IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Coyle (Re), 2011 NSSC 469

Date: December 21, 2011
Docket: B 31647
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 31647
Estate No. 51-1034823

In the Matter of the Bankruptcy of Leslie Coyle

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: September 29, 2011

Counsel: Andrew Waugh representing Leslie Coyle

Jonathan Shapiro representing the Minister of
Human Resources and Skills Development Canada

Tim Hill representing the Superintendent of Bankruptcy

Background

[1] This application originally came before me on March 15, 2011. At that time counsel for the Office of the Superintendent of Bankruptcy (OSB) raised an additional issue which the other parties were not prepared to address. The application proceeded that day on the understanding that I would hear the parties on the additional issue once I filed my decision on the original issue. It was filed on June 20, 2011 and is cited as *Coyle, Re*, 2011 NSSC 238. I again heard the parties on September 29, 2011. This is my decision respecting the additional issue.

[2] The facts are related in full detail in the original decision. However, let me give a brief summary.

[3] The Applicant, Leslie Coyle, had made three separate claims for benefits under the *Employment Insurance Act*, S.C. 1996, c.23 (*EI Act*). Benefits were paid to her. The Canada Employment Insurance Commission (Commission) subsequently in processing these claims determined that she had made fraudulent misrepresentations. The benefits should not have been paid to her. The Commission sought to recover these benefits using the

procedures in the *EI Act* for that purpose. She appealed this determination to the Board of Referees (Board) established under the *EI Act* and made an assignment in bankruptcy on January 31, 2008. The Board heard her appeals, one on February 5, 2008; the other two on December 17, 2008. It confirmed that the Commission was entitled to recover these payments from her.

[4] The original issue was whether the Board was competent to determine whether the obligation to reimburse the Commission would be discharged upon her discharge from bankruptcy on March 25, 2009 or would survive bankruptcy, being debts of the kind described in Paragraph 178(1)(e) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*).

[5] In my original decision I found that the Board has authority to determine whether such debts fall under this Paragraph.

Additional Issue

[6] The additional issue now before me is simply whether the proceedings before the Board were subject to the stay directed by Subsection 69.3(1) of

the *BIA*. I quote it:

> Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.

[7] Section 69.4 permits the court to lift the stay:

> A creditor who is affected by the operation of sections 69 to 69.31 or any other person affected by the operation of section 69.31 may apply to the court for a declaration that those sections no longer operate in respect of that creditor or person, and the court may make such a declaration, subject to any qualifications that the court considers proper, if it is satisfied
>
> (a) that the creditor or person is likely to be materially prejudiced by the continued operation of those sections; or
>
> (b) that it is equitable on other grounds to make such a declaration.

This relief was not sought.

[8] I must first determine whether the proceedings before the Board were subject to the stay. If I find that they were, I must determine whether the stay can now be lifted under this Section *nunc pro tunc*.

Positions of the Parties

[9] The Commission

Counsel for the Commission submits that Subsection 69.3(1) does not apply to proceedings before the Board as they were not commenced by the Commission which is the creditor, but by the Applicant who is the debtor.

[10] But if this Subsection does apply, he submits that the proceedings are not a nullity but an irregularity. The stay should be lifted *nunc pro tunc*.

[11] The Applicant

Counsel for the Applicant submits that the proceedings before the Board are part of the enforcement process provided to the Commission in the *EI Act* for the collection of money alleged to be recoverable by it. The stay provided by Subsection 69.3(1) applies to such proceedings, they being proceedings whereby the Commission is attempting to confirm that the Applicant owes it money. Who initiated the proceedings, the Commission or the Applicant, is not relevant.

[12] As to lifting the stay *nunc pro tunc* he submits that such would be inequitable and should not be granted.

[13] The OSB

Counsel for the OSB notes that appeals before the Board are not true appeals, but rather trials *de novo*. The proceedings before the Board are the first opportunity for a claimant to make submissions before an impartial tribunal where there is the opportunity to advance evidence and question the evidence of the Applicant. Simply put the hearing before the Board is the first judicial proceeding involving both the Applicant and the Commission. It is driven by the provisions in the *EI Act* whereby the debtor - creditor relationship between the Applicant and the Commission is to be judicially determined. In substance it is a proceeding against a bankrupt. It is stayed.

