SUPREME COURT OF NOVA SCOTIA

Citation: *Re Atlantic Sea Cucumber Limited*, 2025 NSSC 419

Date: 20251229
Docket: No. 45461
Registry: Halifax
Estate Number: 51-2939212

In the Matter of: The bankruptcy of Atlantic Sea Cucumber Limited

DECISION

Registrar: Raffi A. Balmanoukian, Registrar in Bankruptcy

Heard: December 18, 2025, in Halifax, Nova Scotia

Counsel: Gavin D.F. MacDonald, Meaghan Kells, and Asia Murphy (articled clerk), for the Applicant creditor Weihai Taiwei Haiyang Aquatic Food Co. Ltd.
Christopher Isnor, for Atlantic Golden Age Holdings Limited
Luke Godin and Kayla Jackman (articled clerk) for the Trustee msi Spergel Inc.
Essber Essber, for Atlantic Sea Cucumber Limited (watching brief only)

By the Court:

[1] Sea cucumbers, apparently, are capable of expelling their innards, which they later regenerate, in self-defence. That level of evisceration pales with the viscerality of the disputes before this Court. What form, if any, of corporate regeneration to follow will depend at least in part on how the pending sale process evolves.

[2] Atlantic Sea Cucumbers Limited ("ASC") is bankrupt. The effective date of bankruptcy is a central issue in determining how much a related company, Atlantic Golden Age Holdings Limited ("AGAH") may prove as an unsecured creditor. A second issue is whether it may prove additional amounts it says it loaned ASC prior to bankruptcy, but were not included in some of its principal's prior evidence; and what if any new evidence it may adduce to that end.

[3] This is important now as ASC is going through a sale and investment solicitation process, commonly called a "SISP." Credit (and/or waiver of dividend) bids are permitted and the amount each unsecured creditor will receive is directly linked to the amount of debt admissible in bankruptcy. I accordingly write with some urgency as the bid deadline is January 30, 2026 and it is foreseeable that one or more of the warring creditors will also be bidders.

[4] Weihai Taiwei Haiyang Aquatic Food Co. Ltd. ("WTH"), a judgment creditor of ASC, says that AGAH's claim should be limited to approximately $1.5 million, as the amount its principal previously said was due at what WTH says is the effective bankruptcy date; that no evidence of further indebtedness should be admitted; and that advances between what WTH says is the bankruptcy date and the date on the certificate issued by the Office of the Superintendent of Bankruptcy (the "OSB") are not part of AGAH's claim provable in bankruptcy.

[5] AGAH says the date on the OSB's certificate is correct, and that both additional amounts should be allowed, effectively doubling its provable claim to just under $3 million.

[6] I have concluded as follows:

- Evidence of AGAH's advances from a second account should be allowed;
- WTH has failed to discharge its burden of proof that the Trustee erred in its business analysis in admitting this amount as part of AGAH's claim;
- The date of bankruptcy is the date ASCL's extended deadline to file a proposal expired, and not the date shown on the OSB's certificate;

- The Trustee relied on an opinion provided by counsel in determining the date of bankruptcy. Although that opinion is incorrect, and although the trustee has predominantly 'sided' with AGAH / ASC during the insolvency process, there is no evidence that it did not act on this opinion in good faith; accordingly it should not bear any cost consequences.

[7] Although the quantum of AGAH's claim has been disputed in the past, it only became a central issue after my ruling in *Atlantic Sea Cucumber Ltd. (Re)*, 2025 NSSC 234. I will refer to this as the "Security Decision" and the proceedings under s. 38 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA") as the "Security Application."

[8] In the Security Decision, I decided that AGAH's advances to ASC were debt, not equity, and that they were unsecured. Until that decision, quantum was very much a secondary issue. If AGAH was secured against all (or at least most) of ASC's assets, no other creditor would receive any appreciable dividend (except, perhaps, if the scope of the security was incomplete); if WTH was correct that AGAH's advances were equity, AGAH would receive nothing as other creditors would have priority to all of ASC's value. 0% of anything is still zero.

