SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *Freckelton (Re)*, 2021 NSSC 144

Date: 20210503
Docket: No. 44686, 44720
Registry: Halifax
Estate Number: 51-2382757, 51-2382759

In the Matter of: The bankruptcies of Alexander Cameron Freckelton and Michelle Dawn Freckelton

Judge: Raffi A. Balmanoukian, Registrar

Heard: April 27, 2021, in Pictou, Nova Scotia

Counsel: Tina Powell, for the Trustee, MNP Limited (by teleconference)
Alexander Cameron Freckelton and Michelle Dawn Freckelton, personally (by teleconference)

Balmanoukian, Registrar:

[1] This case deals with the Registrar's authority over Trustee's costs in summary administration estates. Specifically, it deals with whether, and when, a Court should address costs which the Trustee may recover against the estate (or the bankrupt, if funds in the estate are inadequate) in such summary administration estates.

[2] Mr. and Ms. Freckelton, spouses, made assignments in bankruptcy. They were not joint assignments; each was a summary administration. Eventually, they performed all relevant duties and the Trustee recommended absolute discharges. So far as that goes, these were ordinary files. At the hearing, I granted those orders, with a written decision to follow.

[3] The issues I wish to address are:

- In summary administration estates, what is the Court's authority over the Trustee's taxable costs?

- If the Court has authority over the issue, when there are separate summary administration estates for spouses or domestic partners, should the Court

look at whether a joint filing was practicable; if it was, should it impact the Trustee's entitlement to costs; and

- Do either of those factors impact on the Trustee's entitlement to costs in these estates?

Costs in general

[4] I begin with the obvious. Costs are an important tool in a Court's control over its process. Awards of costs in favour of or against a party, or orders which adjust or reduce an account on a taxation, influence how parties conduct themselves. They reflect how a Court best allocates scarce resources. They reward or sanction actions that enhance or improve, or delay and frustrate, the litigation process. They reflect results obtained and work performed. They condemn shoddy work or waste incurred. They protect and defend against abuses of or infringements upon system integrity. They are a tool to achieve, in the oft-cited but important phrase, the "just, speedy, and inexpensive determination" of a proceeding. These are motherhood sentiments with which nobody can seriously quarrel.

[5] One would think that no authority need be cited for the proposition that a Court has sovereignty over its own processes, and that costs are an elemental tool

in the exercise of that sovereignty. If such authority *is* needed, however, it is vested in this Court both by statute and common law.

[6] Section 192(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA") confers authority to the Registrar to tax accounts; in addition, it confers authority to the Court over its own process and procedure[1]. To repeat, costs are a valuable aspect of control, influence, and regulation of that process and procedure. The relevant provisions 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,
>
> **…**
>
> **(i)** to tax or fix costs and to pass accounts;
>
> **…**
>
> **(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…

[7] It is therefore clear that the Court has both statutory and common law "power and jurisdiction" over costs, both as a matter of taxation and as a matter of

[1] In addition to that provided at Common Law – see this Court's discussion in *Re Eastern Infrastructure Limited*, 2020 NSSC 220 at paras. 19-23.

control over its own process[2]. The question I shall discuss in turn is what limitations, if any, are on that judicially exercised discretion.

[8] As will appear, in the context of this case there are constraints which form a ceiling, *but not a floor*, on Trustee's costs in summary administration.

This Court's Jurisdiction Over Trustee's Costs, in general

[9] As discussed above, this Court's authority over costs is wide, subject to the proper use of judicial discretion. It is now time to talk about *Trustee's* costs, specifically.

[10] Section 192(1) refers to accounts in general, not just for ordinary administration estates. It includes both Trustees' accounts, and lawyers' accounts. I have discussed the latter in *Re Crummey and Wojtyniac*, 2020 NSSC 377; that issue does not arise in the case at bar. I am, here, speaking only with respect to Trustees' accounts.

[2] The scope of authority over any Court's own process is expansive, whether that Court is a creature of statute or not. For example, although s. 192(3) of the Act precludes me from committing for contempt, I nevertheless have authority to cite for contempt and to impose sanctions short of committal, as part of this Court's control over its own process: See *Lymar v. Jonsson*, 2016 ABCA 76. For a more general discussion of a statutory Court's authority over its own process, see our Court of Appeal's comments respecting a statutory Court in *Reference re Public Services Sustainability (2015) Act*, 2020 NSCA 53 at paras. 13-15.

[11] I am also not discussing s. 197 of the BIA, which confers jurisdiction over costs for proceedings in court. I am speaking today about Trustees' costs for administration of the estate.

[12] Trustees are officers of this Court. They are accountable to it for their actions and estate administration. The fact they are licensed and under a regulatory regime does not change that salient fact. To cite an obvious example - lawyers, too, are licensed and regulated but their status as Court officers and accountability to the Court is beyond question.

