

Hfx No. 539955
Estate No. 51-3176229
Estate No. 51-3176186
Estate No. 51-3175914
Estate No. 51-3176190
Estate No. 51-3176175

Supreme Court of Nova Scotia
in Bankruptcy and Insolvency

**In the Matter of the Notice of Intention to Make a Proposal under the
Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3, as amended, of Annapolis
Management, Inc., Ruby, LLP, BSL Holdings Limited, 3337151 Nova Scotia
Limited and 4551650 Nova Scotia Limited**

BOOK OF AUTHORITIES of the APPLICANTS

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The Service List

Lawyer for the Applicants

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SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Scotian Distribution Services Limited (Re)*, 2020 NSSC 131

Date: 20200406

Docket: No. 43999

Registry: Halifax

Estate Number: 51-2624515

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

Judge: Raffi A. Balmanoukian, Registrar

Heard: March 27, 2020, in Halifax, Nova Scotia (via Teleconference)

Counsel: Tim Hill, QC, for the Applicant

Balmanoukian, Registrar:

[1] The word “Bankrupt” is derived from the Italian “*banca rotta*.” In times of yore, an insolvent merchant’s place of business would be trashed by irate creditors; the result was a “broken bench.”

[2] In Nova Scotia, the Bench will not break.

[3] During the Great Plague of 1665-6, the Court in London moved from Westminster to Oxford (as did Parliament). But yet, they persisted.

[4] In 2020, we are blessed with far greater modalities of communication and administration. As circumstances direct they are being, and will be brought, to bear in the interests of delivering both justice and access to justice.

[5] As I write, and with a hat tip to Mr. Yeats, mere anarchy is loosed upon the world.

[6] It is not business as usual. Virtually nothing is.

[7] On March 19, 2020, the Supreme Court of Nova Scotia adopted an “essential services” model in response to the Covid-19 pandemic. This has meant that only matters deemed urgent or essential by the presiding jurist will be heard

until further notice; and those, by the method of least direct personal interaction that is consistent with the delivery and administration of justice. This can, in appropriate instances, include written, virtual, electronic, telephone, video, or other modalities, and adaptations of procedures surrounding filing of affidavit and other material.

[8] On March 20, 2020, I issued a memorandum to all Trustees in Nova Scotia reflecting this as it applies to this Court, and underscoring the “urgent or essential” standard. It can be obtained from the Deputy Registrar whose contact coordinates, in turn, are posted on the Court website (courts.ns.ca).

[9] “Essential” means such matters that must be filed, with or without a scheduled hearing, to preserve the rights of the parties – such as those which face a legislative limitation period. “Urgent” means matters that simply cannot wait, in the opinion of the presiding jurist.

[10] Both the Chief Justice of Nova Scotia, the Honourable Chief Justice Michael J. Wood, and the Chief Justice of the Supreme Court of Nova Scotia, the Honourable Chief Justice Deborah K. Smith, have been clear that this does not mean that Courts, being an essential branch of government and the guardian of the

rule of law, cease to function. It means that they operate during this global emergency – and its local manifestation – on an essential services basis.

[11] Accordingly, scheduled matters are deemed to be adjourned *sine die* unless brought to my attention in accordance with the memorandum noted above and I (or a presiding Justice) deem the standard to be met.

[12] Against that backdrop, evolving in real time, I faced the present application. It is a motion for an extension of time to file a proposal, pursuant to Section 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the “BIA”). That section reads:

(9) The insolvent person may, before the expiry of the 30-day period referred to in subsection (8) or of any extension granted under this subsection, apply to the court for an extension, or further extension, as the case may be, of that period, and the court, on notice to any interested persons that the court may direct, may grant the extensions, not exceeding 45 days for any individual extension and not exceeding in the aggregate five months after the expiry of the 30-day period referred to in subsection (8), if satisfied on each application that

(a) the insolvent person has acted, and is acting, in good faith and with due diligence;

(b) the insolvent person would likely be able to make a viable proposal if the extension being applied for were granted; and

(c) no creditor would be materially prejudiced if the extension being applied for were granted. [emphasis added]

[13] The present motion had been scheduled for March 27, 2020. The applicant’s Notice of Intention had been filed on February 28, 2020, meaning that its expiration, 30 days thereafter, was at the end of March, 2020 (BIA s. 50.4(8)). The

scheduled motion was therefore at the very end of this timeline, and the lack of an extension would result in a deemed assignment in bankruptcy (BIA s. 50.4(8)).

[14] The applicant sought to have the matter heard by teleconference. After a review of the file material, I agreed. The Deputy Registrar, with my gratitude, arranged for recording facilities; this is still an open Court of record. Affected entities are still entitled to notice, and they are still entitled to be heard. As well, our open court principle remains and is at least as important as ever.

[15] To that end, the applicant was directed to provide affected entities, including creditors, with particulars of the conference call, including time and call-in particulars. That was done, and a creditor (who did not object to the application) did indeed avail itself of this facility.

[16] I note that the affidavit of service, and other material, was filed electronically. That is perfectly in order in accordance with the current directives in effect at present.

[17] I have granted the order based on the following factors:

[18] First, I am satisfied that the 'urgent or essential' threshold was met. The limitation period in BIA 50.4(8) was nigh. The deemed assignment would be

automatic. As I will recount below, such an assignment would at least potentially have impacts that run beyond solely the individual interests of the corporate debtor.

[19] Section 50.4(9) requires the Court to be satisfied that the applicant meets a three part test each time it is asked for an extension: that it has and continues to act with due diligence; that there is a likely prospect of a viable proposal; and that no creditor would be materially prejudiced by the extension. The burden is on the applicant each time, to meet each test.

[20] The applicant's affidavit evidence is that the applicant continues in operation and is diligently pursuing the proposal process; the evidence of the current status of the process (ie the engagement of MNP Ltd., review of operations, and review of assets and liabilities) satisfies me, at present, of the good faith requirement.

[21] It has employees and contracts. Its operations include transportation operations, which at least for the basis of the current application are important and perhaps essential on both a micro and macroeconomic basis. While "bigger picture" ramifications outside the particular debtor and creditors are not part of the Section 50.4(9) test, I believe I can take them into account when assessing and placing appropriate weight on the benefit/detriment elements which are the overall thrust of that tripartite standard.

[22] No creditor objected, and there is no evidence that the extension would cause material prejudice to any creditor. Although this burden, too, is on the applicant, I can take judicial notice that proposals, if performed, generally result in a greater net recovery to creditors overall; while there is some indication that the applicant will seek to resile from certain obligations, the test is whether the extension would be prejudicial, not whether the proposal itself would be.

[23] This would be the applicant's first extension under 50.4(9), which allows for a series of extensions of up to 45 days each, to a maximum of five months.

[24] To say that virtually all economic prospects in the near to medium term are moving targets is a considerable understatement. The applicant must still demonstrate that it is "likely [to] be able to make a viable proposal" with the extension in place, but in the current context I consider this to be a threshold in which the benefit of any doubt should be accorded to the applicant. This does not relieve the burden of proof on the applicant of establishing that likelihood to a civil standard; it does, however, indicate that at least on a first extension, it will not likely be a difficult standard to meet.

[25] I can take further judicial notice that especially in the current environment, a bankruptcy of an operating enterprise would almost inevitably be nasty, brutish,

and anything but short. Creditors would be well advised to consider the viability and desirability of a proposal through that lens.

