Court of Appeal for Saskatchewan

Docket: CACV4293

Citation: ***BTA Real Estate Group Inc. v Kaiss*, 2024 SKCA 33**

Date: 2024-03-19

Between:

BTA Real Estate Group Inc.

Applicant/Appellant
(Applicant)

And

Said Wassim Kaiss and MNP Ltd.

Respondents
(Respondents)

Before: Leurer C.J.S. (in Chambers)

Disposition: Application granted

Written reasons by: The Honourable Chief Justice Leurer

On application from: BKY-RG-00169-2023, Regina
Application heard: January 25, 2024

Counsel: Nicholas Conlon for the Applicant
Ryan Moneo for the Respondent, MNP Ltd.

2024 SKCA 33 (CanLII)

2024 SKCA 33 (CanLII)

Leurer C.J.S.

I. INTRODUCTION

[1] BTA Real Estate Group Inc. [BTA] has appealed against a judgment setting the terms under which Said Wassim Kaiss will be discharged from bankruptcy: *BTA Real Estate Group v Kaiss* (6 December 2023), Regina, BKY-RG-00169-2023 (Sask KB) [*Chambers Decision*].

[2] BTA and Mr. Kaiss's trustee in bankruptcy, MNP Ltd. [Trustee], disagree about the contents of the appeal book. After hearing argument on this issue, I made an order with written reasons to follow. This judgment provides those reasons.

II. BACKGROUND

A. Mr. Kaiss's bankruptcy

[3] Mr. Kaiss's financial troubles are directly tied to those of Family Fitness Inc. [FFI]. Prior to his bankruptcy, Mr. Kaiss held all the voting shares of FFI and he was its sole officer and director.

[4] BTA was the landlord for a gymnasium operated by FFI. In 2013, Mr. Kaiss provided BTA with a personal indemnity of FFI's obligations under the lease and granted to BTA a general security interest over his own property to secure the fulfilment of his own obligation. This security interest attached to Mr. Kaiss's shareholdings in FFI as well as several other companies.

[5] In 2020, on the application of BTA, FFI was placed into receivership (*BTA Real Estate Group Inc. v Family Fitness Inc.* (13 October 2020), Saskatoon, QB 1195 of 2020 (Sask QB), amended November 10, 2020). FFI's receivership gave rise to a significant volume of litigation, which I will refer to generally as the "other proceedings". BTA's objections to Mr. Kaiss's discharge are based on: (a) evidence that is found on the court files pertaining to the other proceedings; (b) steps taken by Mr. Kaiss in the other proceedings; and (c) findings made by judges in the Court of King's Bench in the context of those other proceedings.

[6] After FFI entered into receivership, BTA became aware of the pre-receivership sale by FFI of a membership list to SM Fitness Inc. [SMI], a corporation owned by Mr. Kaiss and family members. BTA was convinced that the sale was contrary to the *Fraudulent Conveyances Act, 1571* (UK), 13 Eliz 1, c 5 [*Statute of Elizabeth*], and contrary to its security agreements with FFI. It commenced two separate proceedings, one against FFI and another against SMI. In the end, in the context of FFI's receivership, Elson J. found that "the transfer constituted a fraudulent conveyance under the *Statute of Elizabeth*" (*BTA Real Estate Group Inc. v Family Fitness Inc*., 2021 SKQB 107 at para 52) [*Elson Decision*]. Justice Elson also determined that FFI held "membership rights, the value of [which] formed part of the collateral FFI had granted to BTA" under the security agreement (at para 71).

2024 SKCA 33 (CanLII)

[7] BTA also issued a statement of claim for the enforcement of its indemnity agreement, claiming the balance of FFI's indebtedness remaining after the sale of FFI's assets in the receivership proceedings. There were several contested interlocutory applications in the context of this separate action, two of which resulted in a judgment of Mitchell J. (*BTA Real Estate Group Inc. v Kaiss*, 2022 SKQB 50) [*Mitchell Decision*]. One of the outcomes of the *Mitchell Decision* was an order striking out parts of Mr. Kaiss's amended statement of defence as constituting a collateral attack on a previous court order, as well as the striking of a counterclaim with leave to amend. As part of this, Mitchell J. determined that "an order for enhanced costs is warranted" (at para 45).

