

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Mullen (Re)*, 2016 NSSC 339

Date: December 29, 2016
Docket: *Halifax*, No. 38044
Estate No. 51-1847649
Registry: Halifax

In the Matter of the Bankruptcy of Randall Stephen Mullen

Decision on Costs

Judge: The Honourable Justice Gerald R. P. Moir

Date of Hearing: Written submission only

Date of Last Submission: September 1, 2016

Counsel: Sharon L. Cochrane, for Mr. Leonard Dykens
Pamela J. Branton for Randall Mullen
D. Bruce Clarke, Q.C., for BDO Canada Limited as trustee
in bankruptcy of Randall Mullen

Moir, J.:

[1] Mr. Dykens recovered a judgement against Mr. Mullen in a contested proceeding. Mr. Mullen made an assignment in bankruptcy. Mr. Dykens opposed the discharge, but Registrar Cregan found Mr. Mullen had not acted irresponsibly. He granted an absolute discharge.

[2] Despite the discharge, Mr. Dykens pursued enforcement of his former judgement. He made a motion in the civil proceeding, which error I was prepared to repair by treating the motion as if it had been made to the bankruptcy court. He filed a voluminous affidavit containing much hearsay. I was prepared to ignore the hearsay because the information was also irrelevant.

[3] The motion was for both a lifting of the bankruptcy stay and enforcement of the judgement against an RRSP. These remedies were sought on an unfounded premise, that the *Bankruptcy and Insolvency Act* could be overridden to advance Mr. Dykens' interests. So, Mr. Mullen and the trustee succeeded in their opposition to the motion. They seek costs.

[4] Mr. Mullen seeks costs of \$2,000. The trustees seeks \$1,500 to \$2,000. Mr. Dykens proposes each party bear their own costs or Mr. Mullen receive \$1,000 with nothing for the trustee.

[5] Costs on a bankruptcy motion are governed by s. 197 of the *Bankruptcy and Insolvency Act* and General Rules 18 to 25. Costs are discretionary: s. 197(1). The court may order taxation on a party and party basis, taxation at a solicitor and client scale, or a lump sum instead of taxation: s. 197(2). I am prepared to order a lump sum.

[6] Subsection 197(2) makes reference to the rule that costs usually follow the cause. An exception is made for creditors who oppose discharge in good faith: s. 197(6.1) and (7). There is nothing exceptional about a failed motion to lift the bankruptcy stay.

[7] Mr. Mullen and the trustee were successful in opposing the motion. Mr. Dykens submits that he is “an individual creditor who has been attempting to collect what is rightfully his”. In this submission, Mr. Dykens persists in his assertion that somehow the *Bankruptcy and Insolvency Act* does not apply to him.

[8] The reason Mr. Dykens seeks alternatively an order for no costs to the trustee is that the trustee consented to Mr. Dykens bringing the motion. Note that the trustee did not consent to the result or agree to stand by.

[9] I see no reason to depart from the usual rule. The bankrupt and the trustee were successful. They shall have costs.

[10] With the repeal of s. 197(5), local tariffs may guide taxation or an award of lump sum costs on a bankruptcy motion. See *Re. Gardner* 2010 NSSC 393 (Registrar Cregan). Mr. Dykens suggests the “less than 1/2 day” range in tariff C.

[11] I have discretion to depart from the tariff. See “are in the discretion of the court” in s. 197(1) and “may fix a sum to be paid in lieu of taxation or taxed costs” in s. 197(2). Further, the tariff C range itself is discretionary. See *Tariffs of Costs and Fees Determined by the Costs and Fees Committee to be used in Determining Party and Party Costs*, Tariff C (3).

[12] The volume of materials to which Mr. Mullen and the trustee had to respond and the preliminary issues raised by Mr. Dyken’s choice of forum and his affidavit evidence make a determination of costs based solely on court time unrealistic for achieving the fundamental principle of our tariffs, a partial but substantial contribution to legal expense. I will not apply the \$750 to \$1,000 range.

[13] Mr. Mullen will have judgement for costs in the an amount of \$2,000 against Mr. Dykens. The trustee will have a separate judgement for \$2,000 against Mr. Dykens.