[13] Among other things, Trustees are subject to a Code of Ethics, contained in the *Bankruptcy and Insolvency Act General Rules*, CRC 1978, c. 368 as amended (the "General Rules"). Regulations 34 through 39 read:

> **34** Every trustee shall maintain the high standards of ethics that are central to the maintenance of public trust and confidence in the administration of the Act.
>
> **35** For the purposes of sections 39 to 52, ***professional engagement*** means any bankruptcy or insolvency matter in respect of which a trustee is appointed or designated to act in that capacity pursuant to the Act.
>
> **36** Trustees shall perform their duties in a timely manner and carry out their functions with competence, honesty, integrity and due care.
>
> **37** Trustees shall cooperate fully with representatives of the Superintendent in all matters arising out of the Act, these Rules or a directive.
>
> **38** Trustees shall not assist, advise or encourage any person to engage in any conduct that the trustees know, or ought to know, is illegal or dishonest, in respect of the bankruptcy and insolvency process.

> **39** Trustees shall be honest and impartial and shall provide to interested parties full and accurate information as required by the Act with respect to the professional engagements of the trustees.

[14] As a matter of judicial oversight, it is important that the Court be able to enforce these and other provisions. Regulatory oversight or disciplinary action is not enough. An act or omission that has been detrimental to an estate may not be an ethical, regulatory, or disciplinary default, and may not come to the attention of the Superintendent. Conversely, a licensing or regulatory matter may not be in itself detrimental to any specific estate or be a matter before a Court.

[15] I turn to case law.

[16] The Alberta Court of Appeal was pithy in *Canada (AG) v. Peat Marwick Thorne Inc., (sub. nom. Re Nagy)* 1999 ABCA 133. Berger, JA stated, for the Court:

> [1] Trustees who fail to meet their duties under the Bankruptcy and Insolvency Act are not entitled to full compensation: Re: Deacon (1986) 60 C.B.R. (N.S.) 28 (Ont S.C.); Re: George (1993) 19 C.B.R. (3d) 40 (Ont. Gen. Div.); Re: Kurty [1998] S.J. No. 623. A trustee has a positive duty to determine the amount of the bankrupt's surplus income and to accurately report that amount. On this record, it is clear that Peat Marwick failed to meet this duty.
>
> [2] The Registrar has jurisdiction to tax down the accounts of a trustee as a remedy for failure to recover surplus income. The question of whether or not to tax down the trustee's accounts is a discretionary matter. Absent error in principle, appellate interference is not warranted. [emphases added]

[17] At para. 6, Justice Foisey indicated accounts for three estates – two of $2,663 and one of $2,356. It would appear that these were summary estates; in any event, the comments above do not differentiate between the Registrar's "downward" taxation authority on ordinary administration estates, and summary administration ones.

[18] In *Re Schneider*, 2004 SKQB 394, the well-respected Registrar Herauf stated:

> [8] In addition, however, case law has evolved centering on the equitable jurisdiction of the courts to alter the tariff fees of a Trustee in certain circumstances.
>
> [9] In *Re Deacon* (1986), 60 C.B.R. (N.S.) 28 (Ont. S.C.), the Trustee mistakenly thought that the bankrupt's vehicle was exempt. It was not. The auto was not realized as part of the estate. The Superintendent's Office noted the deficiency, and requested that the Trustee's remuneration be reduced on taxation. Although there was no discretion in the *BIA* allowing the Registrar to reduce the Trustee's fees, Master Ferron noted at para. 12:
>
> > The bankruptcy court is a court of equity and proceedings in bankruptcy are governed by equitable principles. Equity acts in obedience to the statutory law and, while equity guides the bankruptcy court, its doctrines and principles cannot be applied to produce a result incompatible with the statute.
>
> [10] And at paras. 29-30:
>
> > The allowance under the tariff is predicated on the assumption that the trustee has carried out all his duties as trustee under the *Act*. The characterization of the tariff as non-discretionary is limited so far as the court is concerned. In other words, the court is bound to approve the compensation determined by the tariff only in those cases where the trustee has realized and distributed the bankrupt's assets and has applied

> for the bankrupt's discharge in accordance with the requirements of the *Act* and his obligations as trustee.
>
> These three elements comprising liquidation, distribution and rehabilitation are the essence and the object of bankruptcy law. The *Bankruptcy Act* implements those objects. <u>It is only when the trustee has met the requirements of these objects that he is entitled to look to the tariff for his compensation.</u>

[11] Master Ferron went on to determine that the Trustee had not discharged its duty on the facts before the Court, and thus the tariff did not apply.