[8] Mr. Kaiss made his assignment in bankruptcy in August of 2021. In October of that year, BTA filed its proof of claim with the Trustee for an unsecured claim of $500,000 and a secured claim of $1,535,760.

[9] The Report of Trustee on Bankrupt's Application for Discharge is dated May 3, 2023. It indicates that the Trustee did not intend to oppose Mr. Kaiss's discharge.

[10] BTA advised the Trustee that it would oppose the discharge, invoking s. 172(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c B-3 [*BIA*], which states as follows:

> **Powers of court to refuse or suspend discharge or grant conditional discharge**
>
> (2) The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,
>
> (a) refuse the discharge of a bankrupt;

(b) suspend the discharge for such period as the court thinks proper; or

(c) require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[11] Section 173, which is referred to in s. 172(2), states in part as follows:

Facts for which discharge may be refused, suspended or granted conditionally
173(1) The facts referred to in section 172 are:

(a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;

…

(c) the bankrupt has continued to trade after becoming aware of being insolvent;

…

(f) the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt;

(g) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, incurred unjustifiable expense by bringing a frivolous or vexatious action;

…

(o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

[12] BTA filed the affidavit of one of its directors, Atta Anwar, sworn on August 18, 2023. Mr. Anwar's affidavit sets out some of the history of the proceedings involving Mr. Kaiss and FFI, including those that I have mentioned above. The affidavit refers specifically to parts of the record of the other proceedings, including the pleadings, evidence and orders. However, Mr. Anwar's affidavit did not attach any of those documents as exhibits. Mr. Anwar's affidavit also describes other transactions involving Mr. Kaiss and several companies about which BTA had concerns. These include the transfer by Mr. Kaiss to family members of his shares in GEO Fitness Inc., GEO2 Fitness Inc., GEO3 Fitness Inc., GEO4 Fitness Inc., GEO5 Fitness Inc., SMI and 101260539 Saskatchewan Ltd. [GEO transactions].

[13] BTA also filed with the Court of King's Bench a brief of law dated September 1, 2023, explaining its opposition to the automatic discharge of Mr. Kaiss. In advancing its legal position,

2024 SKCA 33 (CanLII)

BTA relied on the evidence given in Mr. Anwar's affidavit. The brief of law also included extensive cross-referencing to the other proceedings. I will review several of the positions it took, to explain the relevance that BTA attached to the other proceedings.

2024 SKCA 33 (CanLII)

[14] Focusing on the specifics of BTA's objections, first, in relation to the fact referred to in s. 173(1)(a), the record filed by the Trustee showed that Mr. Kaiss's assets were not of a value equal to fifty cents on the dollar of the amount of his unsecured liabilities. However, BTA acknowledged that case law exists suggesting that it also must prove that the asset-to-debt ratio resulted from circumstances for which Mr. Kaiss could be justly held responsible. It attempted to meet the onus of proving this by referring to the *Elson Decision*, as well as other actions that were disclosed from a review of the pleadings and evidence filed in connection with the FFI receivership. BTA also referred to the *Elson Decision*, and the pleadings and evidence leading to it, as well as the FFI receivership more generally, to establish several of the other facts set out in s. 173(1), including that Mr. Kaiss had committed an offence under the *BIA* and the *Statute of Elizabeth*. In relation to the fact specified in s. 173(1)(f), BTA referred to the *Mitchell Decision* and the proceedings leading to it, to show that Mr. Kaiss had put it to unnecessary expense by asserting a frivolous or vexatious defence. These are but three examples of the references made by BTA to the records in the other proceedings as proof of the existence of facts referred to in s. 173(1).

[15] Apparently based on the information provided by BTA, the Trustee modified its position concerning Mr. Kaiss's discharge. In a November 20, 2023 affidavit, the Trustee's officer gave evidence that the GEO transactions were "not brought to the attention of [the trustee] until recently". Based on this revelation, the Trustee filed an amended report containing the recommendation that there be a "minimum sixty day suspended discharge due to the fact referred to pursuant to Section 173(1)(c)" of the *BIA*, that is, that Mr. Kaiss had continued to trade after becoming aware of being insolvent.

