SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Little (Re)*, 2020 NSSC 366

Date: 20201214
Docket: No. 51-1956791
51-1956792
Registry: Halifax
Estate Number: 44180

In the Matter of: The Consumer Proposal of Wayne Fredrick Little and Diana Beverly Little

Judge: Raffi A. Balmanoukian, Registrar

Heard: December 11, 2020, in Halifax, Nova Scotia

Counsel: Edward A. MacDonald, for Grant Thornton Limited, Administrator
Wayne Fredrick Little and Diana Beverly Little, not appearing

Balmanoukian, Registrar:

[1] I have referred to most proposal-related applications as having a "one foot hurdle." These types of proceedings - revivals of consumer proposals; permissions to file second consumer proposals; approvals of unopposed Division I proposals - are generally of a net benefit to all. This is because creditors have had an opportunity to have their say, and because proposals are usually designed to provide a greater net return to creditors than would eventuate in bankruptcy (using reasonable assumptions, calculations, and projections).

[2] That does not mean, however, that the hurdle is non-existent. Nor does it mean that this Court is a mere formality, inevitably rubber stamping what is put before it. Nor does it mean that the Court is denied or deprived of oversight or relevant inquiry. Nor does it mean that the Court is bound to unquestioning acceptance of the material before it, particularly when such material consists of *pro forma* or bald statements of fact or opinion.

[3] This application, to file a second consumer proposal, was brought some three years after the Administrator issued an erroneous certificate of full performance to Wayne Fredrick Little and Diana Beverly Little in May 2017. That proposal, deemed accepted on April 1, 2015 and deemed approved on April 15,

2015, provided for periodic payments, plus a lump sum payment of $10,000 from the proceeds of a term deposit.

[4] The periodic payments, totalling $2,700, were made. The lump sum payment was not. The Administrator mistakenly issued a certificate of full performance on May 1, 2017. There is no indication that the Littles did anything to bring this mistake to the Administrator's attention – for over three years. They did not appear, by teleconference or otherwise, at the hearing to explain this.

[5] The Administrator now seeks two orders and has made two applications: first, to annul the certificate of full performance; second, for leave for the Littles to file a second Consumer Proposal.

[6] At first instance, the application to annul was not proven to have been served on any creditors, or for that matter on the Littles. The Administrator referred to s. 180 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 (the "BIA") as not indicating any such requirement. I refused to proceed with that application in the absence of proof of service[1]. The provisions of the BIA relating to bankruptcy (such as s. 180) apply *mutatis mutandis* to Proposals or Consumer Proposals except

[1] Lest there be any ambiguity, I would consider that s. 180 would require service of an application to annul a bankruptcy discharge on affected stakeholders in any event – at a minimum, on the bankrupt, the OSB, and (if not the applicant) the Trustee. I make no comment as to service on any other person under s. 180 at this time as it is not germane to this case.

where a separate provision is contained in Division I or Division II as the case may be (BIA ss. 66(1), 66.4).

[7] In my view, such a separate provision does exist with respect to annulment or deemed annulments of proposals (and by extension in my opinion, to erroneous certificates of full performance), in s. 66.3 BIA. It reads:

> **66.3 (1)** Where default is made in the performance of any provision in a consumer proposal, or where it appears to the court
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> **(a)** that the debtor was not eligible to make a consumer proposal when the consumer proposal was filed,
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> **(b)** that the consumer proposal cannot continue without injustice or undue delay, or
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> **(c)** that the approval of the court was obtained by fraud,
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> the court may, on application, with such notice as the court may direct to the consumer debtor and, if applicable, to the administrator and to the creditors, annul the consumer proposal. [emphasis added]

[8] It may be said that an annulment of a certificate of full performance may be more akin to an annulment of a discharge (s. 180) than to an annulment of the proposal as contained in s. 66.3. I do not believe such is the case; at least not here. The effect of the application in this case is a recognition that the Administrator considers the Littles to have been issued the certificate in error, with knock-on effects to both debtor and creditor. It is not in keeping with a transparent and open process, or with the right of affected parties to receive notice and be heard, for such

an application to be, in effect, *ex parte*. I accordingly directed that the annulment application be made on notice.

[9] If I am wrong in that analysis and s. 180 governs *mutatis mutandis*, as I indicated in the footnote above I believe s. 180 requires as a matter of natural justice service on at least the bankrupt, the OSB and (if not the applicant), the Administrator/Trustee.[2] I also believe here that it requires service on creditors as their rights and potential remedies are affected directly.

[10] The annulment application was dated November 25, 2020 and filed on November 26, 2020. The associated affidavit states that the annulment application was served on November 16, 2020 (interestingly, nine days before the date on the application).

[11] Unorthodox though that timeline may be, I am now satisfied that it is appropriate to issue the annulment order. I do so.

