SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Scotian Distribution Services Limited (re)*, 2020 NSSC 158

Date:20200511
Docket: No. 43999
Registry: Halifax
Estate Number: 51-2624515

In the Matter of: The Proposal of Scotian Distribution Services Limited

Judge: Raffi A. Balmanoukian, Registrar

Heard: May 8, 2020, in Halifax, Nova Scotia (via Teleconference)

Counsel: Tim Hill, QC, for the Applicant, Scotian Distribution Services Limited

Lawrence Freeman, QC, for The Toronto-Dominion Bank

Gavin D.F. MacDonald, for Canadian Western Bank and Canadian Western Bank Leasing Inc.

Rachid Benmokrane (Gowlings WLG Montreal), for Bank of Montreal

David MacDonald, for Mackay's Truck Leasing & Rental Limited

Derek Cramm, for MNP Limited (watching brief)

Balmanoukian, Registrar:

[1] On May 8, 2020 I heard this application by Scotian Distribution Services Limited ("Scotian"). It may be summarized as pursuing two remedies: first, a second extension of time to file a proposal pursuant to Section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"); and second, for an administrative charge in priority to all others (except for CRA) for legal and professional fees, to an aggregate of $50,000, pursuant to Section 64.2 of the BIA.

[2] There were also ancillary motions to abridge time and to validate scope and method of service. Counsel filed and served an amended motion on May 4, 2020 to correct a transcription error that had been raised by the Court.

[3] In the circumstances, I am satisfied as to service and timeliness, including as to the amended motion. I am also satisfied that the late representations, written and oral, by creditors who appeared are justified in the tumultuous Covid-19-driven circumstances in which all find themselves. In ordinary times, the late engagement of counsel and the late (or non-existent) filing of submissions may be objectionable or attract consequences, in costs or otherwise.

[4] These are not ordinary times. I thank counsel for their efforts and for their mutual courtesies in the resultant teleconference.

[5] Turning first to the 50.4(9) extension request, no appearing party opposed the application, whose initial incarnation I discussed in *Re Scotian Distribution Services Limited*, 2020 NSSC 131. The updated affidavit of Mr. Ellsworth amply satisfies me that a second extension is appropriate.

[6] The applicant has taken extensive measures to adjust its operations in light of loss of a major contract and restrictions in the scope of its enterprise. It has shed leases, equipment, and employees. It exceeded expectations in the collection of accounts receivable. I am satisfied that the three-part test in s. 50.4(9) has been met at this juncture, and I issued the stand-alone extension order at the conclusion of the hearing.

[7] I should note that counsel for Bank of Montreal ("BMO") pointed out that there had been an apparent misunderstanding with respect to a request for a lease payment deferral. The parties have apparently made arrangements to put this aright in short order. Given that time frame (10 days), I did not see the necessity of incorporating this into the relevant order, but if this is not resolved to the

satisfaction of both parties, I remain seized to hear them on this matter and, if necessary, to amend the extension order.

[8] I now turn to the s. 64.2 "administrative charge" application.

[9] At the hearing, I raised the issue of whether the Registrar has jurisdiction under this provision. The relevant part of that section reads:

> **64.2 (1)** On notice to the secured creditors who are likely to be affected by the security or charge, the court may make an order declaring that all or part of the property of a person in respect of whom a notice of intention is filed under section 50.4 or a proposal is filed under subsection 62(1) is subject to a security or charge, in an amount that the court considers appropriate, in respect of the fees and expenses of
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> > **(a)** the trustee, including the fees and expenses of any financial, legal or other experts engaged by the trustee in the performance of the trustee's duties;
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> > **(b)** any financial, legal or other experts engaged by the person for the purpose of proceedings under this Division; and
> >
> > **(c)** any financial, legal or other experts engaged by any other interested person if the court is satisfied that the security or charge is necessary for the effective participation of that person in proceedings under this Division.
>
> **(2)** The court may order that the security or charge rank in priority over the claim of any secured creditor of the person. [emphases added]

[10] Counsel agreed that the "may" affords the "court" a discretion. In this context, "court" is defined by Section 2 of the BIA as:

> ***court***, except in paragraphs 178(1)(a) and (a.1) and sections 204.1 to 204.3, means a court referred to in subsection 183(1) or (1.1) or a judge of that court, and includes a registrar when exercising the powers of the court conferred on a registrar under this Act (emphasis added)

[11] Section 183(1)(c) means, in Nova Scotia, that “court” is the Supreme Court. S. 183(1.1) pertains to Quebec and is not applicable here.

[12] Am I conferred such powers? Although there are other provisions within the BIA, my most significant jurisdictional enablers are in Section 192.

[13] Counsel for the applicant submitted that my s. 64.2 jurisdiction arises from one of three fountainheads: 192(1)(k); 192(1)(m); or an inherent or ancillary jurisdiction arising from another conferred authority. I can also hear and determine “interim orders in cases of urgency,” or “with the consent of all parties” (192(1)(e) and 192(1)(j)).