[26] This Court will, no doubt, face a considerable additional case load as the economic fallout of the current human disaster works its way through what is and remains a robust legal process. An applicant should have every reasonable opportunity to avail itself of a restructuring rather than a bankruptcy, assuming it otherwise meets the requirements of BIA 50.4(9).

Conclusion

[27] The application is granted, and I have issued the order allowing the time to file a proposal to be extended to and including May 11, 2020.

Balmanoukian, R.

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Convergix, Re 2006 NBQB 288

IN THE COURT OF QUEEN'S BENCH OF NEW BRUNSWICK

IN BANKRUPTCY AND INSOLVENCY

JUDICIAL DISTRICT OF SAINT JOHN

Court Numbers: 12381, 12382, 12383, 12384 and 12385

Estate Numbers: 51-879293, 879309, 879319, 879326 and 879332

**IN THE MATTER of the Proposals of Convergix,
Inc., Cynaptec Information Systems Inc.,
InteliSys Acquisition Inc., InteliSys (NS) Co.,
InteliSys Aviation Systems Inc.**

BEFORE:

Justice Peter S. Glennie

HEARING HELD:

Saint John

DATE OF HEARING:

July 27, 2006

DATE OF DECISION:

August 1, 2006

COUNSEL:

R. Gary Faloon, Q.C., on behalf of the Applicants

DECISION

GLENNIE, J. (Orally)

[1] The issue to be determined on this application is whether related insolvent corporations are permitted to file a joint proposal pursuant to the *Bankruptcy and Insolvency Act*. For the reasons that follow, I conclude that such corporations are permitted to do so.

OVERVIEW

[2] The Applicants, Convergix, Inc., Cynaptec Information Systems Inc., IntelliSys Acquisition Inc., IntelliSys (NS) Co., and IntelliSys Aviation Systems Inc. (the "Insolvent Corporations") are each wholly owned subsidiaries of IntelliSys Aviation Systems of America Inc. ("IYSA").

[3] For all intents and purposes, the Insolvent Corporations have operated as one entity since 2001. The Insolvent Corporations have one "directing mind" and have the same directors. The Insolvent Corporations maintain one bank account.

[4] The Insolvent Corporations are considered related companies under the provisions of the *Income Tax Act (Canada)*.

[5] Payments to all creditors of the Insolvent Corporations, including some of the major creditors such as Atlantic Canada Opportunities Agency have all been made by one of the Insolvent Corporations, namely, IntelliSys Aviation Systems Inc., ("IntelliSys"), even though loan agreements may have been made with other of the Insolvent Corporations. Similarly, all employees of all the Insolvent Corporations are paid by IntelliSys.

Filing of Notice of Intention to make a Proposal

[6] The Insolvent Corporations attempted to file a joint Notice of Intention to Make a Proposal pursuant to the *Bankruptcy and Insolvency Act* (the "BIA") on June 27th, 2006 in the Office of the Superintendent of Bankruptcy ("OSB"). By letter dated June 28th, 2006 the OSB advised that it would not accept the filing of this joint Proposal.

[7] On June 29th, 2006 each of the Applicants filed in the OSB a Notice of Intention to Make a Proposal. The Insolvent Corporations have each filed in the OSB a Projected Monthly Cash-Flow Summary and Trustee's Report on Cash-Flow Statement.

Extension Pursuant to Subsection 50.4(9) of the BIA

[8] IYSA is required to file quarterly reports with the U.S. Securities and Exchange Commission in Washington, D.C. It is a publicly traded security, over-the-counter, on the NASDAQ. The Applicants say the implications on IYSA created by the financial situation of the Insolvent Corporations must be considered. The Applicants assert that the initial 30 day period of protection under the BIA is not sufficient time for all of the implications on IYSA to be determined and dealt with.

[9] The Applicants say that their insolvency was caused by the unexpected loss of their major client which represented in excess of 25% of their combined revenue. They say that time is needed to assess the market and determine if this revenue can be replaced and over what period of time.

[10] The Insolvent Corporations and Grant Thornton Limited have completed a business plan. It has been presented to investors and/or lenders. The Insolvent Corporations will need more time than the initial period of protection of 30 days under the BIA to have these lenders and investors consider the business plan and make lending and/or investment decisions.

[11] Counsel for the Applicants advise the Court that the OSB does not object to joint proposals being filed by related corporations but requires a Court Order to do so.

[12] The Insolvent Corporations host systems for several Canadian airlines. They provide all aspects of reservation management including booking through call centers and web sites as well as providing the capability to check in and board passengers. The total reservation booking volume is about 1300 reservations per day which results in a revenue stream of \$520,000 per day. The applicants say the loss of revenue for even one day would be catastrophic. They assert that serious damage would be caused to the various client airlines. The Applicants also say it would take at least 30 days to bring another reservation system online.

ANALYSIS

[13] There are no reported decisions dealing with the issue of whether a Division I proposal can be made under the BIA on a joint basis by related corporations. There are two decisions, one dealing with partners [*Howe Re*, [2004] O.J. No. 4257, 49 C.B.R. (4th) 104, 2004 CarswellOnt 1253] and the other dealing with individuals [*Nitsopoulos Re*, [2001] O.J. No. 2181, 25 C.B.R. (4th) 305, 2001 CarswellOnt 1994].

[14] Section 2 of the BIA provides that 'persons' includes corporations.

[15] When interpreting the breadth of the BIA section dealing with proposals, I am mindful of the following comments from *Bankruptcy and Insolvency Law of Canada* by Hon. L.W. Houlden and Hon. G. B. Morawetz, Third Edition Revised, (2006, Release 6, pages 1-6 and 1-6.1):

The *Act* should not be interpreted in an overly narrow, legalistic manner: *A. Marquette & Fils Inc. v. Mercure*, [1977] 1 S.C.R. 547, 65 D.L.R. (3d) 136, 10 N.R. 239; *Re Olympia and York Developments Ltd.* (1997), 143 D.L.R. (4th) 536, 45 C.B.R. (3d) 85, 1997 CarswellOnt 657 (Ont. Gen. Div.); *Sun Life Assurance Co. of Canada v. Revenue Canada (Taxation)*, 45 C.B.R. (3d) 1, 47 Alta L.R. (3d) 296, 1997 CarswellAlta 254, [1997] 5 W.W.R. 159, 144 D.L.R. (4th) 653 (C.A.); *Re County Trucking Ltd.* (1999), 10 C.B.R. (4th) 124, 1999 CarswellNS 231 (N.S.S.C.). It should be given a reasonable interpretation which supports the framework of the legislation; an absurd result should be avoided: *Re Handelman* (1997), 48 C.B.R. (3d) 29, 1997 CarswellOnt 2891 (Ont. Gen. Div.).

The *Act* puts day-to-day administration into the hands of business people - - trustees in bankruptcy and inspectors. It is intended that the administration should be practical not legalistic, and the *Act* should be interpreted to give effect to this intent: *Re Russell* (1999), 177 D.L.R. (4th) 396, 1999 CarswellAlta 718, 12 C.B.R. (4th) 316, 71 Alta. L.R. (3d) 85, 237 A.R. 136, 197 W.A.C. 136 (C.A.).

[16] In *Howe, supra*, the debtors brought a motion for an order directing the OSB to accept for filing a joint Division I proposal, together with a joint statement of affairs, joint assessment certificate and joint cash flow statement.