[16] On November 30, 2023, the Trustee filed a brief of law explaining its new position. Of material substance, the Trustee acknowledged that the GEO transactions "were in violation of section 173(1)(c)" of the *BIA*. However, it described BTA's suggestion that the Court order a suspension of 24 months as "inappropriate" because: (a) the GEO transactions "were valued at

$NIL as at the date of bankruptcy and do not appear to have [had] an impact on the outcome of the bankruptcy or the outcome of the unsecured creditors"; (b) Mr. Kaiss had continued to make payments to it for the benefit of the creditors; and (c) he was a first time bankrupt.

B. The *Chambers Decision*

[17] The matter was argued on December 5, 2023. The *Chambers Decision* is dated the next day.

[18] In the Chambers judge's brief reasons, he observed that the parties had "agree[d] that [Mr. Kaiss] contravened s. 173(1)(c) of the [*BIA*] by transferring shares to third parties in multiple companies while an undischarged bankrupt". For this reason, the Chambers judge stated that he "agree[d] that some consequence is required to uphold the integrity of the legislative scheme". He identified that the "consequence in this case is a delay in discharge" (at para 3). He then stated that he found that "a suspension of 60 days is sufficient and appropriate for several reasons", which he then gave (at para 4). In short, the Chambers judge accepted the Trustee's position as to the appropriate order on discharge.

[19] Given these conclusions, the Chambers judge dismissed BTA's objection and ordered that Mr. Kaiss's discharge be suspended for a period of 60 days. It is from this decision that BTA now appeals.

C. The dispute over the contents of the appeal book

[20] BTA has prepared an appeal book that contains all the contents of Mr. Kaiss's bankruptcy file. The Trustee agrees that these should be part of the appeal record. The disagreement between BTA and the Trustee is over whether the appeal book should also include the pleadings, evidence and orders made in the other proceedings.

[21] As I will explain, the parties presented their disagreement to me as one that should be resolved exclusively by reference to *The Court of Appeal Rules* [Rules]. Neither side referred to any provision of the *BIA* or any part of the *Bankruptcy and Insolvency General Rules*, CRC, c 368 [*Bankruptcy Rules*], as bearing on this issue. I will return to discuss the significance of this omission later in these reasons.

2024 SKCA 33 (CanLII)

2024 SKCA 33 (CanLII)

III. ANALYSIS

A. The applicable Rules

[22] Rule 18 directs that an “appeal book is required in every appeal, unless otherwise ordered”. The appeal book is to contain the materials that will allow this Court to “determine the issue [on appeal] on the customary basis, which is to say *on the basis of the record*” that was before the court or tribunal which made the order or judgment under appeal (*Mann v KPMG Inc.*, 2001 SKCA 24 at para 10, 203 Sask R 267 [*Mann*]). Said more simply, the appeal book is intended to provide a collected, organized and indexed version of the parts of the record on which the order or judgment under appeal was made that are relevant to the issues raised in the appeal.

[23] Conversely, the appeal book should not contain material that was not part of the record of the proceedings before the court or tribunal whose judgment or order is under appeal. Rule 59(1) allows a party to an appeal to apply to this Court for an order allowing it “to adduce evidence on appeal that was not before the court appealed from”. However, this proposed evidence should *not* be included in the appeal book (*Mann* at para 17, and *Turbo Resources Ltd. v Gibson* (1987), 60 Sask R 221 (CA) at para 18).

[24] Rule 23(1) provides the following direction as to the contents of an appeal book:

> **Contents of appeal book**
> **23**(1) The appeal book shall contain the following material in the following order:
>
> (a) a comprehensive index, including:
>
> (i) a sub-index of exhibits, whether included in the appeal book or not, listing them with a reference to the page in the appeal book where each exhibit is reproduced and the page in the transcript where each is referred to in the evidence for the first time;
>
> (ii) a sub-index of witnesses listing their names, by whom each was called, and whether the evidence of the witness was given in examination-in-chief, cross-examination, re-examination or examination by the court appealed from;
>
> (b) the pleadings, indicating by underlining where the pleadings have been amended and by appropriate note when the amendments were made, and any particulars of the pleadings;
>
> (c) the judgment or order issued by the court appealed from;
>
> (d) the reasons for the judgment or order appealed from, if any;
>
> (e) the notice of appeal;

(f) the notice of cross appeal, if any;

(g) the notice served under *The Constitutional Questions Act, 2012*, if any, and particulars of service;

(h) the exhibits, clearly identified by letter and number appearing on each page of the exhibit;

(i) the transcript.