[9] As a result of my decision, which was not appealed, AGAH and WTH are both unsecured creditors; their dividend and how much of any bid they submit may consist of debt (and/or a waiver of dividend) now depends on how much AGAH is owed as of the date of bankruptcy.

[10] I will unpack the issues and reasons behind my conclusions in turn.

Evidence of the "additional" debt

[11] AGAH's principal, Songwen Gao, filed an affidavit dated December 12, 2025. He has filed several other affidavits in other stages of this proceeding, including for the Security Application. WTH specifically declined to cross-examine him on this affidavit. Mr. Gao also was not cross-examined on any of his prior affidavits at any other of the proceedings I have heard. Evidence from prior steps in this matter have been used by all parties in subsequent applications, without objection. Indeed, some have been re-filed in books of authority and prior evidence, for the (appreciated) convenience of the Court.

[12] In his latest affidavit, Mr. Gao confirms that AGAH advanced CAD $1,598,296.02 from a US dollar account[1]. That amount is not materially disputed by WTH (WTH actually says the amount is $1,598,423.05).

[13] Mr. Gao goes on to say, however, that AGAH also advanced an additional $564,893.53 to ASC prior to ASC filing its Notice of Intention to Make a Proposal under the BIA.

[14] He then says that between the time of the NOI and March 27, 2024, AGAH loaned an additional $827,790.07 to ASC. It is not disputed that funds were advanced; however, WTH says that these are, in law, post-bankruptcy advances and as such are not part of AGAH's "claim provable" in bankruptcy.

[15] It is worth pausing to note that AGAH has asserted various balances over time. For example:

- In the NOI dated May 1, 2023, AGAH's debt is listed as $2,748,183.00;.
- In Rong Lu's affidavit of November 21, 2024, there is an attached exhibit showing a balance as of May 1, 2023 (unchanged until August

[1] All figures used in this decision are in Canadian dollars. No party disputed the conversion rate used on US dollar transactions.

2023) of $1,598,423.05 (which is the figure used by WTH), with a balance of $2,163,190 as of November 30, 2023.

- As noted, Mr. Gao's affidavit of November 5, 2024 contains the same transaction report ledger as contained in the Rong Lu affidavit, affirming a balance as of May 1, 2023 (and August 2023) of $1,598,423.05 (without any reference to a Canadian dollar account)

- Mr. Gao's affidavit of July 7, 2023 claims a balance due to AGAH of $2,163,190.00.

- Mr. Gao's affidavit filed in this application, dated December 12, 2025 claims a balance to AGAH of $2,163,189.55 as of May 1, 2023 and $2,990,979.62 as of March 27, 2024. The $2,163,189.55 figure is also the total of two AGAH accounts shown on an internally-prepared balance sheet as of that date.

[16] WTH objected to admission of the December 12, 2025 affidavit. It says that it is unfair to do so and that it constitutes a collateral attack on both the Security Decision and WTH's ability to fully argue "debt versus equity" in that decision, since the circumstances, terms, and timing of the additional advances were not open to scrutiny.

[17] I have admitted the affidavit for the following reasons:

- This application is a distinct and separate one in this ongoing litigation, and not an "after-the-fact" attempt to adduce new evidence in a prior aspect of the proceeding; I note as well that under the BIA, proofs of claim can be amended as required.

- Although as noted the quantum of AGAH's claim was not the focus of proceedings to date, I disagree with the proposition that WTH is only raising the matter now for the first time (see para. 7 of the Security Decision); it is only now commercially relevant, but that does not mean it was not disputed previously. It was.

- Mr. Gao was not sought to be cross-examined. Indeed, in oral argument, counsel for WTH said it was "not questioning the factuality" of this affidavit.

- The quantum now claimed, or some close variant thereof, has been referenced in prior Gao (and other) affidavits.