[17] The OSB accepted that the filing of a joint Division I proposal by the debtors was appropriate as the debts were substantially the same and because the joint filing was in the best interests of the debtors and their creditors. However, the OSB attended at the motion to make submissions regarding its policy in relation to the filing of joint Division I proposals. The policy stipulated

that the OSB would refuse the filing of a proposal that did not on its face meet the eligibility criteria set out in the BIA. The policy further provided that the OSB would refuse the filing of a joint Division I proposal where the trustee or the debtors failed to obtain a Court Order authorizing the filing.

[18] Registrar Sproat rejected the OSB's position as expressed in the policy. He held that the OSB had no authority to reject the filing of a proposal, subject to the proposal meeting the requirements of section 50(2) of the BIA, namely the lodging of documents.

[19] The Registrar reviewed case law dealing with the permissibility of joint Division I proposals under the BIA. He found that, while not explicitly authorized, the provisions of the BIA could reasonably be interpreted as permitting a trustee to file with the official receiver a joint Division I proposal. In this regard he quoted from his comments in ***Re Shireen Catharine Bennett***, Court File No. 31-207072T, where he stated:

It seems to me that the decision of Farley J. in *Re Nitsopoulos* (2001) 25 C.B.R. (4th) 305 (Ont. S.C.) is clear on the issue that the BIA does not prohibit the filing of a joint proposal and. . .does not formally approve/permit a joint proposal to be filed. In my view, it would be consistent with the purpose of the BIA and most efficient and economical to extend the decision in *Re Nitsopoulos* and hold that joint proposals may be filed. . .I am not persuaded that a formal court order is required to permit a joint proposal to be filed. It seems to me that potential abuses can be avoided in the fashion outlined at paragraph 9 of *re Nitsopoulos* i.e. on an application for court approval. . .and determination of abuse (if any) can be dealt with on that application.

Thus to summarize, no order is necessary for a joint Division I proposal to be filed. In the event that the Trustee has difficulty in the said filing the matter may be restored to my list and the OSB shall attend on the date agreed upon.

[20] In the result, the Registrar ordered the OSB to accept for filing the joint proposal. The Court further held that a joint Division I proposal is permitted under the BIA and that the OSB must accept the filing of the joint proposal even in the absence of a Court Order authorizing such filing.

[21] In *Nitsopoulos, supra*, a creditor of each of Mr. and Mrs. Notsopoulos brought a motion for an order that a proposal could not be filed on a joint basis.

[22] The joint proposal lumped all unsecured creditors of the Nitsopouloses into one class, whether such creditors were creditors of the husband, the wife, or both. Justice Farley identified the issue as whether the BIA allowed a joint Division I proposal to be made.

[23] He focused on an important distinction between a Division II consumer proposal and a Division I proposal. A Division I proposal must be approved by the Court to be effective. In contrast, a Division II proposal need not be specifically approved by the Court unless the Official Receiver or any other interested party applies within fifteen days of creditor acceptance to have the proposal reviewed. Justice Farley stated that the role of the Superintendent in Bankruptcy, on a directive basis, is not necessary given that there will automatically be a review by the Court to determine whether the terms and conditions of the proposal are fair and reasonable and generally beneficial to the creditors. He concluded that this review would encompass a consideration equivalent to section 66.12(1.1) of the BIA such that it would be able to determine if a joint proposal should be permitted.

[24] Justice Farley concluded that the BIA should not be construed so as to prohibit the filing of a joint Division I proposal.

[25] In my opinion the filing of a joint proposal is permitted under the BIA and with respect to this case, the filing of a joint proposal by the related corporations is permitted. The BIA should not be construed so as to prohibit the filing of a joint proposal. As well, I am not persuaded that a formal court order is required to permit a joint proposal to be filed.

[26] In this particular case, the affidavit evidence reveals various facts which support the view that a joint filing is in the best interest of the Insolvent Corporations and their creditors.

[27] I am satisfied that the Insolvent Corporations have essentially operated as a single entity since 2001. Payments to all creditors have been made by IntelliSys, even though the loan agreements may have been made with other of the insolvent corporations. Inter-corporate accounting for the Insolvent Corporations may not reflect these payments or transactions.

[28] In reaching the conclusion that a joint filing is in order in this case, I have taken the following factors into consideration:

- (a) The cost of reviewing and vetting all inter-corporate transactions of the Insolvent Corporations in order to prepare separate proposals would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.
- (b) The cost of reviewing and vetting all arms-length creditors' claims to determine which Insolvent Corporation they are actually a creditor of would be unduly expensive and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.
- (c) The cost of reviewing and determining ownership and title to the assets of the Insolvent Corporations would be unduly expensive

and counter-productive to the goal of restructuring and rehabilitating the Insolvent Corporations.

[29] In addition, certain of the Insolvent Corporations have only related party debt. Pursuant to section 54(3) of the BIA, a related creditor can vote against a proposal, but not in favor of the proposal. As a result, IntelliSys (NS) Co. and IntelliSys Acquisition Inc. cannot obtain the required votes for the approval of an individual proposal without a court order.

[30] In my opinion, these considerations are consistent only with a finding that a joint proposal is the most efficient, beneficial and appropriate approach in this case.

[31] In view of the reasoning in *Howe* and *Nitsopoulos*, the interrelatedness of the Insolvent Corporations, the court review inherent in any Division I proposal, and the lack of any prejudice to the creditors of the Insolvent Corporations, I conclude that the Insolvent Corporations ought to be permitted to file a joint proposal.

[32] In *Re Pateman* [1991] M.J. No. 221 (Q.B.), Justice Oliphant commented, "I have some serious reservations as to whether a joint proposal can be made save and except in the case of partners, but since I need not determine that issue, I leave it for another day."

[33] In my opinion, the companies in this case are in effect corporate partners because they are so interrelated. They have the same bank account, the same controlling mind and the same location of their offices.

[34] I am of the view that the filing of a joint proposal by related corporations is permitted under the BIA, and that on the facts of this case, an Order should issue authorizing such a filing. Such an Order is consistent with the principles underlying the interpretation of the BIA, and is in the best interests of all stakeholders of the Insolvent Corporations.

Extension of Time for Filing a Proposal

[35] The Applicants also seek an order pursuant to Section 50.4(9) of the BIA that the time for filing a Proposal be extended by 45 days to September 10th, 2006.

[36] The Proposal sections of the BIA are designed to give an insolvent company an opportunity to put forth a proposal as long as a court is satisfied that the requirements of section 50.4(9) are met: *Re Doaktown Lumber Ltd.* (1996), 39 C.B.R. (3d) 41 (N.B.C.A.) at paragraph 12.

[37] An extension may be granted if the Insolvent Corporations satisfy the Court that they meet the following criteria on a balance of probabilities:

- (a) The Insolvent Corporations have acted, and are acting, in good faith and with due diligence;
- (b) The Insolvent Corporations would likely be able to make a viable proposal if the extension is granted; and,
- (c) No creditor of the Insolvent Corporations would be materially prejudiced if the extension is granted.

[38] In considering applications under section 50.4(9) of the BIA, an objective standard must be applied and matters considered under this provision should be judged on a rehabilitation basis rather than on a liquidation basis: See ***Re Cantrail Coach Lines Ltd.*** (2005), 10 C.B.R. (5th) 164.