[12] This Court made a similar determination in *Re Livingstone* (1998), 1998 CanLII 13683 (SK QB), 169 Sask. R. 305 (Sask. Q.B.). The Court stated at para. 3:

> I prefer to follow the weight of authority which has held that the registrar does have the discretion to tax the accounts and that Rule 115[3] is not applicable when the trustee has not carried out his duties as trustee under the *Act*. See Section 192(1)(i) of the *Bankruptcy and Insolvency Act*, *Re Deacon (Trustee of)* (1986), 60 C.B.R. (N.S.) 29 (Ont. Master), *Re George* (1993), 19 C.B.R. (3d) 40 (Ont. Bktcy.), *Re Vanderbanck* (1995), 42 C.B.R. (3d) 112 (Que. S.C.), and the annotation of C. H. Morawetz, Q.C. to *Re Frustaglio* (1985), 56 C.B.R. (N.S.) 158 (Ont. Bktcy.) and the annotation by L. J. Gouin to *Re Potvin* (1990), 80 C.B.R. (N.S.) 267 (Que. S.C.)
>
> …

[13] In *Livingstone*, the Trustee had failed to properly calculate surplus income, and had essentially acted as an advocate for the bankrupt in the proceedings. Based upon these findings, the fees of the Trustee were reduced by $200.00. [emphases added]

This Court's Jurisdiction Over Trustee's Costs in Summary Administration Estates – a Ceiling, not a Floor

[19] Section 156 of the BIA reads:

[3] This is an apparent reference to the then Saskatchewan Rule 115, not General Rule 115.

> **156** The trustee shall receive such fees and disbursements as may be prescribed.

[20] The fees and disbursements "as prescribed" for summary administration estates are contained in Rule 128 of the General Rules. It sets out a percentage of receipts on a scale, combined with permitted disbursements and times at which the Trustee may take draws against fees. It does not create an entitlement; it states the basis upon which the fees and disbursements are calculated. It reads:

> **128 (1)** The fees of the trustee for services performed in a summary administration are calculated on the total receipts remaining after deducting necessary disbursements relating directly to the realization of the property of the bankrupt, and the payments to secured creditors, according to the following percentages:
>
> **(a)** 100 per cent on the first $975 or less of receipts;
>
> **(b)** 35 per cent on the portion of the receipts exceeding $975 but not exceeding $2,000; and
>
> **(c)** 50 per cent on the portion of the receipts exceeding $2,000.
>
> **(2)** A trustee in a summary administration may claim, in addition to the amount set out in subsection (1),
>
> **(a)** the costs of counselling referred to in subsection 131(2);
>
> **(b)** the fee for filing an assignment referred to in paragraph 132(a);
>
> **(c)** the fee payable to the registrar under paragraph 1(a) of Part II of the schedule;
>
> **(d)** the amount of applicable federal and provincial taxes for goods and services; and
>
> **(e)** a lump sum of $100 in respect of administrative disbursements.
>
> **(3)** A trustee in a summary administration may withdraw from the bank account used in administering the estate of the bankrupt, as an advance on the amount set out in subsection (1),
>
> **(a)** $250, at the time of the mailing of the notice of bankruptcy;
>
> **(b)** an additional $250, thirty days after the date of the bankruptcy; and
>
> **(c)** an additional $250, four months after the date of the bankruptcy.

> **(4)** Subsections (1) to (3) apply to bankruptcies in respect of which proceedings are commenced on or after September 30, 1997 and the accounts are taxed on or after April 30, 1998. [emphases added]

[21] It will be seen that the Rule, although setting out a calculation matrix, still provides for taxation; it also states that the fees "are calculated," not that they "are fixed."

[22] In *Wasserman, Arsenault Ltd. v. Sone*, 2002 CanLII 41494 (Ont. CA), the Ontario Court of Appeal (Weiler, Abella and Godge, JJ.A) set out BIA s. 156 and General Rule 128 and continued:

> [19] Rumanek submits, however, that because the court has a discretion to reduce the trustee's fees below the tariff, it must have a discretion to increase them above the tariff. In *Re Vanderbank* (1995), 42 C.B.R. (3d) 112, (Que. S.C.), the parties agreed that the Registrar and the court kept their discretion in equity to reduce the fees prescribed by the tariff. In that case, the court followed the decision of Henry J. in *Re Frustaglio* (1985), 56 C.B.R. (NS) 158 (Ont. H.C.J.), where he reduced the fees of a trustee who had deliberately delayed submitting his account in order to take advantage of the higher tariff in the new rules. Following the principle in *Frustaglio*, the court in *Vanderbank* held that it is only after a trustee has fulfilled all of the objectives under the BIA of liquidation, distribution and rehabilitation of the bankrupt that he is entitled to look to the tariff for compensation. Because the trustee had not administered the estate in accordance with the Act and his duties, his compensation was reduced.
>
> [20] I would reject the submission that there is a discretion to increase the fees above the tariff because there is discretion to reduce them. Section 156 states that the trustee "shall receive" prescribed fees. The mandatory use of the word "shall" is indicative of the intention of the BIA that the tariff is the maximum that can be allowed. As pointed out by Farley J., although the Superior Court of Justice in Bankruptcy does possess equitable jurisdiction, "that does not confer on this Court the ability, capacity, or jurisdiction to do something not allowed by the BIA." By allowing only prescribed fees, s. 156 excludes any fees not prescribed by regulation. No fees other than the tariff in Rule 128 are prescribed. Former Bankruptcy Rule 117 specifically provided that amounts in excess of the tariff could be awarded if there were extraordinary services. Rule