- AGAH argues that the underpinning of the "debt versus equity" aspect of the Security Decision is undermined by virtue of the opacity of the Canadian dollar account advances, and as such associated evidence

should not now be admitted after the fact. I disagree for the following reasons:

- WTH argues that my analysis in the Security Decision on "debt versus equity" focused strongly on the fact that at one time AGAH was paid in full, and this is not clear with respect to the Canadian dollar advances. The "full" repayment at one time was not central. The reasonable expectation of repayment and the fact of (some) repayment were (see paras. 35-52 of the Security Decision). By definition, for the issue of debt versus equity to be relevant in an insolvency, there must be an outstanding advance as of the relevant date. I agree with the Trustee that the following comments of Cromwell, J.A. (as he then was) in *Montreal Trust Company of Canada v. Hoque*, 1997 NSCA 153 are apposite:

> Finality of court orders is an important value. As Fleming James, Hazard and Leubsdorf put it:
>
> > ...the purpose of a lawsuit is not only to do substantial justice but to bring an end to controversy. It is important that judgments of the court have stability and certainty. This is true not only so that the parties and others may rely on them in ordering their practical affairs (such as borrowing or lending money or buying property) and thus be protected from repetitive litigation, but also so that the moral force of court judgments will not be undermined.
>
> Fleming James, Jr., Geoffrey C. Hayward, Jr. and John Leubsdorf, **Civil Procedure** (4th, 1992) at 581.

> At the core of cause of action estoppel is the notion that final judgments are conclusive as to all of the essential findings necessary to support them. This is seen in the cases concerned with collateral attack, **supra,** and is reflected in the restrictive approach to *res judicata* founded on default judgments.
>
> In my respectful view, Dr. Hoque cannot be permitted to allege in this action anything which is inconsistent with the final orders of foreclosure. In other words, all of the matters essential to the granting of the final orders of foreclosure are not now open to be relitigated in these proceedings. This is not a mere technical rule but an application of a fundamental principle of justice: once a matter has been finally decided, it is not open to reconsideration other than by appeal or other proceedings challenging the initial finding.

- Perhaps most importantly – and I will return to this point – WTH had the opportunity to examine AGAH's claim pursuant to s. 126(1) BIA, including prior to the Security Decision. So far as I know, it did not[2]. That section reads:

> Every creditor who has filed a proof of claim is entitled to see and examine the proofs of other creditors.

It is not now open to WTH to say, "we have no way of knowing whether this additional claim would have changed things." It knew that AGAH had a claim which did not correspond to its views (although again, at the time of secondary importance) and had the opportunity to examine it, particularly in the context of the historic discord between them. If anything, the Gao affidavit setting forth only

[2] It will also be recalled that Mr. MacDonald remains an inspector of the estate.

the $1.5 million advanced from AGAH's US dollar account is the exception to the overall evidence, rather than the $2.1 million as of May 2023.

The Trustee's Decision to Allow AGAH's Additional Claim for the Canadian Dollar Advances

[18] In the Security Decision (paras. 99-110), I discuss the issue of Court deference to Trustee's decisions, and distinguish between questions of law (or mixed questions of law and fact) and questions of business judgment. On questions of law, and on mixed questions when some question of law may be extracted, the Court owes no deference to the Trustee[3]. In questions of business judgment, it is worth repeating the following from the Security Decision:

> [99] ASC argues that I owe deference to a considered determination by the Trustee. It says that the Trustee has given due regard to WTH's arguments, and submitted the purported security not once, but twice, to counsel for an opinion; and that, the Trustee having done so and arrived at its conclusions, this Court should stick to its knitting.
>
> [100] In doing so, counsel for ASC cites Justice Bodurtha's decision in *Re South Wind Properties Limited*, 2020 NSSC 8. In that decision, his Lordship begins by reminding us that Trustees are officers of the Court, who are licensed and regulated and who have duties of neutrality. It follows that they are afforded deference by the Court, "coincidental" with their august responsibilities.
>
> [101] One of these responsibilities, the Justice continues, is to review and finalize claims against the bankrupt. He concludes that consistent with the duties of honesty, integrity,

[3] This is a related topic to the standard of review applicable to such applications. I discussed this in *Re Huphman* 2019 NSSC 280 as did Justice McDougall in *Gaum v. Grant Thornton Ltd*., 2020 NSSC 317. As noted, I have ruled that Mr. Gao's affidavit may be admitted in this case, and I have distinguished between the Trustee's factual and legal determinations in the level of oversight the Court will apply.

and "reasonable business judgment," that "….the Court will show deference to the Trustee's business judgment." (para. 8, my emphasis).