[39] I am satisfied that the Insolvent Corporations' actions demonstrate good faith and diligence. These actions include the following:

- (a) The Insolvent Corporations have retained the professional services of Grant Thornton Limited to assist them in their restructuring;
- (b) The Insolvent Corporations have completed a business plan;
- (c) The Insolvent Corporations are diligently working on the Restructuring;
- (d) Since the filing of the five Notices of Intention to Make a Proposal, representatives of the Insolvent Corporations and Grant Thornton Limited have met with representatives of ACOA, the principle outside creditor of the Insolvent Corporations, to advise them of these proceedings, and
- (e) Representatives of the Insolvent Corporations have met with outside investors.

[40] The test for whether insolvent persons would likely be able to make a viable proposal if granted an extension is whether the insolvent person would likely (as opposed to certainly) be able to present a proposal that seems reasonable on its face to a reasonable creditor. The test is not whether or not a specific creditor would be prepared to support the proposal. In ***Re Baldwin Valley Investors Inc.*** (1994), 23 C.B.R. (3d) 219 (Ont. G.D.), Justice Farley was of the opinion that "viable" means reasonable on its face to a reasonable creditor and that "likely" does not require certainty but means "might well

happen" and "probable" "to be reasonably expected". See also **Scotia Rainbow Inc. v. Bank of Montreal** (2000), 18 C.B.R. (4th) 114 (N.S.S.C.).

[41] The Affidavit evidence in this case demonstrates that the Insolvent Corporations would likely be able to make a viable proposal as there appears to be a core business to form the base of a business enterprise; management is key to the ongoing viability of the business and management appears committed to such ongoing viability; and debts owing to secured creditors can likely be serviced by a restructured entity.

[42] I am satisfied that the proposed extension would not materially prejudice creditors of the Insolvent Corporations. My conclusion in this regard is based on the following facts: the Insolvent Corporations continue to pay equipment leases and the equipment continues to be insured and properly maintained and preserved by the Insolvent Corporations; the principle debt of the Insolvent Corporations is inter-company debt; the collateral of the secured creditors is substantially comprised of equipment and software and its value is unlikely to be eroded as a result of an extension; based on the Projected Monthly Cash-Flow Summary the Insolvent Corporations have sufficient cash to meet their ongoing current liabilities to the end of September, 2006 and in a bankruptcy scenario it is likely that there will be little if any recovery for the unsecured creditors of the Insolvent Corporations.

[43] Accordingly, I conclude that each of the requirements of section 50.4(9) of the BIA are satisfied on the facts of this case and that an extension of time for filing a proposal should be granted.

CONCLUSION AND DISPOSITION

[44] In the result, an Order will issue that the Insolvent Corporations may file a joint proposal pursuant to the provisions of the BIA, and that, pursuant to Section 50.4(9) of the BIA, the time for filing a Proposal is extended by 45 days to September 10th, 2006.

Peter S. Glennie
A Judge of the Court of Queen's Bench
of New Brunswick

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Lundrigan (Re), 2012 NSSC 231

Date: June 18, 2012

Docket: B 36348

Registry: Halifax

District of Nova Scotia
Division No. 03 - Sydney
Court No. 36348
Estate No. 51-1464188

2012 NSSC 231 (CanLII)

In the Matter of the Bankruptcy of Daniel George Lundrigan

LIBRARY HEADING

Registrar: Richard W. Cregan, Q.C.

Heard: May 10, 2012

Written Decision: June 18, 2012

Summary: The applicant's student loans were not discharged by his bankruptcy as he made his assignment before seven years had passed since he had ceased to be a student. He applied for relief under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*.

Result: The court was satisfied that he had acted in good faith respecting the loans. As his resources were limited and he had family responsibilities the court was also satisfied that he would continue experiencing financial difficulty so that he would not be able to pay the debt. Relief was granted.

***THIS INFORMATION SHEET DOES NOT FORM PART OF THE COURT'S DECISION.
QUOTES MUST BE FROM THE DECISION, NOT THIS LIBRARY SHEET.***

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: Lundrigan (Re), 2012 NSSC 231

Date: June 18, 2012

Docket: B 36348

Registry: Halifax

District of Nova Scotia
Division No. 3 - Sydney
Court No. 36348
Estate No. 51-1464188

2012 NSSC 231 (CanLII)

In the Matter of the Bankruptcy of Daniel George Lundrigan

DECISION

Registrar: Richard W. Cregan, Q.C.

Heard: May 10, 2012

Present: Joseph R. Wall, representing the Attorney General of
Canada.

Rita Anderson, representing the Trustee,
PricewaterhouseCoopers.

Daniel George Lundrigan, representing himself.

[1] Background

This is an application by Daniel George Lundrigan for relief under Subsection 178(1.1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) with respect to two student loans which have remained outstanding after his discharge from Bankruptcy. It is opposed by the Attorney General of Canada.

- [2] Mr. Lundrigan enrolled in a two year course at the Marconi Campus in Sydney in 2003. However after completing one and a half years, his common law relationship ended leaving him responsible for debts totalling \$27,000.00, in addition to two student loans, one under Federal sponsorship and the other under Provincial sponsorship, on which were owing on the date of his assignment, February 17, 2011, balances of \$14,575.97 and \$3,799.49 respectively.
- [3] He ceased to be a student in June 2004. This date is 4 months short of seven years from the date of his assignment. Accordingly, because of the provisions of Subsection 178(1)(g) of the *BIA*, the student loans were not discharged with his automatic discharge on November 18, 2011.

[4] There was considerable pressure on him to deal with the indebtedness from his broken relationship. His father agreed to help him. They arranged a loan with the TD Bank for the \$27,000.00. His father co-signed the loan on condition that he live at home and thus be able to make \$600.00 payments each month against this loan. He had to leave his studies and find work. The loan apparently was paid in a timely manner. He then addressed his student loans. He had an understanding with the collection agency that he would pay \$150.00 per month. That was all he could pay as he was no longer living at home. He only made 9 payments.

[5] He has been working throughout as a cashier at the casino in Sydney. He has married. He and his wife, Michelle Lynn Lundrigan, have twins, born July 19, 2010.

[6] His monthly take home pay averages \$1,500.00. His wife's monthly take home pay averages \$1,084.00. She also receives the Child Tax Benefits of \$223.00 and Universal Child Care Benefit of \$200.00 each month. The total current household monthly income is now \$3,007.00.

[7] He works the evening shift at the casino and she works during the day so that one of them is always able to look after their children. This way they avoid child care expenses.

[8] The claims made in his bankruptcy, in addition to the student loans, consisted of a secured claim by TD Canada Trust for \$10,875.47, and an unsecured claims of Capital One Services, LLC for \$4,163.76.

[9] Mr. Lundrigan's work at the casino is steady but he does not see any opportunity for advancement. He does not see that there are other opportunities in the region for him which would pay more.

[10] If he had completed the course at the Marconi Campus, he would be qualified for much better paying work. He needed another half year of study to complete it. He doubts that he could now complete the course. He probably would have to start all over again as the technology involved is always changing.

[11] Law

To be relieved of student loans under Subsection 178(1.1) a bankrupt must satisfy the court that:

(a) the bankrupt has acted in good faith in connection with the bankrupt's liabilities under the debt; and

(b) the bankrupt has and will continue to experience financial difficulty to such an extent that the bankrupt will be unable to pay the debt.

