruptcy (respondent/applicant/appellant) v. 407 ETR Concession Company Limited and Matthew David Moore (moving party/respondent/respondents) (M40742; M40925; C54560; 2012 ONCA 569)

Indexed As: Moore (Bankrupt), Re

Ontario Court of Appeal
Weiler, Blair and Rouleau, JJ.A.
September 5, 2012.

Summary:

Moore made an assignment in bankruptcy in 2007. He had accumulated a debt to "407 ETR" of some $35,000 in unpaid highway 407 toll charges. In 2011, Moore was granted an absolute discharge. He sought to obtain valid vehicle permits. The Registrar of Motor Vehicles refused to validate or issue the permits because of the unpaid tolls (Highway 407 Act, s. 22(4)). Moore moved for a declaration that his debt to 407 ETR was released pursuant to his absolute discharge. The motion judge dismissed the motion. He concluded that there was no operational conflict between s. 22 of the Highway 407 Act and s. 178(2) of the Bankruptcy and Insolvency Act (BIA). The Superintendent of Bankruptcy filed a notice of appeal, relying on s. 5(4)(a) of the BIA. 407 ETR moved to quash the Superintendent's notice of appeal on the basis that the Superintendent lacked standing. The Superintendent brought a motion requesting leave to appeal, relying on s. 193(e) of the BIA and/or the court's inherent jurisdiction and sought an extension of time to do so.

The Ontario Court of Appeal granted the Superintendent's motion for an extension of time to file its notice of motion seeking leave to appeal the motion judge's decision, and its motion for leave to appeal that decision. No useful purpose would be achieved by requiring the filing of a fresh notice of appeal.

Bankruptcy - Topic 6224

Administration of estate - Powers of superintendent - Power to intervene in court - [See first **Bankruptcy - Topic 6722**].

Bankruptcy - Topic 6708

Practice - General principles - Bankruptcy rules - [See **Bankruptcy - Topic 6882**].

Bankruptcy - Topic 6722

Practice - Parties - Status or standing - A discharged bankrupt (Moore) moved for a declaration that his debt to 407 ETR was released pursuant to his absolute discharge and for a declaration to prevent 407 ETR from using s. 22(4) of the Highway 407 Act to stop him from obtaining a vehicle permit - The motion judge dismissed the motion - The Superintendent of Bankruptcy served and filed a notice of appeal - 407 ETR moved to quash the notice of appeal on the basis that the Superintendent did not have the standing

necessary to appeal the decision - The Superintendent relied on the broad power granted by s. 5(4)(a) of the Bankruptcy and Insolvency Act, as providing it with a right of appeal to the Court of Appeal even where it did not participate in the proceedings at the first instance and none of the original parties were appealing - The Ontario Court of Appeal did not agree that s. 5(4)(a) granted the Superintendent that right - The section allowed the Superintendent to "intervene in any matter or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto" - The Superintendent's ability to intervene was restricted to a proceeding in "court" - "Court", as defined in s. 2 of the BIA, was limited to the trial courts, and not the courts of appeal - Although BIA rule 31(1) provided for the filing of the notice of appeal in the Superior Court, the appeal was taken to the Court of Appeal - The Superintendent, therefore, had no standing to bring an appeal to the Court of Appeal as of right - However, that did not dispose of the matter, as the Superintendent had standing to appeal the motion judge's decision with leave of the court - See paragraphs 21 to 26.