[14] “Urgency” was not argued before me, except to the extent that it was submitted that trustees and professional advisors (including lawyers) need to be assured of their payment in order to keep the process of formulating and presenting a proposal moving. That may be so in some instances, but as I will discuss below, I do not see that as constraining the applicant here. The current timeframe to either completing a proposal or a deemed assignment in bankruptcy is 45 days, and where the evidence shows meaningful cash on hand and only $7339 spent on professional fees to date, I think this provision was wisely not pursued in argument.

[15] Two counsel – for The Toronto-Dominion Bank ("TD") and Canadian Western Bank/Canadian Western Bank Leasing Inc. (collectively "CWB") indicated they did not consent to my hearing and determining the substantive s. 64.2 matter. That removes the operation of 192(1)(j). Counsel for BMO consented to my hearing the matter on the merits, but contested the administrative order itself.

[16] So that leaves 192(1)(k) and (m), which respectively read:

> **192 (1)** The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,
>
> …
>
> **(k)** to hear and determine any matter relating to practice and procedure in the courts;
>
> **…**
>
> **(m)** to perform all necessary administrative duties relating to the practice and procedure in the courts; [emphases added]

[17] Counsel could point me to no authority, nor could I find any, for the proposition that a s. 64.2 administrative charge order comes within the scope of "practice and procedure in the courts." This is distinct from, for example, the Court's jurisdiction over taxation or passing the *quantum* of accounts and costs, or timing and procedural matters such as the s. 50.4(9) application before me.

[18] I must also consider s. 64.2 contextually. It gives the court the authority to divest secured creditors "who are likely to be affected" of a contractual right of priority to the extent of the administrative charge, in appropriate circumstances. It is for that reason that it is both discretionary and requires notice to secured (but apparently not unsecured) creditors. It is limited to circumstances in which a proposal has been made or is nigh.

[19] That is great power. With great power comes great responsibility.

[20] Parliament has given me very *limited* responsibility when it comes to proposals. I may extend time, revive, grant leave to file a second consumer proposal, and deal with procedural matters "in the Courts." I only have authority to approve proposals "where they are not opposed" (192(1)(d)), or where the parties confer jurisdiction on me by consent. I cannot see how Parliament would have intended for me to have authority to upset the general scheme of priorities when a proposal or notice of intention has been filed (absent the noted consent) when it has not given me the general authority to adjudicate disputed proposals.

[21] It is worth noting that the Registrar's *position* is not uniform across Canada. However, its *jurisdiction* is. It follows, in my view, that I should consider the scope of my jurisdiction contextually and practically, but not expansively.

[22] Registrars Bray and Nettie – both esteemed former holders of this station in New Brunswick and Ontario respectively – wrote a decade ago in "Current Challenges for Registrars in Bankruptcy" (Sarra, ed., *Annual Review of Insolvency Law*, 2009 (Toronto: Carswell, 2010)):

> Could we postulate that a specialized court to administer this federal statute might eventually become appropriate with one level of adjudication rather than the variety of approaches that now exist with the provincial and territorial superior courts, many of which are administered on the executive model? In some areas, registrars conduct hearings as well as dealing with chambers matters and the administration of the Registry. In other places Masters conduct hearings and perform chambers assignments while non-legally-trained personnel administer the registry. There are differential divisions of tasks between registrars and Section 96 judges between regions; and in some places non-legally-trained registrars conduct hearings. An appropriate objective might be to have a greater level of procedural and administrative consistency throughout the country in the functioning of the *BIA*. [emphasis added]

[23] Again, Parliament in its wisdom has allowed differentiation in what the Registrar's position "looks like" from place to place. Given that, I do not see how I can or should cloak myself with an inherent (as opposed to ancillary) jurisdiction on which the statute is silent.

[24] More pithily, at Section I36, Houlden, Morawetz, and Sarra state in the *2019-2020 Annotated Bankruptcy and Insolvency Act*:

> A registrar derives its authority from the BIA and rules and has no inherent jurisdiction. If authority for an act cannot be found in the BIA or the Rules, then the Registrar cannot perform it: *Re Dymac Systems Inc*. (2003), 64 OR (3d) 360, 42 CBR (4th) 190, 2003 CarswellOnt 1783 (Ont. SCJ)

[25] Counsel for all parties state, correctly, that there is little case law on Section 64.2. Counsel for the applicant submits that this is because administrative charges are more or less a matter of course. He submits three orders (two in Newfoundland and Labrador, one in Nova Scotia) in which he participated and in which such administrative charges were issued.

[26] Quite possibly so. However, he readily conceded that all were by "Section 96" Supreme Court Justices. None were by Registrars.

[27] Accordingly, I must conclude that I do not have jurisdiction to hear an application for a s. 64.2 administrative charge, absent consent of the parties or the type of exigent circumstances contemplated in s. 192, or absent what (with no disrespect) might be termed "housekeeping" situations such as settling orders (192(1)(l)).

[28] Ordinarily, that would be the end of the matter from my perspective. I would (and do) dismiss the s. 64.2 application for want of jurisdiction and advise counsel that they may proceed if they wish before a Supreme Court Justice. However, I heard the parties on the merits given both the restrictions on hearings currently in place and the geographic diversity of the parties and counsel. I did so in able to make a finding on the merits in the event I am wrong about jurisdiction.