[12] I must be satisfied that Mr. Lundrigan has acted in good faith with respect to these debts. The following is a review I have made of cases and commentary on good faith. A number of points are relevant to Mr. Lundrigan's situation.

[13] I shall start by quoting what I wrote in *Hankinson (Re)*, 2009 NSSC 211:

[17] *Re Minto* (1999), 14 C.B.R. (4th) 235 (Sask., Registrar Herauf) is often referred to for its list of factors relevant to the determination of good faith. In paragraph [62] he says:

I agree with counsel that in the context of student loans one can look at certain factors considered in determining whether a condition should be imposed on the discharge of a bankrupt with student loan liabilities; namely, whether the money was used for the purpose loaned, whether the applicant completed the education, whether the applicant derived economic benefit from the education (ie: is the applicant employed in an area directly related to the education), whether the applicant has made

reasonable efforts to pay the debts and whether the applicant has made use of available options such as interest relief, remission, etc.

[18] Registrar Sprout in *Kelly, Re*, 2000 CanLII 22 497 (Ont., S.C.) after referring to these factors added:

- the timing of the bankruptcy, and
- whether the student loan forms a significant part of the bankrupt's overall indebtedness as of the date of bankruptcy.

[19] I would add the following:

- whether the applicant had sufficient work and income to be reasonably expected to make payments on the loan,
- the lifestyle of the applicant,
- whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards,
- what proposals the applicant may have made to the loan administrators and the responses received, and
- whether the applicant was at any time disabled from working by illness.

[14] Black's Law Dictionary (9th ed): gives the following definition:

A state of mind consisting in (1) honesty in belief or purpose, (2) faithfulness to one's duty or obligation, (3) observance of reasonable commercial standards or fair dealing in a given trade or business, or (4) absence of intent to defraud or to see unconscionable advantage. - Also termed *bona fides*.

"The phrase 'good faith' is used in a variety of contexts, and its meaning varies somewhat with the context. Good faith performance or enforcement of a contract emphasizes faithfulness to an agreed common purpose and consistency with the justified expectations of the other party; It excludes a variety of types of conduct

characterized as involving 'bad faith' because they violate community standards of decency, fairness or reasonableness.,

and Barron's Law Dictionary, 3rd edition, the following:

GOOD FAITH a total absence of any intention to seek an unfair advantage or to defraud another party; an honest and sincere intention to fulfill one's obligations. In the case of a merchant, good faith refers to honest in fact and the observance of reasonable commercial standards of fair dealing in the trade. U.C.C. §2-103(1)(b). More generally, the term means "honesty in fact in the conduct or transaction concerned. "U.C.C. §1-201(19).

[15] In Frank Bennett: *Bennett on Bankruptcy*, 14th ed, at page 564 the following factors are suggested:

- ! whether the money was used for the purpose loaned;
- ! whether the bankrupt completed the education;
- ! whether the bankrupt derived economic benefit from the education, namely whether the bankrupt obtained a job in the area directly related to the education;
- ! whether the bankrupt made reasonable efforts to repay the debts;
- ! whether the bankrupt had made use of available options such as interest relief, remission, etc.;
- ! the timing of the bankruptcy;
- ! whether the student loans form a significant part of the bankrupt's overall debts.
- ! whether the bankrupt has acquired a significant estate, property, savings, investments or has the bankrupt incurred and discharged other debts for non-necessaries, while continuing in default of the student loan;

! whether the bankrupt had sufficient work and income to be reasonably expected to make payments on the loan;

! the lifestyle of the applicant;

! whether the applicant has had sufficient income for there to be surplus income under the Superintendent's standards;

! what proposals the applicant may have made to the loan administrators and the responses received; and

! whether the applicant was at any time disabled from working by illness.

[16] The following is said in Roderick J. Wood: *Bankruptcy & Insolvency Law*, Irwin Law, 2009, at page 295:

The good faith requirement means that the debtor must have acted honestly both in the bankruptcy and in obtaining the student loan.

[17] *Houlden, Morawetz & Sarra: Bankruptcy and Insolvency Law of Canada*, Fourth Edition, at H§40, page 6-185, says the following:

"Good faith" implies honesty of intention. Failure to properly disclose the debtor's marital status on the student loan application shows dishonesty of intention: *Re Dustow* (1999), 14 C.B.R. (4th) 186, 1999 Carswell Sask 831, 193 Sask. R. 159 (Sask. Q.B.).

In determining whether the bankrupt acted in good faith, the following factors may be considered:

1. Was the money used for the purpose

loaned?

2. Did the bankrupt complete the education or make an honest effort to do so?

3. Did the bankrupt derive benefit from the education in the sense of gaining employment in an area directly related to the education?

4. Did the bankrupt make reasonable efforts to pay the loan or did the bankrupt make an immediate assignment in bankruptcy?

5. Did the bankrupt take advantage of other options with respect to the loan such as interest relief or loan remission?

6. Was the bankrupt extravagant or irresponsible with his or her finances?

7. Did the bankrupt fairly disclose his or her circumstances on the application for the loan in the sense of acting with an honest intention?

- [18] In *Duke v. Nanaimo (Regional District)*(1998), 50 M.P.L.R. (2d) 116 (B.C.S.C.) at paragraph 52 one finds the following:

Although the phrase "good faith" always contains a component of honesty, it often connotes additional qualities depending on the circumstance in which it is used. In my view, the requirement of good faith mandates genuineness, realism and reasonableness both subjectively and objectively.

- [19] *Lowe, Re*, 2004 ABQB 255 (Romaine J.) concerned a modest balance owing on a student loan of a bankrupt, the head of a family of eight. He ran a successful business. The family income was well in excess of \$100,000. It was observed they lived very well - two cars, several computers, involvement in sports, the expenses for which were very high. He never

made voluntary payments on the student loan in question. He spent his money on family priorities. The point made in this case is that, although it is important that children be given access to sports, cultural activities etc., good faith requires that one's priorities reasonably reflect community standards. Put another way, a certain life style is necessary to earn a living and be a part of a community, and children should be able to participate in community activities, sports, etc., but the expenditures must be reasonable; extravagance is not acceptable. This observation applies to both the bankrupt's good faith and ability to pay.

- [20] In *Cardwell, Re*, 2006 SKQB 164, Registrar Herauf was first concerned with whether Subsection 178(1.1) relief was available to one who had made a consumer proposal. He determined that it did, but questioned whether making such was indicative of good faith. He said:

55.To put it bluntly, I have not been convinced that the applicant has satisfied the requirements in subsection 178(1.1) of the *Act*. The applicant made no attempt to make any payment until compelled to do so by enforcement action brought against him. He did not take advantage of any interest relief mechanisms. While I certainly appreciate the effort by the applicant to complete a Consumer Proposal I cannot equate that effort as a show of good faith. It was judgment enforcement that prompted the Consumer Proposal and not a genuine effort by the

applicant to pay down this debt.

56. I also agree with the respondent's submission that the applicant is gainfully employed in a profession for which he received a student loan funded education. Furthermore, he will be employed in that area for the foreseeable future. The applicant earns substantial remuneration for this work. To allow the application in the present circumstances would make a farce of this provision.