2024 SKCA 33 (CanLII)

[25] Although Rule 23(1) is expressed in mandatory terms (“shall”), it is qualified by other rules. Rule 22(1) directs that “Subject to Rule 43 (Expedited appeal), when an appeal book is required, the appellant shall serve on each respondent a draft agreement as to the contents of the appeal book”. Rule 22(4) provides that the “parties shall make every reasonable effort to *exclude irrelevant material* from the appeal book, avoid duplication and otherwise *confine the contents to that which is necessary* for the purposes of the appeal” (emphasis added). Where an appellant and respondent cannot agree on the contents of an appeal book, Rule 22(5) applies, or Rule 43(3) if the appeal is expedited. Rule 22(5) requires that “the appellant shall apply to a judge to have the matter in dispute settled”. Overall, the Rules contemplate that there are circumstances where parts of the record that were before the court or tribunal whose judgment is under appeal are to be excluded from the appeal book.

[26] Just as there are instances where parts of the record that fall within the scope of what is described in Rule 23(1) are properly left out of an appeal book, it is sometimes appropriate that the appeal book contain material that is not mentioned in that Rule, provided that such material formed part of the record that was before the lower court or tribunal. This most frequently occurs in appeals from Chambers matters, where appeal books are still required (see Rule 18 and Rule 43(2)(b)). Chambers matters are most often decided based on affidavit evidence – this case presents an example of that. Yet, Rule 23(1) makes no reference to affidavits. Instead, the only accommodation made in the Rules for appeals of Chambers matters is that Rule 43(2)(a) applies, which states that “no agreements as to the transcript of evidence or the contents of the appeal book” are required. Notwithstanding the absence of any reference to affidavits in Rule 23(1), they must be included in the appeal book where they are part of the record in the proceedings below and were relevant to the making of an order or judgment under appeal. The same may be said of other forms of evidence that may be filed as part of the record in the proceedings of the lower court or tribunal, such as certified copies of documents, agreed statements of fact, and so on.

[27] In summary, when considered a whole, the intent of the Rules is that the appeal book should contain the *relevant* parts of the record of the proceedings in the court or tribunal from which the appeal is taken and the notice of appeal itself. Most frequently, the record in this context means the pleadings, evidence, the reasons given by the judge for making the order or judgment, and the issued order or judgment that is the subject of the appeal. In most cases, advocacy documents, such as briefs of law, written argument and cases that were previously filed are not relevant and should not be included in the appeal book.

2024 SKCA 33 (CanLII)

B. What was before the Chambers judge?

[28] BTA's position is that the records in the other proceedings were before the Chambers judge through the references made to those documents in Mr. Anwar's affidavit and its brief of law that it filed in opposition to Mr. Kaiss's unconditional discharge from bankruptcy. For this reason, BTA says these records should be included in the appeal book. For its part, the Trustee does not dispute that these references were made. However, it nonetheless maintains that, because the other proceedings' records were not separately filed on Mr. Kaiss's bankruptcy file, they did not form part of the record before the Chambers judge and therefore should not be in the appeal book.

[29] In considering the Trustee's argument, I start with the observation that *The Evidence Act*, SS 2006, c E-11.2, allows for the admission into evidence in a court proceeding a copy of a record from other court proceeding. In this regard, s. 47 of that Act states as follows:

> **Court records**
> **47**(1) In this section, "court" means:
>
> (a) with respect to Canada or any province or territory of Canada:
>
> (i) a court of record; or
>
> (ii) a justice of the peace or coroner; and
>
> (b) with respect to any other jurisdiction:
>
> (i) a court of record, if the judicial system of the jurisdiction is based on the common law; or
>
> (ii) a court having a status equivalent to a court of record, if the judicial system of the jurisdiction is not based on the common law.
>
> (2) A copy of a court record or document is admissible in evidence to the same extent as the original if it is certified:
>
> (a) by the official of that court who is the proper custodian of the court records; or

> (b) in any case to which subclause (1)(a)(ii) applies, by the justice of the peace or coroner.