> 117 has been repealed. This supports the interpretation that the tariff establishes the maximum fee that can be allowed.
>
> [21] Also supportive of this interpretation is the Policy Statement of the Superintendent of Bankruptcy's Programs, effective April 1, 1994. It states that the duties of the Office of the Superintendent have been expanded with the passage of the amendments to the BIA. It specifies that, if the statutory duties of the trustee are not fulfilled within the time limits contemplated under the Act, or at all, the fees that the trustee charges should be reduced, and letters of comment to that effect would be issued. No reference is made to increasing fees.
>
> [22] The trustee's fees are based on and limited by the receipts of each estate under summary administration; they cannot exceed those receipts no matter how much extra work has been done. There is a need for a cap on the fees a trustee can charge because the summary administration of estates is a low value, high volume business. On the other hand, the compensation awarded to a trustee under the tariff is for fulfilling the requirements of the work to be done in administering the bankrupt's estate. If the work has not been done, the Official Receiver can require in its letter of comment, upon the statement of receipts and disbursements submitted by the trustee, that the trustee tax its fee claim. There is no mechanism provided to allow a trustee to have a taxation on a summary administration of a bankrupt's estate in order to increase fees. This structure further reinforces the conclusion that the tariff amount may be reduced but not increased. [emphases added]

[23] In *Re Thomson* (1991), 4 CBR (3d) 109, the late Justice Kelly found that although the Trustee had expended considerable time and effort to the benefit of the estate, Rule 128 set a mandatory "cap" on fees. The Court did not have discretion to increase the fees. It did not say, however, that the Court could not lower the fees, where appropriate.

[24] Similarly, in *Re Crawford,* 1998 CanLII 1544 (NSSC), the Trustee (the late Michael Venner) had gone "above and beyond" and justifiably so. The Registrar found that s. 156 governed and that s. 197 "does not allow the Court to increase the

Trustee's remuneration over and above that stipulated in the BIA." [emphasis added].

[25] *Crawford* also says that s. 192(1)(i) BIA "does not extend to fixing amounts to be paid to the Trustee where the Trustee's remuneration is already dealt with in the BIA." To the extent that comment may be construed to apply to preclude decreases as well as increases, it is *obiter*; and to that extent I respectfully disagree. As discussed above, the Court *does* have a discretion, subject to the Rule 128 "cap," to *reduce* fees where appropriate – such as to preserve the integrity of the insolvency process or to sanction action or inaction by the Trustee, a topic to which I will return below.

[26] Finally, in *Re Danbrook*, 2007 SKQB 304, Registrar Schwann (as she then was) referred to the issue as "relatively settled" and stated at para. 26:

> [26] The position advanced by the trustee invites consideration of the equitable jurisdiction of this court in a summary administration bankruptcy. In *Re Livingston* 1998 CanLII 13683 (SK QB), 169 Sask. R. 305 and *Re Schneider* 2004 SKQB 394 (CanLII), 5 C.B.R. (5th) 111 Registrar Herauf canvassed (what was then) the controversial issue of whether the Registrar could exercise discretion to reduce trustee's fees on a summary administration or whether the Registrar was compelled to follow the tariff. In both cases the court held that the Registrar was not compelled to strictly follow the tariff and could exercise discretion to tax the accounts where the trustee failed to carry out his duties under the Act. (see also: *Re Deacon* (1986), 60 C.B.R. (N.S) 28 (Ont. S.C.); *Re Vanderbanck* (1995), 42 C.B.R. (3d) 112 (Que. S.C.); and *Re Frustaglio* (1985), 56 C.B.R. (N.S.) 158 (Ont. Bktcy.) [emphasis added]

[27] I have approved the "ceiling and not a floor" proposition in *Thomson* in *Re MacFarlane*, 2019 NSSC 201 and *Re Rafter*, 2018 NSSC 331.

[28] *MacFarlane* dealt with a bankrupt who, on the Trustee's recommendation, obtained an absolute order when duties (the repurchase of an asset) remained outstanding. I declined the Trustee's application for costs to annul the discharge, on two bases: first, it was the Trustee's own acts that exacerbated and to a certain extent triggered the necessity of the application (an opinion confirmed on appeal at 2020 NSSC 45 at para. 57). Second, an award of costs would be subject to the calculation of Rule 128 and would partly benefit the Trustee and partly the Estate, and would not be directly for the sole benefit of one or the other; I did not consider the Trustee to have established a case for enhanced remuneration over what it would have received, had the estate been properly administered to begin with.

