

COURT OF APPEAL FOR ONTARIO

B E T W E E N:

DONALD DAL BIANCO

Appellant (Applicant)

- and -

DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC.

Respondents (Respondents)

FACTUM OF THE RECEIVER
(re: directions on jurisdiction and venue)

July 16, 2020

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
TORONTO, ON M5G 1V2

R. Brendan Bissell (LSO #: 40354V)
Tel: 416-597-6489
Fax: 416-597-3370
Email: bissell@gsnh.com

Joël Turgeon (Member of the Bar of Quebec; Ontario
Student-at-Law)

Lawyers for Crowe Soberman Inc. as Receiver

TO: THE SERVICE LIST

PART I – NATURE OF THIS MOTION

1. This is a motion for directions whether the appeal in this matter is to this Court or to the Divisional Court, and if the latter whether this appeal should be transferred there.
2. The Receiver brings this motion because the parties disagree on that point and it may be preferable to resolve the proper *forum* for the appeal before the parties spend time and money preparing for the hearing of an appeal that could be derailed if the Court were to conclude the appeal should be heard elsewhere.

PART II – OVERVIEW

3. The decision under appeal was made on a motion to determine whether section 78 of the *Construction Act* (the “CA”) gave the lien claimants in this matter priority over a third-ranking mortgage held by the Appellant (the “**Third Mortgage**”). The motions judge so held.
4. The proceeding in which that motion was brought is a receivership. Prior to the motion under appeal, the Receiver had brought a different motion to determine whether the Third Mortgage was valid under reviewable transaction principles.
5. The lien claimants had intended to raise the application of section 78 of the CA on the Receiver’s motion, but at a case conference on January 29, 2020 the issue of the application of section 78 of the CA was set down for hearing on its own.
6. The Receiver’s motion, which was going to require the trial of an issue in June, has not been heard because that hearing date was cancelled due to the COVID crisis. The parties and the Receiver now agree that, depending on the outcome of the appeal, the Receiver’s

motion may no longer be necessary in the receivership if the appeal is unsuccessful because the reviewable transaction issues in the Receiver's motion would then be moot.

7. Since the filing of the Notice of Appeal, the parties have disagreed whether an appeal from the decision at issue lies to this Court or to the Divisional Court. The *Bankruptcy and Insolvency Act* (the “**BIA**”) provides that appeals under that Act go to this Court, whereas the CA provides that appeals under that Act go to the Divisional Court.
8. The recent case law from this Court about how to determine the proper appeal route suggests that the appeal route in this matter should be pursuant to the CA, because that was the statutory jurisdiction being exercised by the motions judge. There is, however, other case law that suggests that the BIA appeal route may apply.

PART III – FACTS

- A. **The background to the proceeding**
9. The moving party, Crowe Soberman Inc. (the “**Receiver**”), was appointed receiver in respect of a development project owned the Respondents on May 31, 2018, under BIA s. 243 and s. 101 of the *Courts of Justice Act* (the “**CJA**”).¹
10. The project was an incomplete retirement residence project, which the Receiver sold at the end of August, 2018.² Following payment of prior claims, there remains

¹ May 31, 2018 Appointment Order of Mr. Justice Wilton-Siegel, Receiver's Motion Record (“**MR**”), Tab 6.

² Agreed Statement of Facts agreed to among the parties herein and used in first instance (the “**ASF**”), Tab 4 of the **MR**, para. 4.

approximately \$5.4 million of proceeds remaining. The Appellant claims priority to those funds under the Third Mortgage. The lien claimants claim priority under their liens.³

B. The Receiver's motion, and the evolution of the s. 78 motion

11. Among the issues that the parties disagree about on the proper appeal route is who brought the motion under appeal. The manner in which the motion under appeal came to be is different than normal, so the facts in that regard accordingly need to be addressed in more detail than usual.
12. In response to the priority dispute noted above, the Receiver reviewed and reported on the validity of the Third Mortgage pursuant to reviewable transaction principles under the *Fraudulent Conveyances Act* and the *Assignments and Preferences Act* in February of 2019. The Receiver's report noted that the Third Mortgage was granted in late February of 2018 but secured prior advances made in 2012-2015 without any further funds being advanced. The Third Mortgage was further made at a time when the borrower was likely insolvent, with the liens being registered within weeks and the receivership order being made at the end of May, 2018. The Receiver therefore brought a motion for advice and directions on the matter.⁴
13. The parties exchanged affidavit material on the Receiver's motion, which was eventually scheduled to be heard on November 21, 2019.