[14] He submits that this is not an appropriate case for the Court to exercise its discretion to lift the stay *nunc pro tunc.*

Analysis re Stay of Proceedings

[15] A number of cases were cited to me respecting the reasons for the stay provisions. It suffices that I refer to the following quotation from *R v. Fitzgibbon*, [1990] 1 S.C.R. 1005 (Cory J.), at page 1015:

> It is to be observed that the section prohibits the granting of any

> "remedy against" or "recovery of" any claim against the debtor or his property without leave of the court in bankruptcy. The aim of the section is to provide a means of maintaining control over the distribution of the assets and property of the bankrupt. In doing so, it reflects one of the primary purposes of the *Bankruptcy Act*, namely to provide for the orderly and fair distribution of the bankrupt's property among his or her creditors on a *pari passu* basis. See Duncan and Honsberger, Bankruptcy in Canada (3rd ed. 1961), at p. 4. The object of the section is to avoid a multiplicity of proceedings and to prevent any single unsecured creditor from obtaining a priority over any other unsecured creditors by bringing an action and executing a judgment against the debtor. This is accomplished by providing that no remedy or action may be taken against a bankrupt without leave of the court in bankruptcy, and then only upon such terms as that court may impose.

[16] Section 48 of the *EI Act* directs a claimant to submit a claim in compliance with Section 50 and the regulations and to provide information as directed by the Commission, including the claimant's employment circumstances. Sections 50 and 51 give details of how claims are to be made.

[17] The Commission's argument is simply that it is not a proceeding against the Applicant such as to bring its involvement under the stay provision of Section 69.3 of the *BIA*. It is the Applicant who is taking the proceeding. But the Applicant is not a "creditor". The stay only applies to creditors.

[18] However, the response of both the OSB and the Applicant is that one must

look at the nature of the proceeding. An officer of the Commission reviews the claimant's application. The officer makes an assessment of whether the claimant is entitled to a benefit or has done, as was found here, some improper act which entitles the Commission to the return of money. This is an administrative, not a judicial procedure. The claimant can acquiesce with the administrative decision, and be subject to the collection remedies provided in the *EI Act*. Alternatively, the claimant can appeal the decision to the Board. The result is that the administrative decision is judicially reviewed and a judicial decision follows.

[19] What is the nature of this appeal? Clearly, it is not the appeal of a judicial decision. Rather it is a procedure whereby the Commission must from the start prove its claim before the Board, it being a judicial body empowered by the *EI Act* to determine the validity of the Commission's claims. Either party may appeal to the next judicial level, the Umpire and further to the Federal Courts and ultimately the Supreme Court of Canada.

[20] The narrow question is then one of who is asserting the claim. It is the one who is being stayed. Clearly it is the Commission. The Applicant is simply

asserting her right to have the claim against her judicially determined. The burden remains on the Commission.

[21] The right to defend or the action of defending a claim is not stayed. What is stayed is the proceeding whereby a claim is asserted or pursued.

[22] What is important is not the use of the word "appeal" in the *EI Act*, rather what is the substance of the proceeding. Who is seeking benefits, redress, etc? Who is resisting such? Who has the burden of proof?

[23] I am of the view that although the proceeding is described as an appeal by the Applicant, it is really judicially a trial or hearing of first instance with the Commission seeking to prove its claim against the bankrupt. Counsel for the OSB used the phrase trial *de novo*. However I think my characterization is more accurate, as it is the first judicial proceeding. Incidently, as fraud was alleged by the Commission and found by the Board, the burden of proof clearly was on the Commission. He who alleges fraud, must strictly prove it.

[24] Notwithstanding that the Applicant is referred to as the Appellant, the

moving party is in substance the Commission. The Applicant did not accept the Commission's administrative ruling. She had to appeal its ruling, but in reality she forced the Commission to prove its case before a judicial body. It is the Commission that was seeking relief, i.e. confirmation of its administrative decision. This is clearly a situation intended to be stayed by Subsection 69.(3). This was not done. The proceedings are irregular. The Commission can only revive its claim by obtaining a lifting of the stay *nunc pro tunc* or try to reinstate or repeat proceedings before the Board. I express no opinion whether the latter is now possible.

[25] Considering all these factors, I am of the view that the proceedings before the Board were that of the Commission against the Applicant, a bankrupt. The Commission is a creditor. Its proceedings before the Board were stayed by Subsection 69.3(1).