[29] *Rafter*, on the other hand, involved what I considered to be a necessary and desirable application by the Trustee to determine entitlement to disability tax credits. The Trustee's actions in that case were faultless and, indeed, laudatory. However, I found that the order re-appointing the Trustee which had provided that the costs of that s. 41 action were to be "borne out of the estate" was faulty, as it came under the scope of actions provided for in Rule 128 – no additional remuneration was permitted.

[30] Neither *MacFarlane* nor *Rafter*, nor for that matter *Thomson*, said that Rule 128 provided a floor – or fettered the discretion of the Court subject to Rule 128's "ceiling" – on Trustee's fees in summary administration estates.

[31] In addition to the reasons I have noted already, there are additional significant policy considerations. To allow a *prix fixe* with no "downside" would be to allow the Trustee almost unlimited scope to mess up an estate, without consequences. It would still get its fees, and once beyond the $15,000 in receipts applicable in summary administration estates[4], it wouldn't matter what it did – it would get what it would get and there would be little incentive to optimize realization, management, rehabilitation, or other activity beyond that. As a "low value, high volume business" (*Wasserman, Arsenault, supra*) there would be a distinct incentive to "ram estates through" with few or no consequences. An aggrieved creditor would have recourse, if at all, only by such expensive and cumbersome actions as those taken under s. 37, 38, or 215 of the BIA – if indeed such errors or omissions by the Trustee ever came to a creditor's attention at all.

[4] I note that many summary administration estates exceed this threshold, whether by way of s. 68 income payments [as opposed to asset realization] or by way of asset realization in excess of that expected at the time of filing. However, the summary bills I have seen calculate based on these receipts being $15,000, for a Rule 128(1) fee of $7,833.75 [100% of the first $975; 35% of the next $1,025; and 50% of $13,000], plus HST and permitted disbursements.

[32] I have said on many occasions that the Court is not a rubber stamp, relegated to signing what is put in front of it without review or inquiry. If Parliament had intended me to do so in the context of Trustee's fees, it would have said in s. 192 that I could tax or pass accounts in *ordinary administration* estates; or it would have said I could not tax or pass accounts at all. Taxation means examine, review, and if appropriate, approve. It also means Court oversight and sovereignty over its own process, and that of Trustees as its officers. It does not mean judicial impotence. It also does not mean that the only recourse against a Trustee whose administration is wanting is solely at the instance of an aggrieved creditor, or the regulatory process. And, as noted, the taxation process is one that is within the purview of the Court and does not depend upon the objection of a creditor or the OSB to be set into motion.

[33] To be clear, and to address certain of the comments in *Wasserman, Arsenault, supra*, the lack of comment (adverse or otherwise) by the OSB may be a factor in, but is not determinative of, whether a Court should reduce the Trustee's costs. There may be matters known to the Court that were not known to the OSB. And if the OSB's input (or lack thereof) was determinative of the issue, it would be an abdication of the Court's supervisory and adjudicative functions in favour of a veto by that office.

[34] In *Re Nelson* (2006) CanLII 23396 (Ont. SC), Justice Lax stated at para. 14:

> [14] Moreover, the Program is simply an outline of the Superintendent's policy on intervention in summary administration estates and is for the benefit of all constituents in the bankruptcy process. It does not bind the Superintendent, nor restrict his statutory authority to supervise the administration of all estates. Neither does it fetter the discretion of a Registrar on taxation as it does not have the force of law. Even formal Directives issued by the Superintendent under the *BIA* which are binding on trustees, do not bind the court, although a court may well have regard to them: *Re Morris*, [2004] S.J. No. 3 Q.B. at para. 22. [emphasis added]

When should a Court exercise this discretion?

[35] As noted in *Wasserman, Arsenault, supra*, the failure of the Trustee to perform certain work may justify a reduction in fees. So too, in my view, would be such things as improvident realization, failure to make adequate inquiry, failure to make inquiry of a Court for direction when appropriate, inadequate or improper application of the law, and the like. Obviously, disregard of or failure to comply with the BIA or General Rules would call for scrutiny. Put another way, if the estate has suffered (or could have suffered) as a result of acts or omissions by the Trustee, or if the estate has been put to undue expense, it is appropriate for the Court to inquire, and perhaps to address the shortcoming through costs.

[36] I do not intend to be all-inclusive in setting out factors in which the Court could reduce the Trustee's fees, in summary administration estates or otherwise. Each case will turn on its own facts.

[37] I add, however, that the lack of financial repercussions to the estate will not be determinative – "no harm, no foul" has no place in a proper assessment or a proper administration.