[102] All of this is beyond question. However, he goes on (para. 72) to say that

> While the Court must show deference to a Trustee's business judgment acting under the BIA, Trustees are not immune from review. They must examine proofs submitted by creditors and must only allow claims or securities that are reasonable. The Court may assess Trustees' conduct for both its reasonableness and correctness in fact. [emphases added]

[103] The same Justice has also expressed the Court's oversight role in *BDO v. Carrigan-Warner*, 2022 NSSC 16. In that decision, he made it clear that Trustees do not have an unfettered discretion to do as they please – in that case by using an in-house valuation matrix that was contrary to direction of the Court known to the Trustee. He upheld a reduction in the Trustee's fees accordingly.

[104] It is therefore clear that deference has its limits. It presumes that the Trustee is acting in accord with its licensing, regulatory, and Court obligations (to be clear, there is no suggestion in the case at bar that the Trustee has done anything to the contrary). It is subject to Court oversight for "reasonableness and correctness in fact." If there are binding Judicial pronouncements relevant to the file that are known (or should be known) to the Trustee, compliance is expected. But with those safeguards in place and respected, the Trustee's business judgment is entitled to a degree of deference.

[105] In the case at bar, the Trustee's decisions to admit the claim and to submit the security to counsel's evaluation are not contested, although the quantum *may* be disputed and the results of that evaluation *are* disputed.

[106] In my view, deference is on a continuum. On one end of the scale are pure questions of law. On the other are pure questions of business judgment unfettered by any binding judicial authority or regulatory constraint. It is not a single standard.

[19] In the current circumstances, WTH as the applicant has the burden of proof to establish, on a civil standard, that the Trustee was incorrect – or, arguably, unreasonable - in its decision to allow the proof of claim as filed. Its application is pursuant to s. 135(5) of the BIA, which reads:

> The court may expunge or reduce a proof of claim or a proof of security upon the application of a creditor or of the debtor, if the trustee declines to interfere in the matter.

[20] As will appear, I draw a distinction between the accounts allowed for filing, which in these circumstances is a question of fact, and the date of bankruptcy which in these circumstances is a question of law.

[21] In my view, the Trustee correctly acted within the scope of its reasonable business judgment in considering and allowing both the Canadian and US dollar accounts in the aggregate in the proof of claim. It appears to have obtained account transactions and balances adequate for its analysis, and made its decision accordingly. The priority of the claim is dealt with in the Security Decision, and again it is important to distinguish among allowing the claim, its quantum, and its priority.

[22] As discussed above, the burden is on WTH to establish, to a civil standard, that the Trustee erred (or, perhaps, was unreasonable) in its business decision. For WTH to say "we don't know, but we do know the Trustee has sided with AGAH/ASC throughout these disputes" does not satisfy that standard on either the correctness or reasonability standard, particularly where it had statutory access to "examine the proofs" of AGAH under s. 126 of the BIA and did not do so. This is not a case of WTH not knowing because it wasn't given information; this is a case of WTH not knowing because it didn't ask.

[23] I dismiss the application of WTH to the extent that it seeks to exclude the Trustee's decision to include AGAH's advances from the Canadian dollar account, as at the date of bankruptcy. To the date issue, I now turn.

The Date of Bankruptcy

[24] The OSB dates the bankruptcy as March 28, 2024. This date follows the Court of Appeal's decision at 2024 NSCA 35, released the day before. In that decision, the Court of Appeal denied leave to appeal Justice Rosinski's decision (reported at 2023 NSSC 232) not to abridge time to convert the bankruptcy proceedings to proceedings under the *Companies' Creditors Arrangement Act*, RSC 1985, c C-36 (the "CCAA"). Although the decision of the Court denied leave to appeal, it went on to discuss the merits "out of respect for the parties' efforts to address the merits" (para. 51).

[25] WTH says the effective date of bankruptcy is the expiry of the NOI period, which was either July 15, 2023 or the following Monday, July 17, 2023 (nothing turns, for current analysis, on which of these is operative).

[26] I agree with WTH. Here is why.