[30] The Trustee accepts that the documents referred to in Mr. Anwar's affidavit and BTA's brief of law are court records within the meaning of this provision. It also did not object to their admission before the Chambers judge, or to their being included in the appeal book, on the basis that the records were not certified copies. Instead, its position is tethered exclusively to the fact that the records were not placed on the court file relating to Mr. Kaiss's bankruptcy.

[31] Leaving to the side for the moment the provisions of the *BIA* and the *Bankruptcy Rules*, the filing of a document on a lower court file is not determinative of whether it should be included in an appeal book. This point was made in *Petrelli v Lindell Beach Holiday Resort Ltd.*, 2011 BCCA 367 at para 36, 340 DLR (4th) 733 [*Petrelli*].

[32] In *Petrelli*, two plaintiffs by that name argued that a defendant was abusing the court's processes by defending an action that was similar to a lawsuit commenced by a plaintiff named Bahry against the same defendant. While the British Columbia Court of Appeal found that no abuse of process was occurring, it nonetheless agreed that the Petrellis could refer to the records of the Bahry action without formal proof of them. It did so based on the court's ability to make use of its own records, even if those were in connection with a different proceeding. After setting out s. 26 of the *Evidence Act*, RSBC 1996, c 124, which parallels s. 47 of this province's evidence Act, the Court in *Petrelli* explained why this is the case:

> [36] It is well established, however, that proof in accordance with s. 26 is not needed in order for a court to make use of its own records. Courts have long accepted that they are entitled to look at their own records even if those records have not been formally proven and entered in evidence: *R. v. Jones* (1839), 8 Dowl. 80; *Craven v. Smith* (1869), L.R. 4 Exch. 146. In *R. v. Lewis*, [1941] 4 D.L.R. 640, this Court accepted that a judge of the County Court was entitled to rely on the notice of appeal in the court file to show that a notice had been filed on time. In *R. v. Hunt* (1986), 18 O.A.C. 78 at 79, the Ontario Court of Appeal stated the general proposition that "[t]he Court has at all times the power to look at its own records and take notice of their contents".
>
> [37] Such documents do not have to be attached to affidavits, or presented to the court in the same way that most documentary evidence is presented. In *R. v. Truong*, 2008 BCSC 1151 at para. 57, 235 C.C.C. (3d) 547, Smart J. described the situation as follows:
>
>> [57] It has been said that documents do not walk into a courtroom unaccompanied. Usually, this is true. Documents are typically introduced into evidence through the evidence of a witness or by affidavit evidence pursuant to a statutory provision. See for example s. 29 and s. 30 of the

2024 SKCA 33 (CanLII)

> *Canada Evidence Act*. However, documents in the court's own files are an exception to this usual rule.
>
> [38] I have no doubt that the parties could have asked the chambers judge to look at the pleadings in the *Bahry* action without attaching those pleadings to affidavits, and without proving them in accordance with s. 26 of the *Evidence Act*. Further, in keeping with cases such as *Lewis* and *Hunt*, it seems to me that the judge, with notice to the parties, was entitled to examine the pleadings in *Bahry* even without them having invited him to do so.

2024 SKCA 33 (CanLII)

[33] Based on this reasoning, the British Columbia Court of Appeal found that "the pleadings in *Bahry*, being records of the court, did not have to be proven in order for the judge to consider them" (at para 39).

[34] The approach taken in *Petrelli* parallels what is provided for in *The King's Bench Rules*. In this regard, Rule 9-22 of *The King's Bench Rules* allows a judge of the Court of King's Bench to accept as evidence in a proceeding, evidence taken in another proceeding:

> **Reading of evidence taken in other causes**
>
> **9-22**(1) An order to read evidence taken in another cause or matter is not necessary.
>
> (2) Evidence mentioned in subrule (1) may, subject to all just exceptions, be read:
>
> (a) on an application without notice with leave of the Court; or
>
> (b) on 2 days' notice being given to the other parties by the party desiring to use the evidence.