³ ASF, Tab 4 of the MR, para. 4.

⁴ February 8, 2019 Notice of Motion, Tab 7 of the MR. These issues and their factual and legal premises are more thoroughly set out in the Third Report of the Receiver dated February 8, 2019, filed for reference without appendices at Tab 8 of the MR, the Receiver's Supplementary Report to the Third Report of the Receiver dated October 30, 2019, filed for reference without appendices at Tab 9 of the MR, and the Receiver's Factum dated October 30, 2019, filed for reference at Tab 10 of the MR.

14. At that hearing, the lien claimants intended to argue, among other things, that s. 78 of the CA provided a basis to find that the Third Mortgage was ineffective as against the lien claimants, independently from the reviewable transaction issues identified in the Receiver's motion.
15. The November 21, 2019 motion did not proceed, because the parties declined to conduct cross-examinations, yet argued at the return of the motion that there were material facts in dispute. The judge presiding on November 21, 2019 adjourned the motion and instead imposed a timetable to attempt to ensure the completion of the steps necessary to have that motion be ready for hearing at a trial of an issue in March, 2020.
16. At a case conference on January 29, 2020, the parties had not conducted the cross-examinations required under the timetable and instead asked the presiding judge to (i) set a new June date for a trial of an issue on the Receiver's motion, and (ii) set a separate and earlier March motion date to determine the s. 78 issues based on an agreed statement of fact to be filed.⁵ The presiding judge so directed.⁶

C. The hearing of the s. 78 motion and the appeal

17. The hearing on the s. 78 issue proceeded on March 6, 2020. The Reasons for Decision, reported at [2020 ONSC 1500](#), held that the lien claims were entitled to full priority over the Third Mortgage as a result of s. 78 of the CA.
18. The Appellant filed an appeal in this Court from that decision.

⁵ The ASF, Tab 4 of the MR.

⁶ January 29, 2020 case conference endorsement of Mr. Justice Hainey, Tab 12 of the MR.

19. The lien claimants initially took the position that the appeal should have gone to the Divisional Court. They now argue it is properly before the Court of Appeal (and that leave to appeal under BIA s. 193 is required, but that is not at issue on this motion).
20. The Appellant now takes the position that the appeal should have been brought to the Divisional Court.
21. The parties agreed that it is preferable to determine the proper *forum* for the appeal before further steps are taken in respect of it. The Receiver accordingly brings this motion.

PART IV – ISSUES AND THE LAW

22. The issue is whether the proper appeal route for the appeal in this matter is to this Court or to the Divisional Court, and if the latter whether this appeal should be transferred there.
- A. **The statutory provisions**
23. There are two competing statutory provisions on that issue.
24. CA s. 71 provides that “an appeal lies to the Divisional Court from a judgment... under this Act.”
25. Section 193 of the BIA provides:

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 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.

B. *Astoria Organics*

26. This Court's most recent decision in *Business Development Bank of Canada v Astoria Organic Matters Ltd.*⁷ seems to assist with resolving which statutory appeal route should govern.

27. That case involved a motion for leave to sue the receiver, which had been denied at first instance. The appeal was out of time under the 10-day BIA appeal procedure. The appellant argued that the appeal should instead be under the 30-day CJA appeal procedure.