[21] In *Fournier, Re*, 2009 Carswell Ont. 3522, Registrar Nettie considered the need for the applicant to have acquired a new automobile when it was apparent that she could be well served by public transit, as she lived and worked in central Toronto. He said:

14. When what apparently gives in her budget at the same time that the car is leased are the payments to the student loans, I find this not to be acting in good faith in respect of those loans. No evidence was offered of any real exploration of taking public transit, or of keeping the old car, either of which would have permitted continued or increased payments on the student loans, and I draw the adverse inference that either of those options could have resulted in money being paid under the loans, but that the Applicant chose to have a new car for reasons personal to herself, and not in keeping with her obligation to act in good faith to these two loan programs.

15. Turning to the second part of the test, financial difficulty, I find that while the Applicant certainly appears to be in financial difficulty, her present difficulty is of her own choosing - the car. But for that new car, which increases her regular transit costs from approximately \$200.00 per month for bus passes to \$800.00 or more, she would be able to

make her support payments and pay something to the student loans.

[22] Analysis - Good Faith

Mr. Lundrigan has not benefitted from the education acquired with the money borrowed. The technology behind it is now stale. The asset he acquired with the loans is now of little, if any, value to him.

[23] One might criticize him for abandoning his studies with only six months left in the course. However, one must consider the situation he was in. In addition to these loans he was confronted with the debts he assumed from his previous relationship. No doubt he was being pursued by creditors more aggressive than the student loan authorities. He was a person with limited qualifications in an acknowledged depressed economic area. His father was willing to help him with the assumed debts. He let him stay at home free, so that from a modest income he was able to repay them, no doubt with his father seeing that such happened as quickly as possible. His father's generosity did not extend to the student loans. He had done his part. It might be argued that he preferred these creditors to his student loan creditors. I do not see this as a strong argument. He managed what he could

with limited income. His father's help was limited.

[24] One can second guess what he did. Maybe he could have made a few more payments, but with his limited income the amount available would not be significant. In the situation he found himself I do not see that he can be accused of acting unreasonably. There is no suggestion of extravagance on his part nor of dishonesty. With the birth of his children and with his limited income I see no basis for suggesting that he should be paying anything on these loans to prove that he has been acting in good faith.

[25] As to the period before his children's birth, there is nothing before me to suggest that he was not acting in good faith. He made some payments. He discharged the other loans, which would not have been possible without his father's help and discipline. There would have been little, if anything, left over.

[26] Although the respondent has suggested bad faith on Mr. Lundrigan's part, and one must be careful in this regard, no real incidents of it have been proved. The question is simply - Has Mr. Lundrigan, considering all the

circumstances and looking at the total picture, acted in good faith?

[27] He found himself in debt because of personal misfortune. He was fortunate that his father offered to help him out. He would not help him with the student loan, but at least he was relieved of the greater part of his indebtedness. There were few options for him. He did what he could, maybe not perfectly. He would not have had any significant surplus income prior to the birth of his children, and certainly has had none since. The most he could find for the student loans would be very little.

[28] Some flexibility and generosity regarding human nature has to be given in determining whether one has acted in good faith. One must look at his actions and ask whether he has he acted in good faith. His resources have been limited. To act in good faith does not require perfection. I think he, on the whole, has acted with honesty and reasonableness. I am thus satisfied that he has acted with the good faith required of him.

[29] Analysis - Financial Difficulty

As to financial difficulty, the household monthly income is approximately

\$3,000.00. The Superintendent's Standard for a family of four is currently \$3,680.00. There is no reasonable expectation of any significant increase in the family income. He and his wife have two young children to raise on a modest income. Their circumstances are such that I am quite satisfied that they will continue to have financial difficulty and be unable to pay off these loans.

[30] Conclusion

He is entitled to the relief provided by Subsection 178(1.1) of the *BLA*.

R.

Halifax, Nova Scotia
June 18, 2012

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721

Docket: No. 45461

Registry: Halifax

Estate Number: 51-2939212

2023 NSSC 238 (CanLII)

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

Registrar: Raffi A. Balmanoukian, Registrar in Bankruptcy

Heard: July 17, 2023, in Halifax, Nova Scotia

Final Written Submissions: July 17, 2023

Counsel: Darren O’Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited (“ASC” or the “Debtor”)
Joshua Santimaw, for the Trustee MSI Spergel Inc. (the “Trustee”)
Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. (“WTH”)

Revised Decision: The text of the original decision has been corrected according to the attached erratum, dated **July 25, 2023**.

Balmanoukian, Registrar:

[1] On July 19, 2023, I wrote to Counsel in the form attached, dismissing the application by Atlantic Sea Cucumber Limited ("ASC" or "Debtor") for an extension of time to file a proposal pursuant to s. 50.4(9) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"), following an unsuccessful application to convert the matter to a proceeding under the *Companies Creditors Arrangement Act*, RSC 1985, c. C-36, as amended (the "CCAA"). This extension application also sought to abridge time for making that application, and for the matter to be heard by a Justice or by the Registrar on an emergency basis, *ex parte*. The Trustee, MSI Spergel Inc. (the "Trustee") supported this application. The objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. ("WTH") did not. This document is to put that communication in reportable form. With the exception of this introductory paragraph, and to add paragraph numbers, there have been no changes from the body of that letter, and it is so reproduced below.

[2] On Monday, July 17, 2023 at 4:00 pm, I heard this application on an emergency basis. At the conclusion of that hearing, I gave a 'bottom line' decision dismissing the application, with reasons to follow, in accordance with the Court of

Appeal's comments in *R. v. Desmond*, 2020 NSCA 1 respecting written supplements to oral decisions. As I understand an appeal has been filed (which I have not seen), I will do so in this format and in a summary fashion.

[3] On May 1, 2023, the Debtor filed a Notice of Intention to make a proposal. On May 26, 2023, Debtor's counsel filed a first application to extend time pursuant to s. 50.4(9) of the BIA. I granted it (and an application for abridgement of time) on May 31, 2023, which was the last day of the initial stay. Mr. MacDonald, for WTH, did not object to the abridgement but did object to the extension (or in the alternative sought a shorter extension). I granted the extension for the full 45 days, given that a 30 day period proposed by Mr. MacDonald as an alternative to a refusal would coincide with the Canada Day weekend. However, I expressed significant concern both with the timing of the application, in light of the timing of the Trustee's first report (May 24, 2023) and observed that there may have been incomplete communication between Trustee and Debtor for a period of time between the initial NOI and the Trustee's first report. I emphasized to all parties that I would be seeking fulsome evidence of substantive progress, should a further extension be sought.

[4] On July 6, 2023, the Debtor sought to convert to CCAA proceedings. That was heard, I understand on a contested basis, before Justice Rosinski on July 13,

2023, two days before the BIA stay was set to expire. No prior application was made to extend the BIA stay. I was advised by counsel that the determination to seek to proceed under the CCAA was made in “late June” and that it was deemed to be a “no brainer” that the initial CCAA order would be granted, notwithstanding that it was to be contested.

[5] On the afternoon of July 13, 2023, Justice Rosinski heard the CCAA application and I understand that was dismissed on Friday, July 14, 2023 with reasons that are yet to follow.

[6] WTH asserts that the BIA stay expired on Saturday, July 15. It argues that the federal Interpretation Act, not the Civil Procedure Rules, applies and that Saturdays “count” for such purposes. As such, the application for extension of time that was filed and heard on Monday, July 17 was out of time. That application also sought to abridge time, and for the matter to be heard *ex parte* (although WTH, the Trustee, and perhaps others were in fact served).

