

CANADA / JUDGMENT

Caddick (Re)

2023 BCSC 1497

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Supreme Court of British Columbia

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2023 BCSC 1497 Caddick (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Caddick (Re),

2023 BCSC 1497

Date: 20230828

Docket: B220302

Estate: 11-1987870; 11-1987871

Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Consumer Proposals of

Tyler Roy Edward Caddick and Jennifer Michelle McConachie

Before: The Honourable Mr. Justice Veenstra

Reasons for Judgment

Counsel for the Administrator, Todd McMahon Inc.:

K.S. Campbell

Counsel for the Superintendent of Bankruptcy:

E.C. Girard

Place and Date of Hearing:

Vancouver, B.C.

March 9, 2023

Place and Date of Judgment:

Vancouver, B.C.

August 28, 2023

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Introduction

- [1] This is a dispute between Todd McMahon Inc., in its capacity as Administrator of a consumer proposal (the "Administrator"), and the Office of the Superintendent of Bankruptcy ("OSB") as to the fees properly payable to the Administrator in respect of a consumer proposal made pursuant to Division II of Part III of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA]. It arises in part from a difference in views as to the standard of documentation of various steps taken in the administration of the specific consumer proposal.
- [2] More fundamentally, the dispute between the Administrator and the OSB turns on the proper interpretation of what has been referred to as a "Dondale clause" in the consumer proposal. Section 6 of the form used for consumer proposals allows for "Additional Terms"; in the proposal in question, the following provision was included:

- a) The creditors may appoint up to three inspectors responsible for the consumer proposal of the consumer debtor. The inspectors shall have, in addition to any powers of the inspectors under the Act, the power to
 - i) Receive any notice of default in the performance of a provision of the consumer proposal and waive any such default, and
 - ii) Approve any amendment to the consumer proposal without calling a meeting of creditors, if the amendment would alter the schedule for and amount of the payments to be made by the consumer debtor, but would not change the total amount to be paid; and
- b) That in the absence of the appointment of Inspectors, the powers of the Administrator will include those powers set forth in Paragraph 6(a)(i) and 6(a)(ii), above herein, together with the power to extend the time for the making of any payment required to be made pursuant to this Proposal provided that no such extension shall extend beyond the five years following the approval of this proposal by the court.

[Emphasis added.]

- [3] This inclusion of this provision in a consumer proposal was the subject of a judgment of the Court of Appeal in *Dondale (Re)*, 2009 BCCA 10. The parties disagree as to the nature and scope of what was decided by the Court of Appeal in that case.
- [4] In this case, the full amount to be paid under the consumer proposal was paid by the debtors within the five-year period contemplated by the proposal, the creditors have all been paid the amounts to which they were entitled pursuant to the proposal, and a Certificate of Full Performance was issued in June 2020. What remains is the final approval of the fees of the Administrator.
- [5] The Administrator submitted its final accounting to the creditors and to the OSB in the summer of 2020. On August 12, 2020, the OSB issued a comment letter objecting to the Administrator's proposed fees on the basis that there had been a deemed annulment of the proposal and the Administrator should not be entitled to any fees after that deemed annulment. The Administrator, through counsel, responded to the OSB, disputing the allegation that there had been a deemed annulment. The OSB issued an amended comment letter on September 10, 2021, maintaining its position and requiring the Administrator to seek court approval of its fees.
- [6] None of the creditors have participated in this proceeding.

Background Facts

- [7] Mr. Caddick and his partner Ms. McConachie (the "Debtors") made a joint consumer proposal (the "Proposal") pursuant to the BIA on April 23, 2015. A certificate of filing regarding the Proposal was issued by the OSB on April 28, 2015, and notice was given to the creditors.

- [8] The Proposal provided that the Debtors would pay \$225 upon filing of the proposal, and thereafter 59 consecutive monthly payments of \$225 commencing upon creditor approval of the Proposal, for a total of \$13,500. It provided at section 5(a) that distributions of funds on hand would be made at the discretion of the Administrator. It included the Dondale clause, which I have already quoted, at section 6.
- [9] Of those creditors who filed proofs of claim in relation to the Proposal, only five voted, all of whom were in favour of the Proposal. No inspectors were appointed by the creditors; hence, the powers provided in section 6 were provided to the Administrator.
- [10] Following creditor approval of the Proposal on June 12, 2015, no circumstance arose which required a court hearing for approval. The Proposal was thus deemed to have received court approval on or about June 27, 2015. The Administrator issued a notice to the creditors confirming that the Proposal was deemed to be approved.
- [11] The Debtors made the first of their regular monthly payments on July 20, 2015. For the next two and a half years, they made each payment, with limited exceptions:
- a) The December 2016 payment was returned NSF, but was replaced on January 17, 2017 (some 3½ weeks later);
 - b) The March 2017 payment was two days late, as the Debtors had closed their bank account, but this issue was quickly corrected; and
 - c) The August 2017 payment was returned NSF but was made up on August 29.
- [12] The January 20, 2018 payment was returned NSF. It was not immediately replaced. However, payments for the months of February through May 2018, were all made as scheduled. Then, the June 2018 payment was also returned NSF.
- [13] The day-to-day administration of the Proposal was mostly handled by two licensed insolvency counsellors: a Ms. Prior, until her departure from the firm in October 2019, and thereafter a Ms. Peet.
- [14] The licensed insolvency trustee ("LIT") responsible for this proposal on behalf of the Administrator was Mr. McMahon. He has deposed that:

Although to my observation the Debtors were as diligent as their circumstances apparently allowed them to be regarding the making of monthly payments following deemed court approval of the Proposal, there were periods during which the Debtors reported to the Administrator that various personal circumstances arising in their lives had precluded them from adhering to the payment schedule which the proposal anticipated.