[38] In *Re Hebert*, 2015 BCSC 1646, the Court considered a situation in which the Trustee blamed a computer error for continuing to accept payments under a defaulted proposal. Eventually it was paid in full. Justice Young stated:

> [9] I do agree with the trustee that there has been little harm to the creditors on this estate for the flawed procedure and the delay, but I have to be concerned also about the integrity of the bankruptcy system. In this case, the creditors were denied their right to be consulted and their right to annul a proposal that was not strictly complied with. In the end they did get full payment, but the case law speaks of the integrity of the bankruptcy system in *Nelson, Re*, (2006), 2006 CanLII 23396 (ON SC), 24 CBR (5th) 40 (Ont. S.C.J.) at page 40. This is an appeal from a registrar's decision where the registrar reduced a trustee's fee as a result of delays ranging from six months to three years on 12 different estates.
>
> [10] At paragraph 12 of his decision, which is quoted in the appeal decision, the registrar says:
>
> > In the cases at bar, the creditors were not, in my view, injured by the delay. Neither was there any evidence of prejudice to the OSB. However, the Court's role in taxing the account of its officer transcends these considerations and requires also a consideration of the injury, if any, to the integrity and objectives of the insolvency system as a whole.
>
> [11] And then in *Nelson, Re* the court says:
>
> > In summary administration bankruptcies, a trustee is entitled on taxation to the full tariff under s. 128 of the *General Rules* if he has administered an estate in accordance with the *BIA* and fulfilled his statutory duties. Once it is determined that he has not, the Registrar has discretion to reduce the fees.
>
> [12] And the court goes on to say:
>
> > The Registrar acknowledged the absence of financial impact on these estates, but correctly concluded that the failure to fulfill statutory duties,

> whether at all, or on a timely basis, is a proper matter for consideration by the court on taxation. Deficiencies that result in financial impact are clearly relevant to the taxation of fees, but financial impact is not a prerequisite for the issuance of a letter of comment under the Program.

[13] In *Grefiel, Re,* (Trustee of), 2002 BCSC 883, Registrar Scarth, as she then was, said at paragraph 20:

> However, when assessing fair remuneration for the trustee, I am required to consider not only the interests of the creditors but the interests of the proper carrying out of the principles and objectives of the *BIA*. Unlike the registrar in *Re Pelletier*, I have the benefit of full submissions from the Superintendent on this point. I accept the submissions of the Superintendent that on this estate that the trustee's failure to adhere to the *BIA* warrants a reduction of fees claimed.

[14] And also in British Columbia Registrar Blok, as he then was, wrote in *Re Bankruptcy of Wright,* 2005 BCSC 1618 at paragraph 52:

> While fair and full remuneration ought to be awarded to trustees to encourage the efficient and conscientious administration of estates, equally it is clear that a trustee who improperly administers an estate must bear the risk of having that maladministration condemned through a reduction in fees. The clearest cases for reduced fees are those in which the trustee's misdeeds have resulted in prejudice (perhaps even direct financial loss) to creditors or to the bankrupt, but the authorities make it clear that reductions in fees are not limited to those cases. Trustees' fees have been reduced due to excessive delay even where a creditor representing 95% of the unsecured claims approved the fees (*Re Los*, 2000 BCSC 951), and where the failure to keep proper records, inordinate and unexplained delay in the estate and the failure of the trustee to respond to communications from the inspector and the OSB were all cited as factors **(*Re Haramboure***, *supra*). These cases lead me to the conclusion that it is proper to consider reducing fees where the maladministration does not result in identifiable prejudice to the estate but where the integrity of the bankruptcy system is undermined. [emphases added]

[39] In other words, while potential or actual financial harm or delay may be among the situations in which a downward adjustment of the Trustee's fees may be warranted, they are not the only ones. Again, each case will turn on its facts and the proper exercise of judicial discretion.

This Court's Jurisdiction Over Trustee's Costs as it Pertains to Potential Joint Filings

[40] In *Re Donaldson*, 2019 NSSC 33, I had occasion to address the discharge of a couple who were on their third bankruptcy (and fourth insolvency). They were seniors, whose affairs were inextricably intertwined both by virtue of time and the commonality of almost all (but not ALL) of their debts. I said:

> [33] As I noted above, the Donaldsons effected separate filings. Their consumer proposal and third bankruptcies were joint filings. I believe that would have been appropriate here as well.
>
> [34] It is clear that, for all intents and purposes, their affairs are intertwined. In popular parlance, they are "all in," each with the other. Although some of their debts are held in one name alone, the vast bulk of creditors, in name and in quantum, are the same. Ms. Donaldson listed comparatively small loans with Home Depot, MBNA, and Royal Bank of Canada, lenders who are not listed on Mr. Donaldson's Form 79. There is also a loan from The Toronto-Dominion Bank which is not on his Form 79, although TD Auto Finance is listed on both of their statements. All of the lenders – although again, not necessarily the specific loans – on Mr. Donaldson's affairs are listed on Mrs. Donaldson's.
>
> [35] In my opinion, it is not necessary for the assets and liabilities of a couple to be identical to effect a joint filing. It is adequate, in the words of Superintendent's Directive 2R that assignments
>
> > may be dealt with as one estate where the debts of the individuals making the joint assignment <u>are substantially the same</u> and the trustee is of the opinion that it is in the best interest of the debtors and creditors." (emphasis added).
>
> [36] That directive derives from 155(f) of the BIA, which provides that, in summary administrations (such as these):
>
> > in such circumstances as are specified in directives of the Superintendent, the estates of individuals who, <u>because of their relationship, could reasonably be dealt with as one estate may be dealt with as one estate</u> (emphasis added)

> [37] I cannot speak for the trustee's opinion in this instance, but in reviewing the Forms 79 I cannot but think that the debts are "substantially the same" and that the Donaldsons have a community of interest and community of experience (that is, both have the same insolvency histories); their creditors also have communities of interest in the Donaldsons' affairs.
>
> [38] I cannot preclude dual assignments, as s. 155(f) is permissive and not mandatory; but I do have authority over costs. In my view, the interests of these estates and of any potential dividend to creditors would have been better realized by a single joint filing with a single set of costs. **I therefore exercise my discretion and direct the Trustee to deduct $500 (plus any applicable tax) from the amount to which it would otherwise be entitled under Rule 128 for each estate when passing its accounts.** [underlining in original, boldface added]

[41] I have since repeated that disposition in numerous unreported oral decisions. None has been questioned as to jurisdiction, or the proper exercise of my discretion.

[42] Conversely, it is not inevitable that every spousal filing will or should be a joint one. There can be perfectly valid reasons why not. The parties may be going their separate ways. There may be logistical or timeline reasons to the contrary (for example, if one spouse or partner is on a first bankruptcy and the other is on a second or subsequent). They may have different approaches to and attitudes towards the process; there may be different s. 173 factors at play; they may in fact have different trustees. Perhaps most importantly, they may have substantially different creditors or assets. For an example where a non-joint filing was not only appropriate but probably inevitable, see *Re Gavel*, 2021 NSSC 5.

[43] What is important is that the Trustee turn a reasonable mind to the issue, and reach an objectively justifiable conclusion through a coherent chain of reasoning. A statement of "we don't like doing joint filings" or "it's not firm policy," both of which I have had asserted before me in other hearings, is *not* in itself an objectively justifiable conclusion through a coherent chain of reasoning. It can undermine confidence in the process to see two identical, or near-identical, summary administration estates with two sets of accounts. It smacks of "never ask a barber if you need a haircut."

[44] Although my jurisdiction and reasoning in *Donaldson* has not been challenged, it is worth noting the much more developed reasoning of Registrar Laycock in *Re Casey*, 2000 ABQB 790. The Registrar stated:

> [2] Where husband and wife debtors appears before a bankruptcy trustee contemplating an assignment into bankruptcy the trustee must consider whether separate bankruptcy applications be filed or whether they would file a joint assignment. The Bankruptcy & Insolvency Act section 155 states:
>
> > The following provisions apply to the summary administration of estates under this act:
> >
> > > (f) in such circumstances as are specified in directives of the superintendent, the estates of individuals who, because of their relationship, could reasonably be dealt with as one estate may be dealt with as one estate.
>
> The Superintendent's Directive Number 2 deals with a joint filing and states:
>
> > Assignments filed under the provisions relating to summary administrations may be dealt with as one estate where the debts of the individuals making the joint assignment are substantially the same and the

> trustee is of the opinion that it is in the best interest of the debtors and creditors.
>
> The Act and the Superintendent's Directive leaves the trustee with a discretion whether to do a joint or an individual assignment. The trustee must act reasonably in making his decision.

[3] The trustees must consider a number of issues in determining whether a joint assignment should be made. If all of the debts are identical as between husband and wife and there is no surplus income requirements, the fact that the parties owned different assets would not make any difference to the ultimate distribution to the creditors and therefore a joint assignment should be recommended. If the debts are substantially the same and there are no surplus income requirements or assets to be recovered for an amount in excess of the trustee's fees, a joint assignment should be recommended. If there are surplus income payments required from one spouse only, separate administration would be required. If there are conduct issues by one party, or it is the second or third time bankruptcy for one party, the administration should be separate. If the parties own different assets which may yield a distribution to creditors, the estate should be separate.

…

[6] On October 3rd, 2000, the bankrupts had provided all of the necessary information to the trustee and paid a further $700.00 each into their estates. Accordingly I granted an absolute discharge to both Mr. & Mrs. Casey and directed the taxation of the trustee's accounts be brought before me when the trustee's administrative duties on the estates have been completed.