[7] That application was filed with the Supreme Court, not with me as Rule 9(5) of the BIA *General Rules* require; in fairness, the cover email to the Court sought either a Justice or the Registrar, and the matter was redirected to me.

[8] I did not explicitly deal with the *ex parte* element of the application, as the objecting creditor and trustee in fact appeared, and I was prepared for the sake of argument to accept that the July 17 application was not out of time.

[9] I was presented with the Trustee's second report, which was principally if not exclusively for the CCAA proceedings. I was also advised that the Trustee had completed an inventory and the report contains a cash flow projection (including \$325,000 in professional fees over four months on \$800,000 in sales), and obtained an opinion on the "validity and enforceability" of security granted by the Debtor to a non-arm's length entity.

[10] WTH objects to various assumptions and elements in this opinion, including under ss. 95 and 137 of the BIA and the *Statute of Elizabeth*. It points out that the security was granted just after Justice Coughlan's decision in favour of WTH against the Debtor (2023 NSSC 27), and just two months prior to the Debtor's NOI, although it purports to secure advances made in 2018.

[11] Because of this dispute (and continuing developments in determining creditors), it is currently unclear whether WTH has a 'veto' on any proposal or not. Although I am cognizant of Justice Moir's decision in *Kocken* (2017 NSSC 80) that adverse statements by a veto-holder with respect to a proposal are not

determinative of its ultimate viability, in these circumstances I did pay some attention to WTH's comments, for reasons to which I will return.

[12] Against that backdrop, I considered (using the assumption that the application was not in fact out of time to begin with) the three part test in s. 50.4(9) BIA, which may be summarized as present and continuing good faith and diligence, the "likelihood" of an ultimate viable proposal, and lack of material prejudice to any creditor. I further considered whether, should the test be met, granting an extension would be a proper exercise of my resultant discretion. I will discuss the 50.4(9) requirements in inverse order.

Prejudice

[13] WTH concedes that an extension would not materially prejudice it under 50.4(9)(c). I agree.

Proposal viability

[14] I was asked for a ten day extension, following Justice Rosinski's oral decision. This was not ultimately for the purposes of getting a proposal out to creditors or before the Court, but to assemble the materials to make a *further* extension application. In short, the "no brainer" that the Debtor thought it had in

obtaining the CCAA initial order caught the Debtor with its pants down when the application was refused at a minutes-to-midnight deadline.

[15] This is not the test under 50.4(9)(b) respecting “proposal viability” although I conclude that the application fails not for lack of viability, but under 50.4(9)(a)’s requirement for good faith and due diligence or, if I am wrong, because I would not exercise my discretion in favour of the Debtor.

[16] In *Re T&C Steel Ltd. et al*, 2022 SKKB 236, Justice Scherman reviewed the “viability” test, particularly in the context of a second (or subsequent) application, as follows:

[7] In *Enirgi Group Corp. v Andover Mining Corp.*, 2013 BCSC 1833, 6 CBR (6th) 32 [Enirgi Group], the Court said:

[66] Turning to s. 50.4(9)(b), a viable proposal is one that would be reasonable on its face to a reasonable creditor; “this ignores the possible idiosyncrasies of any specific creditor”: *Cumberland* [[1994] OJ No 132 (Ont Ct J)] at para. 4. It follows that Enirgi’s views about any proposal are not necessarily determinative. The proposal need not 2022 SKKB 236 (CanLII) - 4 - be a certainty and “likely” means “such as might well happen.” (*Baldwin* [[1994] OJ No 271 (Ont Ct J)], paras. 3-4). And Enirgi’s statement that it has lost faith in Andover is not determinative under s. 50.4(9): *Baldwin* at para. 3; *Cantrail* at paras. 13-18).

[17] The Court went on to cite my own decision in *Re Scotian Distribution Services Limited*, 2020 NSSC 131, drawing a distinction between a “first extension” and a subsequent one. Justice Scherman was quite critical of the dearth of information before it, granting the second extension by the proverbial skin of its teeth.

[18] In summary, the test for the likelihood of a viable proposal is an objective one: *Nautican v. Dumont*, 2020 PESC 15 at paras. 16-18. Chief Justice Kennedy put it this way (invoking the inimitable Justice Farley in the process) in *Re Scotian Rainbow Ltd. et al.*, (2000), 186 NSR (2d) 154 at para. 17 *et seq.*:

[17] As to s. 50.4(9)(b), that the insolvent person would likely be able to make a viable proposal of the extension being applied for were granted. Counsel for the primary creditor Shur Gain, in support of the applicant, has brought to this Court’s attention the case of *Re Baldwin Valley Investors Inc.* (1994), 23 C.B.R. (3d) 219. In that matter Justice Farley of the Ontario Court of Justice (General Division) (which it then was), Justice Farley considers the phrase a viable proposal as set out in subsection (b) of s. 50.4(9). He says that that phrase should take on a meaning akin to one that seems reasonable, a proposal that seems reasonable on its face to the reasonable creditor. Reasonable on its face to the reasonable creditor. Justice Farley says this ignores the possible idiosyncrasies of any specific creditor. Justice Farley also examines the meaning of the word ‘likely’, and refers to the Concise Oxford Dictionary of current English where likely is defined, and I quote:

Might well happen or turn out to be the thing specified.

[18] Might well happen or turn out to be the thing specified...I am in agreement with Justice Farley’s determinations as to the meaning of these

words, and I adopt his findings as to their meanings for our purposes. When I make reference to those words for our purposes, I am adopting Justice Farley's definitions.

[19] While I have very considerable doubts in the context of a second extension of "viability," particularly given WTH's express loss of confidence in the Debtor and its ability to drive a proposal, given the objectivity of the test and the binding comments of Justice Moir in *Kocken*, I am compelled on a bare balance of probabilities *for current purposes* to conclude that the "viability" test, as interpreted by the caselaw, has been met.

Good faith and due diligence

[20] That leaves us with 50.4(9)(a) – the due diligence and good faith tests – and with my discretion.

[21] Mr. O'Keefe urges that in his experience, the 59.4(9)(a) inquiry is little more than a catechism – a recitation by the Trustee that good faith and due diligence are at hand. I do not accept that is appropriate. It is a determination to be made by the Court, not by the Trustee. It is also something of an exercise in "don't ask a barber if you need a haircut." I observed this in stark relief at the initial extension application when the Trustee's representative (a different individual from that later involved in the file) became quite agitated when I challenged the timeline leading

up to that initial (and successful) extension application and whether developments to that date passed the “due diligence” test.”

[22] The current case is something of an unusual situation in that although there were notable developments between May 31 and July 6, they were primarily if not exclusively geared towards converting the insolvency to CCAA proceedings. As I read the BIA, the “good faith and due diligence” requirement relates to the development of a viable proposal, not to other insolvency options. In *Re Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC), the Court refused an extension when nothing had been done “in preparing the proposal.” While there was no indication on whether any other work had been done at all (unlike the present case), I read this as supporting the view that due diligence relates to moving the (likely viable) proposal forward – not other options.

[23] Again, it appears that the Debtor thought a Justice would “rubber stamp” an initial CCAA order, filed on the eve of the expiry of the initial BIA extension, and when it was unsuccessful was left scrambling for a second BIA extension – not having left time either for a Justice to consider the CCAA application in a timely fashion, or to make a timely application to extend the 50.4 timeline should that be unsuccessful (as it ultimately was). As I discuss below, as well, I question whether in the last 75 days, more could have been done to determine who are the creditors

and what is their status. On balance, I am not convinced that what has been done, in these circumstances, are adequate to satisfy me to a civil standard of due diligence.