[27] On Monday, July 17, 2023 – following Justice Rosinski's CCAA decision of Friday, July 14, 2023 declining to abridge time to convert the proceedings – I heard an emergency application to extend time to file a proposal pursuant to s. 50.4(9) of the BIA. I issued a 'bottom line' ruling dismissing the application, followed by written reasons reported at 2023 NSSC 238.

[28] My decision was appealed. It is not contested that s. 195 of the BIA, in which appeals stay certain BIA proceedings, does not apply to appeals from decisions of the Registrar: *Royal Bank of Canada v. LaHave Equipment Ltd*., 2007 NSCA 106. In that decision, Justice Fichaud (also the author of the CCAA decision noted above) stated:

> [14] In my view, I have no jurisdiction to hear this application. Section 195 is under the heading "Appeals" which immediately proceeds s. 193. Section 193 defines such an appeal as follows:
>
> > . . . an appeal lies to the Court of Appeal from any order or decision of a judge of the court . . .
>
> The "appeal" contemplated by s. 195 is an appeal under s. 193 to the Court of Appeal from a decision of a judge. There is no such appeal here. So there is no automatic stay under s. 195. An appeal from a Registrar to the Supreme Court of Nova Scotia is dealt with in s. 192(4), and Rule 30 under the *BIA*. Nothing in that proceeding triggers the automatic stay of s. 195 or any jurisdiction of a chambers judge of the Court of Appeal. The authorities cited in counsel's memoranda, governing the principles under s. 195, concern appeals to the Court of Appeal from a judge under s. 193…
>
> [emphasis added]

[29] Thus, unless there is another action which invokes s. 195, WTH says the appeal against my extension application, in itself, would not stay the operation of s. 50.4(8) of the BIA, which reads:

> **(8)** Where an insolvent person fails to comply with subsection (2), or where the trustee fails to file a proposal with the official receiver under subsection 62(1) within a period of thirty days after the day the notice of intention was filed under subsection (1), or within any extension of that period granted under subsection (9),
>
> > **(a)** the insolvent person is, on the expiration of that period or that extension, as the case may be, deemed to have thereupon made an assignment;
> >
> > **(b)** the trustee shall, without delay, file with the official receiver, in the prescribed form, a report of the deemed assignment;
> >
> > **(b.1)** the official receiver shall issue a certificate of assignment, in the prescribed form, which has the same effect for the purposes of this Act as an assignment filed under section 49; and
> >
> > **(c)** the trustee shall, within five days after the day the certificate mentioned in paragraph (b.1) is issued, send notice of the meeting of creditors under section 102, at which meeting the creditors may by ordinary resolution, notwithstanding section 14, affirm the appointment of the trustee or appoint another licensed trustee in lieu of that trustee.
>
> [emphasis added]

[30] AGAH argues that there was another proceeding – namely the conversion appeal – which triggers s. 195 BIA. Even if I was not bound by the decision of the Court of Appeal in the CCAA conversion application (2024 NSCA 35) – which of course I am – I would disagree. The conversion application was under the CCAA, not the BIA. Fichaud, J.A. explicitly said so as the basis for there being a requirement to seek leave to appeal in that aspect of this dispute. He said:

[35] The *CCAA* says:

Leave to appeal

> **13** Except in Yukon, any person dissatisfied with an order or a decision **made under this Act** may appeal from the order or decision **on obtaining leave** of the judge appealed from or of the court or a judge of the court to which the appeal lies and on such terms as to security and in other respects as the judge or court directs.

[bolding added]

[36] Atlantic Sea has not applied for leave. It submits Justice Rosinski's ruling was not "made under" the *CCAA* and leave is not required. Its factum explains:

> 45. While ASC was seeking an order under the CCAA, the requested relief is irrelevant to whether the Decision was actually "made under" the CCAA legislation. ASC respectfully submits that the facts and applicable legal concepts discussed above make it readily apparent that the Decision under appeal was not made pursuant to the CCAA, or even the BIA. The Decision was made, as the Learned Justice expressly stated, "entirely within the procedural ambit of our Civil Procedure Rules".

[underlining in factum]

[37] I respectfully disagree.