[12] In contrast, there is no indication of proof of service of the application for permission to file a second proposal, which was dated December 8, 2020 and filed

[2] I can think of at least one case over which I presided – *Re MacFarlane*, 2019 NSSC 201 (appeal dismissed 2020 NSSC 45) – in which the bankrupt contested the Trustee's s. 180 application to annul the discharge. I found that opposition was ill-founded, but that is a completely different matter from the bankrupt's inherent right to receive notification and to be heard.

December 9, 2020 for hearing on December 11, 2020. If there was service, it was untimely (BIA Rule 6); there was no application for abridgement of time.

[13] As opposed to the required service of the application to annul the certificate of full performance, I accept that it is appropriate to proceed with the application for leave to file a second proposal, at least in this case, without it having been served on creditors, or the OSB. Section 66.32 of the BIA reads:

> **66.32 (1)** Unless the court otherwise orders, where a consumer proposal is annulled or deemed annulled, the consumer debtor
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> - **(a)** may not make another consumer proposal, and
> - **(b)** is not entitled to any relief provided by sections 69 to 69.2
>
> until all claims for which proofs of claim were filed and accepted are either paid in full or are extinguished by the operation of subsection 178(2). [emphasis added]

[14] What is the difference between these two situations? In the first application (annulment), substantive rights are potentially affected by the annulment; in the second, the applicant is simply asking for leave to file a second proposal. Creditors will receive the details, and will have the right to weigh in, vote, prove claims, call for a meeting of creditors, and object. There is no conceptual reason I can think of, other than perhaps abuse of process, for such an application for leave alone to require notice. I am confident Courts are vigilant enough of their own gates to guard against any abuse at the "leave" threshold. Part of that gatekeeping,

in my view, involves a consideration of the factors which I discuss in the balance of this decision.

[15] I now therefore address the substance of the application under s. 66.32 BIA.

[16] As I have said, the material on file discloses the following:

1. The debtors made their monthly, but not lump sum, payments.

2. Over three years elapsed between the (erroneous) certificate of full performance and this application.

[17] No reason was advanced for this delay. One may speculate – and it is only speculation - that the Littles were perfectly content with the certificate of full performance and went on with their lives, until the error was discovered. That, I do not know. It is also possible that they were waiting to be contacted by the Administrator to forward the $10,000. If that was the case, it appears the Littles did not put the money under the proverbial mattress for such a day. Mr. MacDonald indicated that the proposal is likely to take the form of a $10,000 payment over the maximum five years allowed for a Division II proposal, as the Littles “don’t have a lot of money.” It begs the question of what the Littles thought they were entitled to do, and ultimately did do, with the $10,000 term deposit.

[18] In *Re Mooring*, 2018 NSSC 190, I allowed a debtor who had fallen into default in a 1998 proposal to file another in 2018 on essentially different debts, and stated:

> [10] In 2001, my predecessor, Registrar Hill, considered s. 66.32 and appeared to have done so as a case of first instance. In *Re Bartlett*, 2001 CanLII 3848; 25 CBR (4th) 207 (NSSC), he stated:
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> > Having given the matter what I believe to be careful consideration I am of the view that it is incumbent on the debtor on an application such as this, where the debtor seeks to have the court exercise its discretion, to show firstly that there is a reasonable explanation for the default, and secondly to demonstrate that the second proposal contemplated has a reasonable prospect of being accepted by the creditors.
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> [11] That two-part test has been met with approval in *Re Britton*, 2005 CanLII 21871, 11 CBR (4th) 204 (Ont. SC).[3]

[19] In this case, the affidavit material simply states that "the administrator is of the opinion that a second proposal has a reasonable prospect of being accepted," apparently on the basis that the debtors seek to pay the $10,000 they originally would have, but over the next five years. I am not sure that acceptance is a *fait accompli*, or that this opinion of likelihood of success is syllogistically logical; it is not before me whether the debtors are the same as they were in 2015, or in the same proportion. This is quite aside from the timing. That ambiguity, alone, would be sufficient for me to adjourn or dismiss the application. However, I do

[3] Citation corrected to remove a link added by CanLii which is not in the original decision's manuscript.

not believe disposing of the case in such a manner is sufficient to address its shortcomings.

[20] Master Jean recently set out a more robust set of considerations in *Re Nyembo*, File number 31-1260730 (Ont. SC, unreported, March 4, 2020). In that instance, Mr. Nyembo's first proposal went into default over nine years before the application for leave to file a second proposal came before the Master. In the meantime, Mr. Nyambo incurred over $40,000 in new debt. In adjourning the application, Master Jean stated:

> In my view, the factors that are relevant include, but are not limited to, the following:
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> 1. What are the reasons for the default in performance of the consumer proposal?
>
> 2. Did the debtor act in good faith in fulfilling the terms of the consumer proposal?
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> 3. What was the debtor's income (and expenses) during the proposal period or subsequent to approval or deemed court approval and was it sufficient to perform the consumer proposal?
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> 4. Have any assets at the date of the consumer proposal been liquidated or dissipated? If so, is the debtor able to account for the proceeds?
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> 5. What are the current assets of the debtor, including value?
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> 6. Have any debts at the date of the previous consumer proposal been repaid and if so, which ones (and in what amounts)?
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> 7. What are the total debts as of a current date? If the level of debt has increased since the filing of the previous consumer proposal, what new debts were incurred? Why were the new debts incurred?
>
> 8. Does [sic] the debtor likely to be able to make a viable consumer proposal that might be acceptable to the creditors?