[24] Which brings me to good faith. There are two places where this is relevant: directly, in the 50.4(9)(a) test, and more holistically under Section 4.2(1) of the BIA.

[25] I begin by observing that a failure to prove good faith is not the same as a finding of bad faith. It does not require malice or caprice or abuse of process. It is an affirmative test – that there is good faith; not the presence or absence of bad faith.

[26] At all Court stages of this and the CCAA proceeding, there have been distinct flavours of attempts to “strong arm” the Court by compressing timelines where the upshot has been “you have to sign this or disaster will result.” It will be recalled that the initial 50.4(9) extension was filed on May 26 (together with an application for abridgement of time) and was heard on the very last possible day. The CCAA application was heard on the last juridical day before that extension expired (having been filed seven days prior). The CCAA materials make the point that if the initial CCAA order was not granted, a disastrous bankruptcy would

follow; when that was rejected, the Debtor returned (arguably out of time) to this Court making the same argument, and sought to do so *ex parte* (although again, in fairness, having in fact given short notice to adverse parties).

[27] I was not presented with any reason for this. It is not consistent with good faith and fair dealing. It is, conversely, consistent with attempting to compel the Court to the Debtor's agenda and objectives.

[28] Inconsistent with good faith as well is the current state of affairs. Distilled, it is this: "we were unsuccessful in the CCAA application. We don't have any additional materials to put in front of you; we don't even know what the creditor matrix is going to look like, given a potential substantial additional creditor and the security dispute. So give us ten days to pull that all together because we didn't think we would fail on the CCAA application."

[29] In *Cogent Fibre Inc.*, 2015 ONSC 5139, Justice Penny said this, which I find completely consistent with my prior comments on "recalcitrant creditors" not being determinative but yet not relieving the Debtor of its burden under 50.4(9):

[17] In effect, Cogent says it needs more time to continue discussions with its two major creditors when at least one of those creditors (a creditor with veto power) has not engaged in any discussions with Cogent and has no intention of doing so. Cogent's position is, I find, entirely tautological.

[18] In his factum and in oral submissions, counsel for Cogent emphasized the rehabilitative nature of the proposal sections. He relied heavily on recent Ontario and B.C. authority to the effect that a veto-empowered creditor's statement that it will never agree to a proposal is not dispositive of whether to terminate or refuse to extend a stay. I quite agree with this position and the supporting law. Creditors often, for strategic reasons, say they will never agree.

[19] Nevertheless, it seems to me there must be a certain forthrightness on the part of the debtor about what is sought to be achieved. There must also be an air of reality about the likelihood of any proposal being viable.
[emphases added]

[30] In this case, the Debtor is essentially saying, "we need more time to get a third extension request in front of you, because we didn't get what we wanted under the CCAA. We know there will be a sale, but we can't tell you yet what that is going to look like or who is going to be voting in what proportions on it." I cannot consider that, on a balance of probabilities, to be "forthright....about what is to be achieved," or in furtherance of good faith. It is at least questionable whether it meets the test of due diligence as well.

[31] In making these comments, I wish to be clear that I am not making negative aspersions as to any individual. I am not privy to the communications among Debtor, Trustee, or Counsel. I am aware that the Debtor's principal is in China and that this posed logistical and perhaps language barriers. This was not a new development and existed at least from the original NOI onward. What is clear is that, for whatever reason, the Debtor found itself in a situation that was awkward at

best and out of time at worst, and expected the Court essentially as a matter of right or rote, to fix it.

Discretion

[32] Finally, I turn to my discretion. 50.4(9) is permissive, not mandatory. It states that I “may” grant an extension (assuming it to be made in time) if the three part test is met. I have assumed the application was timely, and concluded the test was not met. If I am right on the first point and wrong on the second, however, I would not exercise my discretion in favour of the Debtor.

[33] The case law recognizes that a 50.4(9) extension is a discretionary order, if the conditions for its exercise have been met: see *Re Dynamic Transport* 2016 NBCA 70 at paras. 4 and 9; *Re Entegrity Wind Systems Inc.* 2009 PESC 25 at para. 30; *Re Entegrity Wind Systems Inc.* 2009 PESC 33 at para. 36; *Royalton Banquet and Convention Centre Ltd.* 2007 CanLii 1970 (Ont. SC).

[34] Thrice in this insolvency has the Debtor come forward on an “emergency” basis, in effect seeking forgiveness not permission. There are circumstances when that comes with the territory of insolvency. The subject can be on occasions sedate, in others it can develop in real time. However, here it was known both that there was a substantial adversarial and opposing creditor, that the Court was

concerned with the prior timelines, and that the Creditor would be seeking to convert to CCAA proceedings no later than late June. It frankly appears that the Creditor did indeed consider such an application to be what counsel described to me as a “no brainer” and got caught flat-footed when (again at the last possible moment) the initial CCAA order was refused.

[35] It was argued that while this may have been a strategic or procedural mistake, the Debtor should not be held to account for that, given the alleged inimical consequences of a bankruptcy. While both the CCAA and BIA 50.4(9) arguments focused on this alleged destruction of value, no evidence of that was presented to me. I pointed out that a bankrupt can make a proposal (50(1) BIA), and this was argued to be undesirable given the dynamics of who would be “driving the bus” in a bankruptcy proposal versus an insolvency proposal. I did not find that persuasive in convincing me to exercise my discretion if I am wrong in finding that the 50.4(9) “good faith and due diligence” tests have failed. Indeed, it may well be that a change of drivers is exactly what is needed to move the sale process forward, given the other disputes in the file.

[36] As I have said, I am aware that my “bottom line” decision is under appeal, on grounds that I have neither seen nor heard. These reasons will illustrate the basis upon which that decision was made.

[37] Costs were not argued before me. In the circumstances, that issue should it arise is best left to the appellate Justice.

[38] Mr. O'Keefe, solicitor for the Debtor, is to provide a copy of this decision to the service list forthwith.

Balmanoukian, R.

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Atlantic Sea Cucumber Limited (re)*, 2023 NSSC 238

Date: 20230721

Docket: No. 45461

Registry: Halifax

Estate Number: 51-2939212

2023 NSSC 238 (CanLII)

In the Matter of: The intention to make a proposal by Atlantic Sea Cucumber Limited

ERRATUM

Registrar: Raffi A. Balmanoukian, Registrar in Bankruptcy

Heard: July 17, 2023, in Halifax, Nova Scotia

Final Written Submissions: July 17, 2023

Erratum Date: July 25, 2023

Counsel: Darren O’Keefe and Caitlin Fell, for the applicant Atlantic Sea Cucumber Limited (“ASC” or the “Debtor”)
Joshua Santimaw, for the Trustee MSI Spergel Inc. (the “Trustee”)
Gavin D.F. MacDonald and Meaghan Kells, for the objecting creditor, Weihai Tawei Haiyang Aquatic Food Co. Ltd. (“WTH”)

Erratum:

- [1] Meaghan Kells was added as co-counsel for the objecting creditor.
- [2] Additional underlining was included in paragraph 29.
- [3] The word “Debtor” was added the counsel section on the title page and added to the decision in paragraph 1.