

IN THE SUPREME COURT OF NOVA SCOTIA  
IN BANKRUPTCY AND INSOLVENCY  
**Citation:** Donald-Reagh (Re), 2008 NSSC 390

**Date:** December 19, 2008  
**Docket:** B-31562  
**Registry:** Halifax

District of Nova Scotia  
Division No. 01  
Court No. B-31562  
Estate No. 51-880427

In the Matter of the Consumer Proposal of Heather Anne Donald-Reagh

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DECISION

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**Registrar:** Richard W. Cregan, Q.C.

**Heard:** July 11, 2008  
September 12, 2008

**Counsel:** Francyne Hunter representing the Office of the  
Superintendent of Bankruptcy

Charles Wackett representing the Trustee, WBLI  
Incorporated

- [1] Heather Anne Donald-Reagh filed a consumer proposal on July 6, 2006. The Administrator of the proposal was WBLI Incorporated, with Charles Wackett, Trustee in Bankruptcy, being the trustee responsible. It provided that she would pay \$250.00 on filing the proposal and thereafter would make payments of \$350.00 per month for the next 50 months, for a total of \$17,750.00.
- [2] Prior to September 2, 2007, she had paid into the proposal \$4,325.00 but then failed to make further payments resulting in her proposal being deemed annulled on December 2, 2007. However, the Administrator later received a cheque dated December 19, 2007 in the amount of \$13,425.00 from Ms. Donald-Reagh's solicitor. This completed the payments required by the proposal.
- [3] On January 23, 2008, the Administrator obtained an order authorizing it to retain the funds received and to distribute them in accordance with the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (*BIA*). Mr. Wackett had then represented to the court that the Official Receiver had indicated that he would not oppose the order.

- [4] The Administrator issued a certificate of Full Performance of Proposal to Ms. Donald-Reagh on February 6, 2008.
- [5] The Administrator now asks that the Certificate of Full Performance of Proposal be ratified and that it be allowed to take administration fees on not only the \$4,325.00 received before the deemed annulment but also on the \$13,425.00 received afterward.
- [6] Ms. Hunter of the Superintendent's office says that it is not entitled to fees on the latter sum. I am not sure what her position is on the certificate. My recollection is that when I expressed my concern about whether Ms. Donald-Reagh now had the benefit of the proposal I received an affirmative answer. However, Ms. Hunter's post hearing brief suggests otherwise. However, it will appear in my disposition of this application that this is a secondary issue. Mr. Wackett's concern is his entitlement to fees.
- [7] At the end of the hearing it was agreed that the money would immediately be distributed to the creditors after reserving the amount of the fees claimed, pending this decision.

- [8] Mr. Wackett admitted his office had lost sight of the file and had done nothing about the deemed annulment which was effective on September 2, 2007.
- [9] Let me review the relevant provisions of the *BIA*. Section 66.3(1) gives the court power to annul a proposal where it appears that the debtor was not eligible in the first place, that it cannot continue without injustice or undue delay, or that court approval was obtained by fraud.
- [10] Section 66.31 further provides for a deemed annulment where in the case of a proposal calling for monthly or more frequent payments there is default to the extent of three months' payments, unless there has previously been a court order to the contrary or an amendment has been filed. It further directs that upon this happening "the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver."
- [11] The consequences of an annulment or deemed annulment are stated in Section 66.32:

66.32(1) Unless the court otherwise orders, where a consumer proposal is annulled or deemed annulled, the consumer debtor

(a) may not make another consumer proposal, and

(b) is not entitled to any relief provided by sections 69 to 69.2

until all claims for which proofs of claim were filed and accepted are either paid in full or are extinguished by the operation of subsection 178(2)

(2) Where a consumer proposal is annulled or deemed annulled, the rights of the creditors are revived for the amount of their claims less any dividends received.

[12] The Administrator did not warn Ms. Donald-Reagh of the approaching annulment and did not do what is required once it took place, nor did it inform the creditors or file the report as required in Section 66.31(1). It was only when a solicitor acting for her called to say that there were funds to satisfy the proposal that it took any post annulment action.