[38] The phrase "made under" in s. 13 of the *CCAA* attracts an "expansive interpretation" after a "broad functional inquiry" rather than a "parsing exercise". Briefly, "if a claim is being prosecuted by virtue of or as a result of the *CCAA*, section 13 applies". See: *Sandhu v. MEG Place LP Investment Corporation*, 2012 ABCA 91, para. 17; *Re Essar Steel Algoma Inc.*, 2016 ONCA 138, para. 22; *Urbancorp Inc. v. 994697 Ontario Inc.*, 2023 ONCA 126, paras. 10, 19-20.

[39] Atlantic Sea's Notice of Application to the Supreme Court, Schedule "B" (Grounds for Relief) says:

> 6. The Company is insolvent and now seeks to continue the NOI [Notice of Intention] proceedings under the ***Companies' Creditors Arrangement Act***, RSC 1985, c. C-36 (the "CCAA" pursuant to section 11.6 therein. …

[bolding added]

[40] Atlantic Sea's Memorandum of Fact and Law, dated July 11, 2023, in support of its application to Justice Rosinski, included:

> 2. …At the Application, ASCL is seeking an Order, among other things:
>
> …
>
> d. authorizing the continuation **under the CCAA** of the Company's proposal proceedings commenced under the BIA, pursuant to the NOI;
>
> [bolding added]

[41] The *CCAA* says:

> **10 (1)** Applications under this Act shall be made by petition or by way of originating summons or notice of motion in accordance with **the practice of the court** in which the application is made. [bolding added]

[42] The practice of the Nova Scotia Supreme Court is governed by the Court's *Civil Procedure Rules*. Rules 5.06 and 31 say notice of the documents for an application must be given at least 10 days before the hearing. Rule 23.11 says the documents for a motion in chambers also must be filed no later than 10 days before the hearing. Rule 94.02 says the time periods exclude the days the interval begins and ends, Saturdays and Sundays.

[43] Section 10(1) of the *CCAA* incorporates the "practice" of the Supreme Court of Nova Scotia. The practice includes the time prescriptions in the Court's *Rules*. Those time prescriptions are "under" the *CCAA* by incorporation. Justice Rosinski applied those prescriptions. Under s. 11 of the *CCAA*, he had discretion to abridge or waive the time, but he declined to do so.

[44] **Atlantic Sea applied "under" the *CCAA* and Justice Rosinski's ruling was "under" the *CCAA***. Section 13 requires leave to appeal.

[45] The *CCAA* says:

> Court of appeal
>
> **14 (1)** An appeal under section 13 lies to the highest court of final resort in or for the province in which the proceeding originated.
>
> Practice
>
> **(2)** All appeals under section 13 shall be regulated as far as possible according to **the practice in other cases of the court appealed to** …
>
> [bolding added]

> [46] The practice in this Court is governed by *Civil Procedure Rule* 90. Rule 90.05 prescribes a Notice of Appeal (General) for appeals as of right and a Notice of Application for Leave to Appeal and Appeal for appeals requiring leave.
>
> [47] Atlantic Sea filed a Notice of Appeal (General), used for an appeal as of right. It has not applied for leave by filing a Notice of Application for Leave to Appeal. At the hearing in this Court, Atlantic Sea's counsel acknowledged Atlantic Sea has not applied for leave to appeal.
>
> [48] Atlantic Sea's factum says:
>
> > 46. ASC says that leave is not required. Alternatively, ASC respectively [*sic*] asks that leave be granted such that the Appeal can be decided on its merits.
>
> [49] An alternative sentence in a factum is not an application for leave to appeal under the practice of this Court.
>
> [50] Absent an application, I would deny leave to appeal.
>
> [bold and underlined emphasis in para. 44 added; all other formatting as per Court of Appeal's original decision]

[31] It is certainly not my place to circumvent the clear decision of the Court of Appeal that it was not ruling on a BIA proceeding, but a CCAA one. If I found that s. 195 applied to those proceedings, I would be doing just that. As the inimitable Master Funduk colourfully reminded us over 35 years ago in *South Side Woodwork (1979) Ltd. v. R. C. Contracting Ltd*. (1989), 95 A.R. 161:

> McDonald is a decision by the Supreme Court of Alberta, Trial Division, now the Court of Queen's Bench. I am bound by decisions of judges of this Court unless they have been overruled by our Court of Appeal or the Supreme Court of Canada, or unless there are contrary decisions by judges of this court, in which case I would face a dilemma (which I could probably "solve" by ordering a trial of an issue).
>
> Any legal system which has a judicial appeals process inherently creates a pecking order for the judiciary regarding where judicial decisions stand on the legal ladder.