28. This Court concluded that the jurisdiction being exercised should dictate the statutory appeal procedure.

29. In applying that principle to the facts of that case, the Court noted that the requirement in the receivership order for leave to sue the receiver was ancillary to the power to appoint a receiver, which was made both under s. 243 of the BIA and s. 101 of the CJA. The appellant argued that the dual statutory appointment provisions meant that it was possible to appeal under the (longer) timeframe permitted by the CJA. In rejecting that position, this Court said:

The proper appeal route is the BIA when the order sought to be appealed was made in reliance on jurisdiction under the BIA. That is the case here. The Superior Court dismissed SusGlobal's request to sue the receiver—the dismissal SusGlobal wishes to appeal—in reliance on the leave to sue provision in the receivership order. The court's authority to include that provision in the receivership order flowed by necessary implication from the statutory power to appoint a receiver under s. 243(1) of the BIA. [...]

⁷ [2019 ONCA 269](#) ("Astoria Organics").

“...*In my view, the answer depends on whether the order under appeal is one granted in reliance on jurisdiction under the Bankruptcy and Insolvency Act. Where it is, the appeal provisions of that statute are applicable.*” ...I agree with that approach.⁸

[Emphasis added. Reference omitted.]

30. In this case, the jurisdiction exercised by the motions judge emanated from the CA, not the BIA. While the overall proceeding is of course a receivership like in *Astoria Organics*, that does not appear to have been the *ratio* for how appeal procedures are to be determined.

C. *Re Wallace*

31. The judgment of this Court in *Wallace (Re)*⁹ may also provide guidance. There the bankrupt sought to quash the bankruptcy trustee’s appeal of the dismissal of the trustee’s contempt motion against the bankrupt.¹⁰ The bankrupt argued the appeal ought to have been brought to the Divisional Court under the CJA.¹¹ The trustee argued that the appeal should proceed under BIA s. 193.¹²

32. This Court held that the BIA appeal procedure applied, finding that the trustee’s contempt motion was “*based on the bankrupt’s conduct in the bankruptcy*”, and was therefore a motion made under the BIA.¹³

⁸ *Astoria Organics*, paras. 29, 31.

⁹ [2016 ONCA 958](#) (“*Wallace*”).

¹⁰ *Wallace*, para. 1.

¹¹ *Wallace*, para. 2.

¹² *Wallace*, para. 5.

¹³ *Wallace*, para. 7.

D. *Sam Lévy*

33. The Supreme Court's decision in *Sam Lévy & Associés v Azco Mining Inc.*¹⁴ should also be considered. That case concerned claims by a trustee in bankruptcy on behalf of the estate against a third party, and the issue turned on whether those claims were being made under the BIA or not. The Supreme Court held:

The principle is that if the dispute relates to a matter that is outside even a generous interpretation of the administration of the bankruptcy, or if the remedy is not one contemplated by the Act, the trustee must seek relief in the ordinary civil courts. Thus in the Quebec case of *Re Ireland*, the trustee brought proceedings to determine who had the right to proceeds of insurance policies taken out by the trustee on properties of the bankrupt estate. Bernier J. concluded that the Quebec Superior Court sitting in Bankruptcy lacked jurisdiction over the subject matter of the dispute. The controversy raised purely civil law questions and nothing in the Act [the BIA] conferred on the bankruptcy court a special jurisdiction to entertain these matters. Similar arguments prevailed in *Cry-O-Beef Ltd./Cri-O-Boeuf Ltée (Trustees of) v Caisse Populaire de Black-Lake; In re Martin; In re Reynolds; Re Galaxy Interiors Ltd.; Mancini (Trustee of) v Falconi; and Re Morris Lofsky.*¹⁵ [...]

If the trustee's claim is in relation to a stranger to the bankruptcy, i.e. "persons or matters outside of [the] Act" (*Re Reynolds*) or lacks the complexion of a matter in bankruptcy it should be brought in the ordinary civil courts and not the bankruptcy court.¹⁶ [...]

It is well established that the bankruptcy court does not have the general jurisdiction of a civil court to award damages in breach of contract cases. It is restricted to the jurisdiction and remedies contemplated by the Act.¹⁷ [...]