Bankruptcy - Topic 6722

Practice - Parties - Status or standing - A discharged bankrupt moved for a declaration that his debt to 407 ETR was released pursuant to his absolute discharge and for a declaration to prevent 407 ETR from using s. 22(4) of the Highway 407 Act to stop him from obtaining a vehicle permit - The motion judge dismissed the motion - The Superintendent of Bankruptcy filed a notice of appeal - 407 ETR moved to quash the notice of appeal on the basis that the Superintendent did not have the standing necessary to appeal the decision - The Superintendent moved for leave to appeal - 407 ETR opposed leave being granted on the basis that the Superintendent was not a party to the underlying dispute that had since settled, and there was no basis in law for granting such leave - Section 193 of the Bankruptcy and Insolvency Act provided for statutory rights of appeal - The Superintendent submitted that s. 193(e) ("in any other case by leave of a judge of the Court of Appeal") was broad enough to permit the court to grant leave - The Ontario Court of Appeal agreed with that submission - Section 193(3) was distinct from the preceding sections in that it was discretionary - "Indeed, reading the provision in the context of the statutory scheme and, in particular, the unique position of the Superintendent, necessitates this conclusion. Even where the Superintendent does not intervene as a party in the Superior Court, its statutory position is such that it is not a true stranger to the proceedings. The Superintendent holds a unique position with respect to bankruptcy proceedings." - See paragraphs 27 to 32.

Bankruptcy - Topic 6722

Practice - Parties - Status or standing - Section 193(e) of the Bankruptcy and Insolvency Act provided 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: ... (e) in any other case by leave of a judge of the Court of Appeal." - The Ontario Court of Appeal stated that "where the Superintendent relies on s. 193(e) to appeal a decision to which it was not a party at first instance, leave to appeal should only be granted in exceptional circumstances and in accordance with the factors the court relies on when exercising its inherent jurisdiction to grant leave to an non-party ... That is, the applicant should be able to show: (a) that its interest was not represented at the proceeding; (b) that it has an

interest which will be adversely affected by the decision; (c) that it is, or can be, bound by the order; (d) that it has a reasonably arguable case; and (e) that the interests of justice in avoiding a multiplicity of proceedings would be served by the grant of leave." - See paragraphs 35 to 37.

Bankruptcy - Topic 6882

Practice - Appeals - When available - The Ontario Court of Appeal stated that "[a]n appeal from a decision or order made in proceedings instituted under the BIA [Bankruptcy and Insolvency Act] is governed by the BIA and the Bankruptcy and Insolvency General Rules, C.R.C., c. 368 (BIA rules), not by the Courts of Justice Act, R.S.O. 1990, c. C-43, and the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. BIA rule 31(1) provides that an appeal to a court of appeal referred to in s. 183(2) of the BIA (which includes the Court of Appeal for Ontario) must be made by filing a notice of appeal at the office of the Registrar of the court appealed from. In the case of Ontario, the court appealed from is the Superior Court of Justice. The appeal must be filed within ten days of the order or decision appealed from." - See paragraphs 20 and 21.

Bankruptcy - Topic 6888

Practice - Appeals - Leave to appeal - [See second and third **Bankruptcy - Topic 6722**].

Bankruptcy - Topic 6888.1

Practice - Appeals - Leave to appeal - Time for (incl. extension of) - A discharged bankrupt (Moore) moved for a declaration that his debt to 407 ETR was released pursuant to his absolute discharge - The motion judge dismissed the motion - The Ontario Court of Appeal, before deciding whether the Superintendent of Bankruptcy should be granted leave to appeal in this case, considered the question of the timing of its motion - The decision the Superintendent sought to appeal was issued October 25, 2011 - The Superintendent's notice of appeal was served and filed November 4, 2011- The notice of motion seeking leave to appeal, however, was not filed until January 17, 2012, after the Superintendent became concerned that leave might in fact be required - By that time, the motion was out of time - The court concluded that the extension of time ought to be granted - The Superintendent formed the intention to appeal within the relevant 10 day appeal period - It also provided a satisfactory explanation for the delay in bringing the motion for leave - There was no indication of any prejudice to 407 ETR as a result of the timing of this motion - Further, since 407 ETR and Moore had settled their dispute, the timing of the appeal did not delay any receipt of funds - As to the merits of the appeal and the justice of the case, there were a number of alleged errors of law raised by the Superintendent - Those issues were significant and at the very least constituted arguable grounds for an appeal - There was, therefore, good reason to grant the extension sought by the Superintendent - See paragraphs 38 to 45.