[35] This Rule makes no reference to pleadings or judgments or orders. However, I have no doubt that a judge of the Court of King's Bench has the power to refer to all parts of the record found on the files pertaining to other proceedings before the Court.

[36] Rule 9-22 contemplates that a party seeking to refer to evidence found on another court file provide notice of their intention to do so. This accords with the principles of procedural fairness. In this case, although BTA made no formal application to adduce the record of the other proceedings as evidence in the discharge application, the Trustee did not suggest that it did not have notice that this was what BTA intended to do. Indeed, Mr. Anwar's affidavit and BTA's brief of law that referred to the other proceedings were both filed many weeks before argument was made.

[37] On the facts of this case, I do not need to decide the question of whether the Chambers judge could have examined the records in the other proceedings without notice to the parties, as

the Court in *Petrelli* held, because here BTA invited the Chambers judge to review the records and, so far as I was told, the Trustee did not object to him doing so.

[38] For all of the above reasons, I am satisfied that the records in the other proceedings that were mentioned in Mr. Anwar's affidavit and BTA's brief of law should be considered for the purposes of this appeal to have been before the Chambers judge, and on that basis included in the appeal book even though they were not separately filed on Mr. Kaiss's bankruptcy file.

2024 SKCA 33 (CanLII)

C. The relevance of the records in the other proceedings

[39] The question remains whether the records in the other proceedings are relevant to the issues in this appeal. Stuart J. Cameron, writing extrajudicially in *Civil Appeals in Saskatchewan: The Court of Appeal Act & Rules Annotated*, 1st ed (Regina: Law Society of Saskatchewan Library, 2015) at 163–164, explained that what is relevant or irrelevant "depends in significant part on whether the appeal is from the whole of the decision or only part of it, and whether the grounds of appeal are such as to require resort to the whole of the record or only part of it". Later, he tied relevance for appeal purposes to the issues identified in the grounds of appeal, and a consideration of whether the disputed material is "necessary to the proper disposition of the appeal" (at 166).

[40] Said another way, the material that should be part of the appeal book is that which is required for this Court to perform its appellate function. Therefore, my task when settling the contents of the appeal book is not to evaluate if the Chambers judge erred in his assessment of relevance or to determine whether the panel of this Court that hears this appeal will conclude that it is necessary to refer to the records in the other proceedings to decide the appeal. Indeed, the panel may find that the records from the other proceedings are irrelevant to the question of the conditions that should attach to Mr. Kaiss's discharge. What I need to do is determine what materials this Court should have before it for the purposes of performing its appellate review of the *Chambers Decision*.

[41] Here, the Chambers judge was called upon to decide what conditions should attach to Mr. Kaiss's discharge from bankruptcy. To resolve this issue, the Chambers judge had to determine which, if any, of the facts referred to in s. 173 existed that would justify an order other than an absolute discharge from bankruptcy. Now, in this Court, BTA's notice of appeal puts into

issue every objection it made to Mr. Kaiss's discharge in the court below. In substance, this means that every document that BTA asked the Chambers judge to consider for that purpose is relevant in this appeal. Simply put, given the issues as defined by BTA's notice of appeal, in order for this Court to perform its appellate role it must have available the same information that was before the Chambers judge.

2024 SKCA 33 (CanLII)

[42] In reaching this conclusion, I acknowledge – and agree with – the Trustee that there are *some* parts of the records in the other proceedings that do not bear on the matters referred to in s. 173 of the *BIA*. The latter fact renders applicable Rule 22(4) of *The Court of Appeal Rules* (repeated here for reference):

> (4) The parties shall make every reasonable effort to exclude irrelevant material from the appeal book, avoid duplication and otherwise confine the contents to that which is necessary for the purposes of the appeal.