[In the present case,] the trustee is entitled to claim the shares and warrants (s. 17(1)) and, with the permission of the inspectors (which it obtained) to bring a legal proceeding in relation thereto in the bankruptcy court (s. 30(1)(d)). The trustee, relying on these statutory provisions and remedies, clearly brings its claim within the Act.¹⁸ [...]

¹⁴ [2001 SCC 92](#) ("Sam Lévy").

¹⁵ *Sam Lévy*, para. 36.

¹⁶ *Sam Lévy*, para. 39.

¹⁷ *Sam Lévy*, para. 50.

¹⁸ *Sam Lévy*, para. 54.

[I]it is sufficient to hold that the bulk of the trustee's claim is cognizable in bankruptcy for the reasons previously discussed.¹⁹

[Emphasis added. References omitted.]

E. *Re Bearcat Exploration*

34. An example of a matter that was held to be outside the jurisdiction of the BIA is in the recent Alberta Court of Appeal decision in *Re Bearcat Exploration Ltd.*²⁰

35. In that case, a creditor sought bankruptcy orders against debtor companies.²¹ The companies initially opposed, arguing they were not insolvent and that in any event the loan agreements were illegal due to usurious interest rates, but later filed notice of intention to make proposals.²²

36. The court at first instance granted interim receivership orders subject to a stay pending the proposal process, while also making findings in the reasons for decision on the illegality of the interests claimed, the principal amounts owing, the revised interest rates, and whether some loans were secured.²³

37. On appeal from that decision, the Alberta Court of Appeal held that those findings were *ultra vires* the bankruptcy court on a petition for bankruptcy or a receivership application:²⁴

Therefore, when there is a bona fide dispute between the petitioner and debtor with respect to the debt, the matter must be decided in proceedings in the ordinary courts, rather than in the bankruptcy court. A bankruptcy court's jurisdiction to issue declaratory judgments is limited to the matters allowed for in the BIA. It is not the judge's function in bankruptcy

¹⁹ *Sam Lévy*, para. 55.

²⁰ [2003 ABCA 365](#) ("Bearcat Exploration").

²¹ *Bearcat Exploration*, para. 1.

²² *Bearcat Exploration*, para. 2.

²³ *Bearcat Exploration*, para. 4.

²⁴ *Bearcat Exploration*, para. 16.

proceedings to determine whether the respondent has a good defense to the petitioner's claim. Accordingly, final decisions or declarations about illegality, severance, principal amounts owing, interest rates and validity of security are beyond the jurisdiction of a bankruptcy court hearing a bankruptcy petition.²⁵

[Emphasis added. References omitted.]

F. Other recent case law - *Sica Masonry*

38. For completeness it is appropriate to also note the recent decision of this Court in *Ontario Wealth Management Corporation v Sica Masonry and General Contracting Ltd.*²⁶
39. At first blush, that case appears to be quite relevant, because it involved a priority dispute between a lien claimant and a mortgagee, and the Court applied the BIA appeal provisions.
40. *Sica Masonry* may not be on point authority for the issue in this motion. That is because the issue before the Court in that case was whether an extension of time under the BIA appeal procedure should be granted.²⁷ The parties had agreed that the BIA appeal procedures governed,²⁸ so the Court did not actually rule on that point.
41. Further, the priority dispute between the lien claimant and the mortgagee in that case was complicated by conduct issues. In that case the receiver had distributed the funds at issue to the mortgagee after the decision of the motions judge at first instance. After that decision, the lien claimant had given no notice of an intention to appeal, which led this Court to

²⁵ *Bearcat Exploration*, para. 15.

²⁶ [2014 ONCA 500](#) (“*Sica Masonry*”).

²⁷ *Sica Masonry*, para. 1.