> I am bound by decisions of Queen's Bench judges, by decisions of the Alberta Court of Appeal and by decisions of the Supreme Court of Canada. Very simply, Masters in Chambers of a superior trial court occupy the bottom rung of the superior courts judicial ladder.
>
> I do not overrule decisions of a judge of this Court...

[32] AGAH further argues that, because s. 11.6 of the CCAA only allows for conversion if no BIA proposal has been filed, it could not file a proposal even if it wanted to, while the CCAA conversion application was underway. I believe this is a *non-sequitur* as to whether a bankruptcy had, in law, occurred. There is not – as AGAH proposes – a legislative 'gap' in which the company that is looking to proceed under the CCAA is "neither fish nor fowl" while attempting to do so, because of that legislative prohibition. If it is bankrupt, it can file a proposal or not; it does not get to avoid the operation of s. 50.4(8) by "moving over" to the CCAA. In fact, the CCAA specifically precludes conversion of BIA proceedings in which s. 50.4(8) of the BIA has come into operation.

[33] AGAH goes on to argue that since s. 49 of the BIA requires certain things to happen on an assignment, and those didn't happen in July 2023, that there was no bankruptcy at that time. I disagree. Section 49 contemplates an <u>act</u> of assignment "by an insolvent person," not a <u>deemed</u> assignment by operation of law which may be – as here – over the kicking and screaming of a debtor unwilling to be put into

the bankruptcy process. The CCAA also specifically contemplates the deemed assignment that can result from the operation of s. 50.4(8) when it says:

> **11.6** Notwithstanding the *Bankruptcy and Insolvency Act*,
>
> > **(a)** proceedings commenced under Part III of the *Bankruptcy and Insolvency Act* may be taken up and continued under this Act only if a proposal within the meaning of the *Bankruptcy and Insolvency Act* has not been filed under that Part; and
> >
> > **(b)** an application under this Act by a bankrupt may only be made with the consent of inspectors referred to in section 116 of the *Bankruptcy and Insolvency Act* but <u>no application may be made under this Act by a bankrupt whose bankruptcy has resulted from</u>
> >
> > > <u>**(i)** the operation of subsection 50.4(8) of the *Bankruptcy and Insolvency Act*, or</u>
> > >
> > > **(ii)** the refusal or deemed refusal by the creditors or the court, or the annulment, of a proposal under the *Bankruptcy and Insolvency Act*.
>
> [emphasis added]

[34] The fact that the documents that are supposed to follow an assignment were not created in 2023 does not assist ASC. A deeming provision is just that – it operates to make something so, which may not otherwise so be. I disagree with AGAH's assertion at paragraph 26 of its brief that "further steps are required before an assignment into bankruptcy is deemed to be effective." Upon the expiry of the relevant time provided for by s. 50.4(8) of the BIA, the bankruptcy event is complete, even if the materials that are required as a consequence are not forthcoming. To hold otherwise would allow an insolvent person to circumvent

the effect of s. 50.4(8) of the BIA by refusing or neglecting to take the further statutory steps called for.

[35] ASC was bankrupt as of, at the latest, July 17, 2023. As of that date, the best evidence, which I accept, is that the AGAH advances from the US dollar account had a balance of $1,598,423.05. The AGAH advances from the Canadian dollar account had a balance of $564,893.53, for a total of $2,163,316.58. This is the amount of its unsecured claim as at the date of bankruptcy[4].

[36] What is the effect of the OSB's certificate being dated March 27, 2024? There may be occasions in which the later certificate date may serve to "move the goalposts" as to the effective date. I make no comment on whether, and in what other circumstances, this may be so. This is not one of them. This is why.

