



**IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR  
COURT OF APPEAL**

**Citation:** *Wabush Hotel Limited v. Business  
Development Bank of Canada*, 2016 NLCA 47

**Date:** 20160921

**Docket:** 201601H0068

**BETWEEN:**

WABUSH HOTEL LIMITED,  
L.H. SERVICE CENTRE LIMITED and  
D.P.B. HOLDINGS

APPLICANTS

**AND:**

BUSINESS DEVELOPMENT BANK OF CANADA

RESPONDENT

**Coram:** White J.A.

**Court Appealed From:** Supreme Court of Newfoundland and Labrador  
Trial Division (G) 201608G0071

**Application Heard:** September 20, 2016

**Decision Rendered:** September 20, 2016 (Orally)

**Written Reasons Filed:** September 21, 2016

**Counsel for the Applicants:** Ernest Gittens

**Counsel for the Respondent:** Darren D. O'Keefe

**Counsel for Price Waterhouse Coopers:** Neil Jacobs

**White J.A.:**

[1] This is my decision on the matters argued this morning.

*Was there a valid application for leave to file a Notice of Appeal?*

[2] A copy of the application was received at the Bankruptcy and Insolvency Court registry within time. The original was filed with this Court's registry.

[3] I have concluded that there was a clear indication of an intention to seek leave to appeal, and that the Respondent was effectively on notice.

[4] The failure to file the original in the Bankruptcy and Insolvency Court (or any other difficulty in the extent of filing) cannot be regarded as other than a minor irregularity cured by s. 187(9) of the *Bankruptcy and Insolvency Act* (the *Act*):

No proceeding in bankruptcy shall be invalidated by any formal defect or by any irregularity, unless the court before which an objection is made to the proceeding is of opinion that substantial injustice has been caused by the defect or irregularity and that the injustice cannot be remedied by any order of that court.

[5] There is no substantial injustice. Accordingly, there was a valid notice of application for leave to appeal.

*Is leave required and if so should it be granted?*

[6] After hearing the arguments of the Applicants, the Respondent and Price Waterhouse Coopers Inc. (PWC), the court-appointed receiver, I have concluded that it is not necessary to resolve any issue around whether an appeal was automatic under s. 193(a)-(d) of the *Act*, or whether this is a true leave case under s. 193(e). This is because I have concluded that if leave is required, it should be granted as there are issues raised regarding the propriety of appointing PWC in these circumstances, and relative to the form of order utilized where there are multiple creditors.

[7] There may or may not be merit to the matters raised (and I express no opinion them) but they appear to engage issues relating to receiverships generally and the operation of our legal system as it relates to a court appointed receiver.

[8] As this Court concluded in *R v. National Data International Inc.*, 2005 NLCA 62, 250 Nfld. & P.E.I.R. 201, there is a novel issue of significance to the practice of bankruptcy and insolvency law. This meets the threshold for granting of leave.

*Is there, or should there be, a stay?*

[9] The relevant sections of the *Act* are:

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.

...

195 Except to the extent that an order or judgment appealed from is subject to provisional execution notwithstanding any appeal therefrom, all proceedings under an order or judgment appealed from shall be stayed until the appeal is disposed of, but the Court of Appeal or a judge thereof may vary or cancel the stay or the order for provisional execution if it appears that the appeal is not being prosecuted diligently, or for such other reason as the Court of Appeal or a judge thereof may deem proper.

[10] Granting leave could mean that there is a retroactive stay to the date of the filing of notice of application for leave to appeal *or* from the date leave is granted. This point may raise difficulties when an applicant files a notice of appeal that includes an application for leave, as contemplated by s. 31(2) of the *Bankruptcy and Insolvency General Rules*, CRC, c. 368: see *NsC Diesel Power Inc.*, [1998] N.S.J. No. 64 (C.A.). But in this case the only document filed was a notice of appeal. Logically, there is no appeal until leave is granted so any stay could only operate from the date leave is granted, which is today. So, there is a stay, effective today.

*The effect of the Stay.*

[11] As the Respondent has indicated that, if there is a stay same should, in these circumstances, be cancelled, it is in the interest of justice to exercise my discretion to maintain the *status quo* until a decision is made on any application to cancel the stay. Therefore, the imposition of the stay is suspended until, and if, an application to cancel same is dismissed.

*Order*

[12] Accordingly, it is ordered that:

1. A valid application for leave to file a notice of appeal was filed;
2. The application for leave to file a notice of appeal is granted;
3. Commensurate with the granting of leave to file a notice of appeal all proceedings under the receivership order granted by the Bankruptcy Court dated June 29, 2016 are stayed effective September 20, 2016.
4. The stay is immediately suspended pending a decision and order of this Court in relation to an application to cancel the stay to be taken by Business Development Bank of Canada pursuant to s. 195 of the *Act*;
5. Unless varied by order of this Court, the application pursuant to s. 195 shall be filed by October 17, 2016; the Respondent shall file any response by October 25, 2016; and, the application shall be heard on November 8, 2016 at 2:30 p.m.

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C. W. White J.A.