Bankruptcy - Topic 6888.1

Practice - Appeals - Leave to appeal - Time for (incl. extension of) - The Ontario Court of Appeal stated that "[g]enerally speaking, the factors to be considered on an application for leave to appeal are: a) whether the point of appeal is of significance to the practice; b) whether the point raised is of significance to the action itself; c) whether the appeal is

prima facie meritorious or, on the other hand, whether it is frivolous; and d) whether the appeal will unduly hinder the progress of the action. ... However, ... there is no stringent test for determining whether to grant leave to appeal pursuant to s. 193(e) of the BIA. There is a variety of factors to consider depending on the circumstances of the case." - The prominence of two such factors were noted, namely, "the existence of arguable grounds of appeal and issues of significance to the bankruptcy practice that ought to be considered and addressed by the Court of Appeal." - See paragraphs 47 and 48.

Bankruptcy - Topic 6888.1

Practice - Appeals - Leave to appeal - Time for (incl. extension of) - The Superintendent of Bankruptcy sought leave to appeal from a lower court decision to which it was not a party - The Superintendent had established that the appeal was not without merit and the issues raised were significant to the bankruptcy practice - It had therefore satisfied the standard test for obtaining leave applicable to all parties - The second part of the equation was whether the Superintendent had demonstrated that this was an exceptional case - The Ontario Court of Appeal granted the Superintendent's motion for leave to appeal - "The importance of the arguable issues in the proposed appeal, combined with the inability of the Superintendent to respond to them at first instance brings this case within the narrow category of exceptional cases where leave to appeal ought to be granted to the Superintendent despite that it was not a party at first instance." - See paragraphs 49 to 54.

Cases Noticed:

Société des Acadiens du Nouveau-Brunswick Inc. and Association de conseillers scolaires francophones du Nouveau-Brunswick v. Minority Language School Board No. 50 and Association of Parents for Fairness in Education, Grand Falls District 50 Branch, [1986] 1 S.C.R. 549; 66 N.R. 173; 69 N.B.R.(2d) 271; 177 A.P.R. 271, refd to. [para. 35].

Rizzi v. Mavros et al. (2007), 224 O.A.C. 293; 85 O.R.(3d) 401; 2007 ONCA 350, refd to. [para. 39].

Husky Oil Operations Ltd. v. Minister of National Revenue et al., [1995] 3 S.C.R. 453; 188 N.R. 1; 137 Sask.R. 81; 107 W.A.C. 81, refd to. [para. 43].

Power Consolidated (China) Pulp Inc. v. B.C. Resources Investment Corp. (1988), 19 C.P.C.(3d) 396 (C.A.), refd to. [para. 47].

Med Finance Co. S.A. v. Bank of Montreal et al. (1993), 24 B.C.A.C. 318; 40 W.A.C. 318; 22 C.B.R.(3d) 279 (C.A.), refd to. [para. 47].

Norbourg Groupe financier inc. (Syndic de) (2006), 33 C.B.R.(5th) 144; 2006 QCCA 752, refd to. [para. 47].

Medical International Technologies (MIT Canada) Inc. v. V. & G. International Licensing Corp., 2010 QCCA 1826, refd to. [para. 47].

Pope & Talbot Ltd. (Bankrupt), Re (2011), 308 B.C.A.C. 211; 521 W.A.C. 211; 21 B.C.L.R.(5th) 270, refd to. [para. 27].

SVCM Capital Ltd. v. Fiber Connections Inc. (2005), 198 O.A.C. 27 (C.A.), refd to. [para. 48].

Gorguis v. Saskatchewan Government Insurance, [2011] 6 W.W.R. 372; 372 Sask.R. 152; 2011 SKQB 132, refd to. [para. 52].

Statutes Noticed:

Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, sect. 5(4)(a) [para. 21]; sect. 193(e) [para. 27].

Bankruptcy and Insolvency General Rules, C.R.C., c. 368, rule 31(1) [para. 20].

Counsel:

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

Liz Tinker, for the appellant.

These motions were heard on May 16, 2012, before Weiler, Blair and Rouleau, JJ.A., of the Ontario Court of Appeal. In reasons written by Rouleau, J.A., the Court of Appeal delivered the following judgment, released on September 5, 2012.