[37] On July 19, 2023, the Trustee filed its Form 34, report of Trustee on Non-filing of Proposal, as required by s. 50.4(8)(b) of the BIA (and being one of the steps required after the "deemed assignment" noted above). Referred to and attached to that report is a "legal opinion stating that the filing of the appeal of Rosinski, J. decision operates as a stay of proceedings of the deemed bankruptcy of [ASC] until the Court of Appeal varies, cancels or disposes of the appeal…."

[4] This is $127.03 more than the amount totaled by Mr. Gao and appears to be reflective of the discrepancy noted in paragraph 12 of this decision.

[38] That opinion is wrong.

[39] Notably, the opinion does correctly identify that the appeal from my Registrar's decision does not result in a statutory stay and that ASC "must file a motion with supporting material seeking a stay of proceedings pending appeal." Such a stay is mooted but not decided as potentially possible in paragraph 15 of *LaHave, supra*:

> [15] I make no comment whether a judge of the Supreme Court of Nova Scotia may or may not have the power to grant a stay, interim injunction, or other interim relief pending the hearing by the Supreme Court judge of LaHave's appeal from the decision of the Registrar (eg. see *Amex*, ¶ 1,5).

[40] I have reviewed the file appealing my BIA "extension" decision (2023 NSSC 238). There is no stay order and it does not appear that any was sought. The only order on file is that of Bodurtha, J dated May 1, 2024 dismissing the appeal.

[41] That leaves only the appeal of Justice Rosinski's decision; the legal opinion states "[t]he filing of the appeal of Rosinski J. decision operates as a stay of proceedings until the Court of Appeal varies, cancels or disposes of the appeal." The opinion refers to s. 195 of the BIA.

[42] As discussed above, the Court of Appeal disagreed that the appeal of Justice Rosinski's decision was an appeal under the BIA. So do I, respectful to but in

complete accord with that binding authority. With a hat tip to Mr. Clemens, the best that can be said of the legal opinion is "it's what you know for sure that just ain't so."

[43] It appears that the OSB accepted the legal opinion or at least was prepared to hold its activity in abeyance pending appellate authority. That has now occurred. The OSB's certificate should have been dated, at the latest, July 17, 2023.

Costs

[44] WTH seeks $2,000 in costs, payable by the Trustee, recognizing the Court's discretion on the subject. It says that the Trustee has advanced the ASC/AGAH positions consistently, with at best imperfect results and that WTH has taken up the yeoman's yoke in this contest. It says the Trustee acted imprudently in its examination of AGAH's claim and that it was unreasonable to rely on the legal opinion discussed above pertaining to the effective bankruptcy date.

[45] I agree that the Trustee has generally supported the positions taken by AGAH/ASC and that these have had variable success. That is not the whole story. The success of WTH has also been mixed, including in this decision.

[46] I also find that, notwithstanding my divergence from the legal opinion cited above, it was reasonable and prudent for the Trustee to obtain such an opinion. It was entitled to rely on it. Indeed, it is commendable that it sought such an opinion rather than proceeding arbitrarily. The OSB accepted it or at least was prepared to consider it pending appellate disposition.

[47] As I have pointed out in the deference discussion above, Trustees are (usually) not lawyers. At the time the opinion was provided, the Court of Appeal had not weighed in. I have also found that the Trustee exercised reasonable business judgment by including both the advances from the AGAH Canadian and US dollar accounts in the proof of claim, although the applicable date of the balance used is incorrect as a matter of law – again, in at least partial reliance on the opinion of counsel. Given these factors, and the level of success attained by each party, I find it is appropriate for each party to bear their own costs.

Conclusion

[48] In summary, pursuant to s. 135(5) of the BIA, AGAH's claim is an unsecured one, in the amount of $2,163,316.58, as of the effective date of bankruptcy, being July 17, 2023. Each party shall bear its own costs.

[49] Any party may take the initiative to prepare and circulate the draft order. I reiterate, as I have in the past, my appreciation for the professionalism and courtesy counsel have extended to each other before this Court, notwithstanding the commercial vicissitudes which persist.

Balmanoukian, R.