[13] Concerned as to what to do the Mr. Wackett spoke to the Official Receiver. Mr. Wackett recognized that the normal procedure would be to recognize the deemed annulment and apply to court for leave to file a second proposal. However, he thought he could save the expense of this procedure by simply distributing the money to the creditors presumably after taking the Administrator's fees. The response of the Official Receiver was to apply to

the court.

[14] The Administrator thought that this was quite proper being in the spirit of the still unproclaimed amendments to the *BIA* which would allow in certain circumstances for a proposal deemed to be annulled to be revived.

[15] There seemed to be some disagreement between Mr. Wackett and the Official Receiver as to just exactly what was said or at least what was meant or intended. My decision does not require me to address this disagreement.

[16] One cannot rely on unproclaimed amendments to the *BIA*, and one cannot rely on what one may think the Official Receiver intended. The Official Receiver's views can only be relied on if in fact they are right. He cannot waive the requirement of the *BIA*, particularly where creditors' rights may be affected.

[17] The law referred to above is clear that the court has no express nor inherent jurisdiction to revive a consumer proposal annulled or deemed to have been annulled. Specifically the *BIA* makes it quite clear what happens to a

consumer proposal after default and annulment. It just no longer is and certain things must follow. There is no discretion to forgive. The parties are left to pursue the available remedies, such as seeking leave to file a second consumer proposal. To find otherwise would conflict with these provisions in the *BIA*. See: *Wiggins, Re* (2003), 50 C.B.R. (4<sup>th</sup>) 306 (Ont. Swinton J.)

[18] This is the position taken in the past by Registrar Hill of this court in *Schrader, Re* (1999), 13 C.B.R. (4<sup>th</sup>) 256 and in *White, Re* (2001), 31 C.B.R. (4<sup>th</sup>) 128.

[19] I note in the latter case that Registrar Hill said that money received after annulment is not subject to the administrator's fees and that, as the money was given to the administrator to be distributed to the creditors, the administrator as the debtor's agent is obligated to disburse the money to the creditors. I would add this commentary that, as the proposal was annulled, the money was not received as a payment into the proposal nor could it be paid out as a distribution from the proposal. The money simply is trust money for the creditors and not part of any existing proposal. That is the reason for it not being subject to fees, there no longer being a proposal to

govern it.

[20] Registrar Nettie of the Ontario Superior Court of Justice recently ruled in *Koskins, Re* (2007), 32 C.B.R. (5<sup>th</sup>) 225, that a Certificate of Full Performance given in these circumstances is a nullity. With an annulment there is no existing proposal to perform, nor is there any proposal for which to give a certificate. My concern is that when a certificate is given where a proposal is annulled, the debtor may consider herself discharged from the proposal debt. However, Subsection 66.32(2), quoted above in [11], revives the balance of the claim in full.

[21] This gives creditors the right to take action to collect the deficiencies on their claims. Certificates given after an annulment simply are of no effect. They cannot protect the debtor from creditors who elect to assert their full original claims. The Superintendent cannot waive the creditors' rights in this regard, only they can.

[22] My finding is that, once there was an annulment of the proposal, there was no proposal; no longer was the scheme of the consumer proposal available;



and thus no longer was there the basis for taking fees, no proposal - no fees, and no effective certificate. I think it is abundantly clear that an administrator who takes on this work is bound to carefully follow actively on its proposals, noting payments, noting deadlines, advising debtors of impending default, and, when there is an annulment, advising creditors and the Official Receiver. I suggest the Administrator was neglectful and may be answerable to Ms. Donald-Reagh and her creditors. However, it is not for me in this application to make findings in this regard nor to give advice as to how best to rectify the situation.

[23] An order will be granted refusing ratification of the Certificate of February 6, 2008, and declaring that no fees are due to the Administrator respecting the post annulment payment.

R.

Halifax, Nova Scotia  
December 19, 2008