[7] In Re: ***Nagy*** 1999 ABCA 133 (CanLII), [1999] 70 A.L.R. (3rd) 360 the Alberta Court of Appeal determined that the Registrar had a discretion in taxing down a trustee's accounts where the trustee failed to meet the duties under the Bankruptcy & Insolvency Act. The trustee advised during the hearing that he does not do a joint administration unless all of the assets and all of the liabilities are the same. The trustee has misapprehended the purpose of the Bankruptcy & Insolvency Act section 155 and the Superintendent's Directive No. 2. There is no benefit to either the debtors or the creditors in having a separate administration for Mr. & Mrs. Casey. The only person who benefits is the trustee who charges two fees in circumstances where there is little or no additional work required in filing a joint assignment.

[8] Accordingly the trustee's fees in both estates must be taxed on further application to me when the administration of the estates are complete. [emphases added]

[45] I had the same thoughts in mind in *Donaldson*. I have them now. Both the general Rule 128 case law, and the spousal-filing case law, determine that I have a costs discretion when I think separate filings are unreasonable.

Should This Have Been A Joint Filing?

[46] Mr. and Ms. Freckelton filed assignments on the same day with the same Trustee. They listed identical assets, including half -interests in exempt household contents and in each of two vehicles (one exempt, one fully-encumbered). They each had a one-third interest in real property, again with no realizable equity. Each had meaningful s. 68 surplus income. Obviously, each had the same household size. It was a first assignment for each, and each cited the same reason for filing (credit overextension). Each had identical counselling dates. They are of similar age. At filing, they had near-identical income (both subsequently increased; Mr. Freckelton's more so).

[47] The objection to discharge was, in each case, based on failure to comply with all s. 68 requirements. There was no other realization aside from modest tax refunds.

[48] All of Mr. Freckelton's debts, $151,299 unsecured and $197,389 secured, are listed as Ms. Freckelton's debts as well. Ms. Freckelton lists only two other

accounts – to CRA ($3,700) and student loans ($1,433). In other words, 100% of Mr. Freckelton's debt is joint and almost 97% of Ms. Freckelton's unsecured debt is joint.

[49] Neither estate appears to have been especially onerous, nor did either estate appear to have administration issues that were not in common. Obviously, each had to file tax returns, but that is the case whether an estate is separate or joint. Nothing has come to my attention as to why this was not a joint filing.

[50] The Court hearing was sub-optimal. It proceeded completely by phone, as opposed to this Court's usual Covid protocol of "Trustee in the room, all others by phone except with prior leave or direction of the Court." The Trustee, in what I accept is inadvertence, was late to phone in and in the interests of expediency I granted the discharges subject to these reasons to follow. The Trustee, therefore, has not had adequate opportunity to make submissions as to its costs, and it would be unfair to the Trustee not to make that opportunity available to it.

[51] To be clear, I am not imposing any sanction for the Trustee's late attendance – the phone-in change occurred on the day before the hearing, as heightened restrictions were evolving in near real-time. My concern is whether this should

have been a joint filing, in line with my comments in *Donaldson*, and those of Registrar Laycock's in *Re Casey*, *supra*.

[52] *Casey* opined on separate filings when there was only one spouse with a surplus income payment requirement, but not when *both* had this obligation (presumably due to the different discharge timelines when one has this obligation and the other does not). It strikes me that when neither or both have surplus income obligations, and it is a first time or second time filing for both, with identical assets, and near-identical debts, this should be a joint filing unless I can be presented with rationally justifiable reasons otherwise.

Conclusion

[53] To summarize:

1. The Court has jurisdiction to reduce, but not increase, the Trustee's fees in summary administration estates from that provided for in BIA s. 156 and General Rule 128;
2. The Court's use of that jurisdiction is a discretionary one, exercised judicially;
3. The position (if any) by the OSB is not determinative of whether or how the Court should exercise that jurisdiction;

4. There are numerous factors which could attract the attention of the Court, and each case will turn on its own facts; the Trustee's actions must be objectively reasonable to obtain its full fee;

5. The lack of injury or harm to the estate is not determinative, but the presence of such injury or harm is highly relevant;

6. In spousal or domestic partner filings, due consideration should be given to whether a joint filing is appropriate; if there should have been a joint filing, costs may be reduced; and

7. A Joint filing by Mr. and Ms. Freckelton should have been effected, so far as I can see from the information before me. As in *Casey*, *supra*, I am to tax the Trustee's accounts, when administration of the estate is complete. The Trustee may make submissions when presenting those accounts, if it wishes. I also invite the OSB to make submissions, if it wishes.

[54] The Freckeltons are discharged; however, I direct the Trustee to re-draft its orders to reflect the requirement for taxation by me, above.

Balmanoukian, R.