²⁸ *Sica Masonry*, para. 36.

conclude that it would not be fair to permit an extension of time because of the further steps that had been taken.²⁹

G. Conclusion

42. A common theme in *Astoria Organics*, *Wallace* and *Sam Lévy* is that the BIA appeal procedures apply when:

- (a) the order appealed from was “made in reliance on jurisdiction under the BIA”,³⁰
- (b) the order was “a remedy contemplated by the BIA”³¹ or one “flowing by necessary implication”³² from the BIA, or
- (c) the proceeding has the “complexion of a matter in bankruptcy”³³ and that determines an issue “cognizable in bankruptcy”.³⁴

43. Similarly, *Bearcat Exploration* stands for the proposition that a determination on illegality or other issues that are not specifically referable to BIA provisions are an exercise of civil jurisdiction.³⁵

44. In this case, the jurisdiction exercised by the motions judge was under s. 78 of the CA. This case may be unusual in how insular that issue and finding has been made in comparison with other cases where conduct or bankruptcy administration considerations also affect the

²⁹ *Sica Masonry*, para. 33.

³⁰ *Astoria Organics*, paras. 29, 31.

³¹ *Sam Lévy*, paras. 36, 50.

³² *Astoria Organics*, paras. 29, 31.

³³ *Sam Lévy*, para. 39.

³⁴ *Sam Lévy*, para. 55.

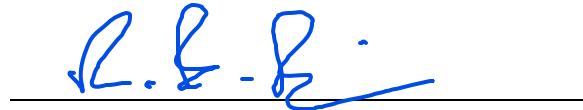
³⁵ *Bearcat Exploration*, para. 15.

disposition. That is likely a product of the narrow manner in which the parties chose to frame and argue that issue.

PART V – ORDER SOUGHT

45. The Receiver therefore requests directions whether the proper appeal route for the appeal in this matter is to this Court or to the Divisional Court, and if the latter whether this appeal should be transferred there.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 16th day of July, 2020.

A handwritten signature in blue ink, appearing to read "R. B. B.", is written over a horizontal line.

R. Brendan Bissell,
of counsel for the Receiver

SCHEDULE A – LIST OF AUTHORITIES

1. *Business Development Bank of Canada v Astoria Organic Matters Ltd.*, [2019 ONCA 269](#)
2. *Wallace (Re)*, [2016 ONCA 958](#)
3. *Sam Lévy & Associés v Azco Mining Inc.*, [2001 SCC 92](#)
4. *Re Bearcat Exploration Ltd.*, [2003 ABCA 365](#)
5. *Ontario Wealth Management Corporation v Sica Masonry and General Contracting Ltd.*, [2014 ONCA 500](#)

SCHEDULE B – RELEVANT STATUTES

Construction Act, R.S.O. 1990, c. C.30

Appeal to Divisional Court

71 (1) Except as otherwise provided in this section, an appeal lies to the Divisional Court from a judgment or an order on a motion to oppose confirmation of a report under this Act.

Notice of appeal

(2) A party wishing to appeal shall file and serve a notice of appeal within fifteen days of the date of the judgment or order, but the time for filing or serving the notice of appeal may be extended by the written consent of all parties, or by a single judge of the Divisional Court where an appropriate case is made out for doing so.

No appeal without leave

(3) No appeal lies from an interlocutory order made by the court, except with leave of the Divisional Court.

No appeal

(4) No appeal lies from a judgment or an order on a motion to oppose confirmation of a report under this Act, if the amount claimed is \$10,000 or less.

Priority over mortgages, etc.

78 (1) Except as provided in this section, the liens arising from an improvement have priority over all conveyances, mortgages or other agreements affecting the owner's interest in the premises.

Building mortgage

(2) Where a mortgagee takes a mortgage with the intention to secure the financing of an improvement, the liens arising from the improvement have priority over that mortgage, and any mortgage taken out to repay that mortgage, to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV, irrespective of when that mortgage, or the mortgage taken out to repay it, is registered.