9. Does the debtor have sufficient cash flow to fund a consumer proposal?

The debtor's motion record does not adequately address these factors. Accordingly, I adjourn the motion sine die to allow the debtor to file further evidence as to these factors, if so advised. Counsel may schedule the motion following the regular court procedure.

[21] I would respectfully offer the following as additional potential considerations:

1. What would reasonably be expected to be produced in a bankruptcy versus the anticipated terms of a second proposal – in other words, are creditors likely to benefit?

2. What are the debtor's prospects during the relevant bankruptcy or proposal period? In other words, is the second proposal now a way of sheltering a significant enhancement to the debtor's income or assets[4] that is expected during what would be the relevant minimum bankruptcy period?

3. Are there employment issues that would or could be affected adversely by a bankruptcy, such as licensing or bonding requirements?

4. Are the anticipated terms of the second proposal known or likely to be the same, superior, or similar to the first proposal?

[4] For example, a pending inheritance, lump sum receipt, or pay raise.

5. How much of a delay has there been since the default or annulment, and what if any explanation is advanced for that delay?

6. Are the nature of the debts, or the debtor's prior history, such as to put the Court to inquiry whether the debtor is seeking to use the Court or the BIA process as the proverbial "clearing house for debt," either public or private?

7. Have any creditors indicated their likely views on a second proposal or what would be the acceptable content of a second proposal, should that be presented to them? In particular, where one or a small number of creditors have a 'veto' by reason of the size of their debt(s), are their views known or anticipated? This goes, of course, to the 'reasonable prospect of acceptance' factor enunciated earlier.

8. Further to the issues of good faith and assets and valuations noted by Master Jean, has the debtor made full and robust disclosure in the first proposal, and has the debtor done so on a reasonable basis? [5]

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[5] An illustration. I recently had occasion to return a proposal in which the debtor- through another firm, not Mr. MacDonald's - made the argument that the sole source of receipts in a third bankruptcy would be the equity in the home. However, that equity was calculated on an unacceptable basis – and thus the amount called for in the proposal was not, as alleged, superior to that which would be realized in a bankruptcy. This is particularly so when (as I said in that case) a third bankruptcy would have been required to come to court and there was no prospect whatsoever that this Court would have accepted the equity calculation as set forth in the proposal.

[22] The material before me does not adequately address the relevant factors to my satisfaction. In returning to my original comment that I view these applications as a "one foot hurdle," I also comment that the Registrar, limited though its jurisdiction may be, is not a juridical eunuch devoid of supervisory or adjudicative function. This office is not destined merely to see, sign, and shut up. The Registrar adjudicates, not abdicates. The fact that creditors will be able to say 'yea' or 'nay' at a future time may be adequate protection for the application to be without service, but it is not adequate for the Court itself to say "carry on," without exception and without inquiry.

[23] I add that the Court relies heavily upon the skill and candour of Trustees/Administrators in weighing this (and every) application. It may be said that the factors I have outlined place additional burdens upon them. Certainly the Trustee/Administrator is constrained by economic factors[6] and is entitled to a reasonable return for services and expertise rendered. I do trust that in considering whether to make application for leave to file a second proposal, the proposed Administrator has already weighed many if not most of the factors I have outlined, in assessing the best, most practicable, and most viable course of action. It is

[6] Remuneration in Division II proposals being governed, among other things, by BIA Rule 129.

hopefully therefore not a Herculean effort to recount such matters into bespoke submissions to the Court rather than a rote template.

[24] In making this decision, I wish to emphasize that I actively encourage proposals as an alternative to bankruptcy. When properly formulated and packaged, viable proposals tend strongly towards a win-win. The debtor is not bankrupt. Assets that may otherwise face forced liquidation are oft preserved. Creditors generally get more money in their hand. There is less of an administrative burden upon the Trustee/Administrator. There is infinitely more flexibility and creativity brought to bear in the process. Indeed, in a bankruptcy discharge application, I am mandated to address whether a viable proposal was an option (s. 173(1))(n)). This is an issue I raise regularly; the trustee is asked that self-same question in its s. 170 report. Proposals are, I am happy to say, now a small majority of insolvency filings in Canada. As we move towards the post-pandemic economy I have my own hypotheses as to their increased utility, especially as impacted citizens who were "in the wrong business" seek to retain non-exempt assets or make arrangements that fall outside the 9, 21, 24, or 36 month timeframes applicable to most first or second-time bankruptcies. But it does not mean that just because something is labeled a "proposal" rather than a

"bankruptcy," all oversight and inquiry is stripped from the equation, at the Court or any other level.

[25] The application to annul the certificate of full performance is granted. The application for leave to file a second proposal is adjourned without day.

Balmanoukian, R.