Order accordingly.

Editor: E. Joanne Oley

Bankruptcy - Topic 6224

Administration of estate - Powers of superintendent - Power to intervene in court - A discharged bankrupt (Moore) moved for a declaration that his debt to 407 ETR was released pursuant to his absolute discharge and for a declaration to prevent 407 ETR from using s. 22(4) of the Highway 407 Act to stop him from obtaining a vehicle permit - The motion judge dismissed the motion - The Superintendent of Bankruptcy served and filed a notice of appeal - 407 ETR moved to quash the notice of appeal on the basis that the Superintendent did not have the standing necessary to appeal the decision - The Superintendent relied on the broad power granted by s. 5(4)(a) of the Bankruptcy and Insolvency Act, as providing it with a right of appeal to the Court of Appeal even where it did not participate in the proceedings at the first instance and none of the original parties were appealing - The Ontario Court of Appeal did not agree that s. 5(4)(a) granted the Superintendent that right - The section allowed the Superintendent to "intervene in any matter or proceeding in court, where the Superintendent considers it expedient to do so, as if the Superintendent were a party thereto" - The Superintendent's ability to intervene was restricted to a proceeding in "court" - "Court", as defined in s. 2 of the BIA, was limited to the trial courts, and not the courts of appeal - Although BIA rule 31(1) provided for the filing of the notice of appeal in the Superior Court, the appeal was taken to the Court of Appeal - The Superintendent, therefore, had no standing to bring an appeal to the Court of Appeal as of right - However, that did not dispose of the matter, as the Superintendent had standing to appeal the motion judge's decision with leave of the court - See paragraphs 21 to 26.

Bankruptcy - Topic 6708

Practice - General principles - Bankruptcy rules - The Ontario Court of Appeal stated that "[a]n appeal from a decision or order made in proceedings instituted under the BIA [Bankruptcy and Insolvency Act] is governed by the BIA and the Bankruptcy and

Insolvency General Rules, C.R.C., c. 368 (BIA rules), not by the Courts of Justice Act, R.S.O. 1990, c. C-43, and the Rules of Civil Procedure, R.R.O. 1990, Reg. 194. BIA rule 31(1) provides that an appeal to a court of appeal referred to in s. 183(2) of the BIA (which includes the Court of Appeal for Ontario) must be made by filing a notice of appeal at the office of the Registrar of the court appealed from. In the case of Ontario, the court appealed from is the Superior Court of Justice. The appeal must be filed within ten days of the order or decision appealed from." - See paragraphs 20 and 21.

Bankruptcy - Topic 6888

Practice - Appeals - Leave to appeal - A discharged bankrupt moved for a declaration that his debt to 407 ETR was released pursuant to his absolute discharge and for a declaration to prevent 407 ETR from using s. 22(4) of the Highway 407 Act to stop him from obtaining a vehicle permit - The motion judge dismissed the motion - The Superintendent of Bankruptcy filed a notice of appeal - 407 ETR moved to quash the notice of appeal on the basis that the Superintendent did not have the standing necessary to appeal the decision - The Superintendent moved for leave to appeal - 407 ETR opposed leave being granted on the basis that the Superintendent was not a party to the underlying dispute that had since settled, and there was no basis in law for granting such leave - Section 193 of the Bankruptcy and Insolvency Act provided for statutory rights of appeal - The Superintendent submitted that s. 193(e) ("in any other case by leave of a judge of the Court of Appeal") was broad enough to permit the court to grant leave - The Ontario Court of Appeal agreed with that submission - Section 193(3) was distinct from the preceding sections in that it was discretionary - "Indeed, reading the provision in the context of the statutory scheme and, in particular, the unique position of the Superintendent, necessitates this conclusion. Even where the Superintendent does not intervene as a party in the Superior Court, its statutory position is such that it is not a true stranger to the proceedings. The Superintendent holds a unique position with respect to bankruptcy proceedings." - See paragraphs 27 to 32.

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