[43] This rule exists to serve the interests of judicial efficiency. The removal of irrelevant or duplicative material can, in some cases at least, save the parties the expense of assembling and reproducing material that will not be referred to by them or considered by the Court. It can also ease the access to those parts of the record that are relevant, which is to the benefit of the parties and the Court.

[44] The records in the other proceedings that do not relate to the s. 173 issues should not be part of the appeal book. However, caution must be exercised when culling the record that was before the court, judge or tribunal from which an appeal is taken. The references made by BTA to the records in the other proceedings were broad and encompassing. When I offered counsel for BTA and the Trustee the choice between filing the entire record of those proceedings or going through the draft appeal books to remove those parts that they were confident they would not refer to in their submissions, both indicated that it would be more economical to simply file the records in their entirety. While Rule 22(4) exists for the benefit of both the parties and the Court, on this occasion, given the breadth of the references made by BTA to the records in the other proceedings, and the position adopted by both parties, I am of the view that the records in the other proceedings need not be culled to remove what is potentially irrelevant.

D. The significance of s. 190 of the *BIA* and Rule 9 of the *Bankruptcy Rules*

[45] As I have noted, the parties presented their disagreement to me as one that should be resolved exclusively by reference to the Rules of this Court. Neither side referred to s. 190 of the *BIA*, which states as follows:

> **Evidence of proceedings in bankruptcy**
>
> **190 (1)** Any document made or used in the course of any bankruptcy proceedings or other proceedings had under this Act shall, if it appears to be sealed with the seal of any court having jurisdiction in bankruptcy, purports to be signed by any judge thereof or is certified as a true copy by any registrar thereof, be admissible in evidence in all legal proceedings.
>
> **Documentary evidence as proof**
>
> **(2)** The production of an original document relating to any bankruptcy proceeding or a copy certified by the person making it as a true copy thereof or by a successor in office of that person as a true copy of a document found among the records in his control or possession is evidence of the contents of those documents.

[46] Additionally, neither party referred to Rule 9 of the *Bankruptcy Rules*, which provides as follows:

> **9 (1)** All proceedings used in court must be dated and entitled in the name of the court in which they are used, together with the words “in Bankruptcy and Insolvency”.
>
> **(2)** Every document used in the filing of a bankruptcy application or used after the filing of an assignment must be entitled “In the Matter of the Bankruptcy of ...”.
>
> **(3)** Every document used in the filing of a proposal before bankruptcy must be entitled “In the Matter of the Proposal of ...”.
>
> **(4)** Every document used in the course of a receivership must be entitled “In the Matter of the Receivership of ...”.
>
> **(5)** Unless the Chief Justice, Associate Chief Justice or Commissioner, as the case may be, referred to in section 184 of the Act otherwise directs, every document that is required to be filed in court must first be filed at the office of the registrar.
>
> **(6)** If the court deems necessary that any notice be sent to the Superintendent in any proceeding before it, a copy of that notice shall be sent to the Division Office.

[47] These provisions could influence whether the parts of the general law to which I have referred apply. In other words, it might be that properly understood and applied, these provisions, or others found in the *BIA* or the *Bankruptcy Rules*, did not allow BTA to bring the records in the other proceedings before the Chambers judge in the way that it did. However, at least before me, the Trustee did not argue against the inclusion of the documents from the other proceedings in the appeal book based on s. 190, or indeed any other section, of the *BIA* or any part of the *Bankruptcy Rules*. It also did not suggest that it offered any objection to the Chambers judge considering the

2024 SKCA 33 (CanLII)

records in the other proceedings because those records were not filed in accordance with s. 190 or Rule 9 of the *Bankruptcy Rules*.

[48] It is not for me to determine, in the context of this application, if either of these provisions apply. That will be for the panel to decide if that issue is presented as an argument in the appeal. Given what I have been told about the positions taken by the parties before the Chambers judge, it remains necessary to include the records in the other proceedings for this Court to perform its appellate function.

2024 SKCA 33 (CanLII)

IV. CONCLUSION

[49] For these reasons, I ordered that the appeal book in this matter contain the entirety of the record from the other proceedings.

[50] The costs of this application are reserved to the panel of the Court that hears BTA's appeal.

"Leurer C.J.S."

Leurer C.J.S.