Analysis re Lifting the Stay under Section 69.4 *nunc pro tunc*

[26] It is well established that the failure to have the stay lifted before proceeding against a bankrupt is only an irregularity. Leave to proceed or lifting of the stay, whichever way one wishes to describe it, can be granted *nunc pro tunc*.

(*Trust and Guaranteed Co.* v. *Brenner* (1932), 13 C.B.R. 518 (Ont. CA).

[27] First I must determine whether a stay would have been granted, if it had been sought at the proper time.

[28] It can be granted, if the court is either satisfied that the creditor is "likely to be materially prejudiced" by the operation of the stay or "it is equitable on other grounds" to lift the stay.

[29] There is little case law that is directly helpful. However, I note the following:

1. *Re Kandasamy* (2009), 50 C.B.R. (5th) 207 (Ont. Registrar Diamond) in which it is observed that where a debt survives bankruptcy and the stay is not lifted, the result is simply a delay in the litigation which is likely to prejudice the creditor.

2. *Re Advocate Mines Ltd.* (1984), 52 (C.B.R.) (N.S.) 277 (Ont. Registrar Ferron) which clearly acknowledges that the stay may be removed in:

> "1. Action against the bankrupt for a debt to which a discharge would not be a defense."

3. *Ma, Re* (2001), 24 C.B.R. (4th) 68 (Ont. CA) which held that it was not necessary to prove a *prima facie* case to have a stay lifted. What is required is simply "sound" reasons" consistent with the scheme of the

> *BIA*. In practice it is usually enough to review the pleadings and other material on file. Where it is clear that the substance of the claim is fraud the stay normally should be lifted.

[30] The prejudice for the Commission is that it would be denied the right of remedy against the Applicant when it had reasonable bases for asserting a claim framed in fraudulent misrepresentation, which, if proved, would survive bankruptcy. This is how it "was likely to be materially prejudiced". The purpose of the stay is to facilitate the administration of the bankrupt's estate. Assets are collected by the trustee. Creditors must assert their claims to the trustee. It is the trustee who then makes the lawful distribution of assets and debts are thereby discharged. But debts arising from fraud and the like are not discharged. Such creditors are normally allowed to pursue their debts outside the bankruptcy procedures. But to assure that procedures against the bankrupt are orderly, the permission of the Court is necessary. As mentioned above where fraud is involved such permission is normally granted. Delay can result in prejudice to the creditor and unwarranted advantage to the debtor.

[31] No submissions were made that the administration of the estate would have

been prejudiced, if the stay were lifted. I do not see that any rights of the Applicant would have been prejudiced by lifting the stay. The debts, if proved, would survive bankruptcy.

[32] I am satisfied that the stay would have been lifted, if it had been sought before the commencement of proceedings before the Board.

[33] If the stay is not now granted *nunc pro tunc*, the Commission may not be able to reassert its claim and will have lost the benefit of the determination of the Board. The Applicant on the other hand may be relieved of debts for technical reasons, notwithstanding their validity as debts which survive bankruptcy was otherwise confirmed by the Board and in this application.

[34] The Commission knew that the Applicant was in bankruptcy. It may be said that the Commission is deemed to know the law and should have known that it was required to seek leave and therefore cannot plead its ignorance. This is technically correct. However, until my earlier decision there apparently was no clear jurisprudence on the point. What is being sought by the Commission is a discretionary remedy. I think the state of the law at the

time may be a factor in my exercise of discretion.

[35] In contrast there is a danger in making such relief too easy to obtain. Creditors may proceed without having the stay lifted, knowing that, if it later becomes a problem, the stay can be granted *nunc pro tunc*. The provision is thereby emaciated.

[36] However, the overriding theme in the commentary and case law strongly says to me that where debts fraudulent in character and surviving bankruptcy are in issue, not only should stays be lifted, if sought at the appropriate time, but also, if sought *nunc pro tunc*. Otherwise, the integrity of the bankruptcy system would be prejudiced.

Conclusion

[37] I shall exercise my discretion by granting a lifting of the stay *nunc pro tunc.* It is fair that it should be subject to appropriate conditions. There was uncertainty in the jurisprudence. Counsel ably prepared extensive briefs. We have made this contribution to its clarification. This has taken time. I assume that interest and possibly penalties have been accruing to the

Applicant's prejudice. The condition of this relief is that the Commission waive all interest and penalties which have been accruing against the Applicant from the respective dates of the Board's decisions to the date of this decision.

R.

Halifax, Nova Scotia
December 21, 2011