

Court of Appeal File No.

Court/Estate File No. 31-2675583

COURT OF APPEAL FOR ONTARIO

IN THE MATTER OF THE PROPOSAL TO CREDITORS OF  
CONFORTI HOLDINGS LIMITED, A CORPORATION  
INCORPORATED UNDER THE ONTARIO *BUSINESS  
CORPORATIONS ACT*, R.S.O. 1990, C. B.16

NOTICE OF APPEAL

Crowe Soberman Inc., in its capacity as proposal trustee (in such capacity, the “**Proposal Trustee**”) to the proposal to creditors of Conforti Holdings Limited (the “**Company**”) APPEALS to the Court of Appeal from the order of the Honourable Mr. Justice Cavanagh of the Ontario Superior Court of Justice (Commercial List) (the “**Court Below**”) dated May 31, 2022 (the “**Decision**”) made at Toronto.

THE APPELLANT ASKS that:

1. leave be granted to bring this appeal pursuant to section 193(e) of the *Bankruptcy and Insolvency Act* (the “**BIA**”);
2. the order be set aside and an order be granted as follows:
  - a) directing the Proposal Trustee to not undertake the adjudication of the proof of claim of Moroccanoil, Inc. (“**Moroccanoil**”) pursuant to section 135 of the BIA;
  - b) lifting any stay of proceedings that may apply under the BIA to the claim by Moroccanoil to allow Moroccanoil to obtain a determination of the Moroccanoil Claim in the United States District Court for the District of New Jersey (the “**US Court**”), provided that

enforcement of the same against the Company shall remain stayed and subject to the BIA, including claim processes; and

- c) awarding costs of the motion below and of the appeal.

THE GROUNDS OF APPEAL are as follows:

### **The Decision**

1. The Decision was made in response to a motion for directions by the Proposal Trustee regarding the proof of claim of Moroccanoil, which related to litigation that has been ongoing between Moroccanoil and the Company in the US Court since early 2015;
2. The US Court has held that that litigation has completed its interlocutory process and is now ready for briefing and hearing, including hearing *viva voce* testimony where required;
3. The Proposal Trustee sought in its motion directions that it not determine the proof of claim by Moroccanoil under s. 135 of the BIA and that instead Moroccanoil's claim be determined in the US Court along with a claim by the Company and its principal against Moroccanoil and a further claim by Moroccanoil against the principal of the Company personally;
4. The Decision held that:
  - a) the Court has no jurisdiction to grant the direction sought, and
  - b) if it did have such jurisdiction then the directions sought were not appropriate because the Court Below believed that stated intent to have a hearing before the Superior Court of Justice (Commercial List) on appeal from the decision by the Proposal Trustee of Moroccanoil's claim could be done in a manner that would not be materially longer, less efficient, or more costly than continuing with the proceedings before the US Court;

**Leave to appeal**

5. The Decision is of significance to BIA practice as a whole, because reasoning in the Decision that there is no jurisdiction to depart from the claim process in the BIA is applicable to every BIA proceeding in which proofs of claim are filed, which is therefore every bankruptcy and every Division I (general) and Division II (consumer) proposal;
6. The Decision is of significance to this proceeding, because it will effectively import litigation that has been ongoing in the US Court for over seven years to the Commercial List and require that the estate of the Company bear increased costs including those of the Proposal Trustee and its counsel in the Ontario proceedings, which would not be the case in the US Court;
7. This appeal is *prima facie* meritorious;
8. This appeal will not unduly hinder the progress of the proceeding, because the proposal of the Company is capable of being performed with a reserve out of the funds payable to creditors for the amounts claimed by Moroccanoil which can then be distributed to Moroccanoil or to the other creditors depending on whether the Moroccanoil claim is successful in whole or in part;

**The appeal**

9. The Court Below erred in law in holding that there is no jurisdiction to make the directions sought;
10. At the core of the directions sought was the stated intent by Moroccanoil and the Company to appeal any decision by the Proposal Trustee on the claim that did not go in their favour, with the result that a hearing and trial to replicate what would have been done before the US Court would then proceed in the Commercial List;

11. The Court has inherent jurisdiction to control its own process, which was continued under s. 96 of the *Constitution Act, 1867* and incorporated in BIA proceedings in s. 183(2) of that Act;
12. The Court should and must have the ability to decline to hear a proceeding and seek the assistance of a Court in another jurisdiction if it believes that the proceeding is being, or should be, heard elsewhere;
13. In the alternative, the jurisprudence regarding s. 183(2) of the BIA does give the Court the power to accommodate extraordinary circumstances, which includes the power to make orders that depart from the processes of the BIA in order to give effect to the legislative intent, purposes and policy of the BIA, such that a direction to a proposal trustee not to determine a claim under s. 135 may be made in appropriate circumstances;
14. The Court Below further erred in finding that a trial to determine Moroccanoil's claim would be appropriate in Ontario by:
  - a) incorrectly finding that effectively moving the proceedings in the US Court to the Commercial List would not be more costly than letting those proceedings continue;
  - b) failing to consider the aspects of the proceedings in the US Court that are not part of Moroccanoil's proof of claim to be determined in any Ontario proceedings under the BIA, including the claims by the Company against Moroccanoil and its principal and the claims by Moroccanoil against the principal of the Company personally;
  - c) focussing on whether moving the proceedings in the US Court to Ontario will be materially longer, less efficient, and more costly, when the proper question to consider was whether it is appropriate to move to Ontario part of a proceeding that is otherwise ready for hearing in the US Court.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:(i) section 193(e) of the BIA, (ii) the order appealed from is final, and (iii) leave to appeal is required.

June 10, 2022

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RCP-E 61A (February 1, 2021)

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**Proceedings commenced at Toronto**

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