[29] As noted, counsel for the applicant states that a s. 64.2 administrative charge is more or less a matter of course. Perhaps so.

[30] It should be common knowledge, at least locally, that I do not consider the arguments that "all the cool jurists do it" or "that's the way it's always been done" to be persuasive (Hammurabi's bankruptcy code called for three years' indentured servitude; the law has since evolved). Absent binding authority to the contrary, I do have jurisdiction over "practice and procedure in the courts" – so if I am wrong and I am cloaked with s. 64.2 authority , it is incumbent upon me to consider the application on its merits and not as a Soviet-style rubber stamp. My duty is both to recognize the limits of my jurisdiction, and also not to abdicate what authority there is and "sign what is put in front of me," without inquiry.

[31] Counsel for Scotian has provided me with one of the few reported cases on s. 64.2, namely *Re Colossus Minerals Inc*., 2014 ONSC 514. In that case, Justice Wilton-Siegal found that the s. 64.2 "super-priority" was called for as "essential both to a successful proceeding under the BIA as well as for the conduct of the SISP" [sale and investor solicitation process]; because the proceeding was complex; *and because the priority would be subordinate to two secured creditors*, although those creditors had not objected (paras. 8, 12-15).

[32] In contrast, the evidence before me is that since filing its notice of intention to file a proposal, Scotian has shed much of its operations – returning some 26 tractors, downsizing from fourteen warehouses and three offices to one-and-one respectively, and effecting numerous layoffs (affidavit of Erville Ellsworth, para. 8). Its collection of accounts receivable has exceeded expectations, amounting to just under a million dollars (report of Derek Cramm, MNP Ltd., para. 17, hereinafter the "Cramm Report"). It budgeted $5,000 for professional fees to March 31, 2020 (Cramm Report, Exhibit A) and in fact spent $7,339 (Cramm Report, Exhibit B).

[33] There is also a notation of a legal action against Maritime-Ontario for $175,000 (Cramm Report, Exhibit B, note B) which I am told is in limbo. Counsel for Scotian clarified that the associated legal and professional fees would not be covered by the priority charge he seeks.

[34] As noted, counsel for CWB, TD, and BMO all oppose the application or, in the alternative, seek to have their respective securities exempted from the priority and/or that the priority should be for a lower amount. The net effect of "carving out" all of these objecting security holders would be to render the priority meaningless. TD's security limit, I am told, is approximately $1.6 million (its current balance is not before me). BMO was unable to give me a precise figure,

but has financed at least five trucks (Cramm Report, para. 10). CWB is in for some $335,000 (which it asserts, for clarity, are under "true leases." I am not to determine that today and have no material on which to do so).

[35] That is not to say that in appropriate circumstances, a secured creditor may not have to stand down to the extent of a reasonable priority administrative charge. I agree with Scotian's counsel that the purpose of such a charge is to ensure that a debtor has access to the professional advice needed to formulate and advocate a viable proposal. However, in the current circumstances it appears that Scotian has cash flow from its collections, but limited operations. The Cramm report, Exhibit B, shows $122,793 in net cash flow for March and April, 2020.

[36] I therefore agree with counsel for TD, BMO, and CWB that Scotian's ability to access short-term professional advice, for at least the 45 days during which I have extended the time for filing a proposal, is not jeopardized by reason of being devoid of financial resources. No doubt the proposal itself will deal with professional remuneration, and its priority, for creditor consideration. That is a topic for another day.

[37] I also observe that both the budgeted and actual professional fees to April 2020 are a fraction of the $50,000 priority sought. It may well be that "the heavy lifting" is yet to be done, but it appears Scotian has made substantial progress in

rightsizing its operations to date, having incurred $7,339 in professional fees (perhaps excluding work in progress) to do so.

[38] Conversely, $50,000 represents 7.8% of Scotian's 2019 revenue (Cramm Report, paragraph 1).

[39] Thus, in the event that I am wrong as to jurisdiction and do have authority to order an administrative charge pursuant to Section 64.2 BIA, I would not exercise that discretion in this case.

[40] Lastly, if I had ordered such a charge, it would have been:

(a) the lesser of $25,000 – a number alternately proposed by Scotian's counsel – and the amount of professional fees for the next 45 days as taxed by the Court;

(b) specifically exclusive, for clarity, of any professional fees related to the Maritime-Ontario action; and

(c) Subject to the priority of Bank of Montreal to payment of lease arrears which I have discussed above (or as determined by the Court in the event the parties continue to be under mutual misunderstanding on the point).

[41] The application for an extension of time under s. 50.4(9) is granted. The application for a priority administrative charge pursuant to s. 64.2 is dismissed for want of jurisdiction.

[42] Once again, I am indebted to all counsel for their courtesy and flexibility in the difficult times and logistical constraints in which we are situate. Having noted that this virtual hearing proceeded on the 75th anniversary of Victory in Europe Day, I am sure I cause no indignity by concluding that "we'll meet again."

Balmanoukian, R.