Prior mortgages, prior advances

(3) Subject to subsection (2), and without limiting the effect of subsection (4), all conveyances, mortgages or other agreements affecting the owner's interest in the premises that were registered prior to the time when the first lien arose in respect of an improvement have priority over the liens arising from the improvement to the extent of the lesser of,

(a) the actual value of the premises at the time when the first lien arose; and

(b) the total of all amounts that prior to that time were,

- (i)** advanced in the case of a mortgage, and
- (ii)** advanced or secured in the case of a conveyance or other agreement.

Prior mortgages, subsequent advances

(4) Subject to subsection (2), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that was registered prior to the time when the first lien arose in respect of an improvement, has priority, in addition to the priority to which it is entitled under subsection (3), over the liens arising from the improvement, to the extent of any advance made in respect of that conveyance, mortgage or other agreement after the time when the first lien arose, unless,

- (a)** at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b)** prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Special priority against subsequent mortgages

(5) Where a mortgage affecting the owner's interest in the premises is registered after the time when the first lien arose in respect of an improvement, the liens arising from the improvement have priority over the mortgage to the extent of any deficiency in the holdbacks required to be retained by the owner under Part IV.

General priority against subsequent mortgages

(6) Subject to subsections (2) and (5), a conveyance, mortgage or other agreement affecting the owner's interest in the premises that is registered after the time when the first lien arose in respect to the improvement, has priority over the liens arising from the improvement to the extent of any advance made in respect of that conveyance, mortgage or other agreement, unless,

- (a)** at the time when the advance was made, there was a preserved or perfected lien against the premises; or
- (b)** prior to the time when the advance was made, the person making the advance had received written notice of a lien.

Advances to trustee under Part IX

(7) Despite anything in this Act, where an amount is advanced to a trustee appointed under Part IX as a result of the exercise of any powers conferred upon the trustee under that Part,

(a) the interest in the premises acquired by the person making the advance takes priority, to the extent of the advance, over every lien existing at the date of the trustee's appointment; and

(b) the amount received is not subject to any lien existing at the date of the trustee's appointment.

Where postponement

(8) Despite subsections (4) and (6), where a preserved or perfected lien is postponed in favour of the interest of some other person in the premises, that person shall enjoy priority in accordance with the postponement over,

(a) the postponed lien; and

(b) where an advance is made, any unpreserved lien in respect of which no written notice has been received by the person in whose favour the postponement is made at the time of the advance,

but nothing in this subsection affects the priority of the liens under subsections (2) and (5).

Saving

(9) Subsections (2) and (5) do not apply in respect of a mortgage that was registered prior to the 2nd day of April, 1983.

Financial guarantee bond

(10) A purchaser who takes title from a mortgagee takes title to the premises free of the priority of the liens created by subsections (2) and (5) where,

(a) a bond of an insurer licensed under the *Insurance Act* to write surety and fidelity insurance; or

(b) a letter of credit or a guarantee from a bank listed in Schedule I or II to the *Bank Act* (Canada),

in the prescribed form is registered on the title to the premises, and, upon registration, the security of the bond, letter of credit or the guarantee takes the place of the priority created by those subsections, and persons who have proved liens have a right of action against the surety on the bond or guarantee or the issuer of the letter of credit.

Home buyer's mortgage

(11) Subsections (2) and (5) do not apply to a mortgage given or assumed by a home buyer.

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

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 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.

DONALD DAL BIANCO, Appellant (Applicant), and DEEM MANAGEMENT SERVICES LIMITED and THE UPTOWN INC., Respondents (Respondents)

Court of Appeal File No. C68214
Commercial List Court File No.: CV-18-598657-00CL

COURT OF APPEAL FOR ONTARIO

FACTUM OF THE RECEIVER
(re: directions on jurisdiction and venue)

GOLDMAN SLOAN NASH & HABER LLP
480 University Avenue, Suite 1600
Toronto (ON) M5G 1V2

R. Brendan Bissell (LSO# 40354V)
Tel: 416-597-6489
Email: bissell@gsnh.com

Joël Turgeon (Member of the Bar of Québec;
Ontario Student-at-Law)

Lawyers for Crowe Soberman Inc., in its capacity
as Receiver