- [15] Mr. McMahon described his practice when payments are NSF as follows:

- (i) Where payments made by a debtor under a consumer proposal are made by way of pre-authorized debit, and where there are insufficient funds in the bank account involved for the payment to be made, the Administrator's office is made aware of that circumstance by the debtor's bank.

(iv) Regardless of the means by which the fact of a missed payment became known, my standing instructions to my support staff were that I was to be made aware of all such instances, in order that I could determine how deal with each such instance and instruct my support staff accordingly, so far as contact with the debtor, determining the reason for the missed payment, and the debtor's proposed means of addressing it were concerned, all of which were then to be considered and decided upon by me as the LIT having carriage of the file on behalf of the Administrator.

[16] He further explained that:

I acknowledge that one reviewing the terms of many of the email messages, and certainly the sample notice letter [of November 2018], will note the absence of any formal agreement between the Debtors and the Administrator regarding a formal re-alignment of the payment plan anticipated by the Proposal, as opposed to a waiver of a specific default, or even to paragraph 6(b) of the Proposal itself. That was not accidental. The purpose of such communications was to encourage the Debtors to make good on those payments which were missed, and to resume the making of timely payments as soon as that could be accomplished.

The Administrator had no desire to convey the message to the Debtors, either expressly or implicitly, that the Debtors could rest in the comfort of assuming they could take five years after court approval of the Proposal to pay the amount required of them, regardless of the payment schedule set out in the Proposal. To the contrary, the Administrator's intent was to keep the Debtors mindful that, whatever indulgences might be granted under paragraph 6(b) of the Proposal on one occasion, might well be the last such occasion.

In my experience, that approach has generally been effective in having debtors perform the terms of their proposals, in order that both debtors making consumer proposals and their creditors can have the benefit of the bargain they agreed to; whereas deciding against exercising the authority granted by paragraph 6(b), and thereby triggering a deemed annulment of the kind paragraph 6(b) was intended to preclude, often resulted in a bankruptcy which advanced the interests of neither the debtors or their creditors.

[17] The record on this application contained no email or other written communication prior to October 2018. No explanation is provided for this - it is not clear whether communication prior to this point was by telephone, whether prior emails were no longer available, or whether it had simply been determined they were not relevant.

[18] The materials in the record include a letter dated November 27, 2018, sent by the Administrator to Mr. Caddick, stating:

Please be advised that your payment was returned by the bank.

The returned payment of \$225.00 must be replaced immediately by cash, money order or a certified cheque. Please contact our office with the date that we can expect payment.

You should be aware that failure to make your required payments on time will require us as your trustee to close your Proposal and notify all your creditors that the restrictions on the collection of their debts has been removed.

Should you have any questions, please feel free to contact us at [contact information provided].

- [19] With respect to this letter, Mr. McMahon deposed that based on his review of the file, the letter "is one of several which Ms. Prior sent to the debtors". He does not list the months in which such a letter was sent. Presumably, they include some of the months earlier in 2018 when payments were not made.
- [20] Returning to the chronology, no withdrawal was attempted from the Debtors' bank accounts in July 2018. Nothing in the file material indicates why this occurred; presumably there was some sort of communication by which the Debtors advised Ms. Prior that there would not be sufficient funds in the account.
- [21] After the payment of July 20, 2018, was not made, there were three months' payments outstanding. The OSB says that, by virtue of s. 66.31 of the BIA (cited below), the Proposal was thus deemed to be annulled.
- [22] On August 20, 2018, the Debtors made a double payment (\$450), reducing the arrears to two months. However, in September and October 2018, no withdrawals were attempted. After October 20, 2018, there were four months' payments outstanding.
- [23] On October 24, 2018, Mr. Caddick emailed the Administrator stating "Still have not seen the payment clear the acct Is there a problem on your end?" Then on November 6, 2018, a payment of \$225 was made from Mr. Caddick's account - this was presumably the October 2018 payment.
- [24] The payment on November 20, 2018, was returned NSF. It was this payment that led to the letter of November 27, 2018, which I have quoted above. As of November 27, 2018, Mr. Caddick was back to four months in arrears.
- [25] The next two payments (December 20, 2018 and January 20, 2019) were both made successfully. However, the payments on February 20 and March 20, 2019, were both returned NSF. By this point, Mr. Caddick was six months in arrears.
- [26] The record before me contains a number of emails between Mr. Caddick and Ms. Prior from March 31 to July 17, 2019. In the first email, Mr. Caddick notes that he is communicating by email because of difficulty getting through by telephone, and stating:

I don't want to lose all the work I put into this. Please email me back with my total buy out so I can get away from this mess.

[27] Ms. Prior advised by email that if the Debtors paid before April 21, 2019, the balance would be \$3,375, and that once the funds cleared they would be issued a Certificate of Full Performance which would confirm they had completed the program. Mr. Caddick responded that he was going to sell his car and pay out that amount. Ten days later, however, he wrote again advising that his car sale had fallen through, and asking "what do you need to get this payments back on track? Do you need another void cheque or something?"

[28] Ms. Peet replied that day (April 11, 2019):

I'm sorry to hear that. Unfortunately we need a minimum of \$1,350.00 to bring your account up to March, as your quite a few months behind (7 months). If you have a new bank account then we would [sic] the new bank information so we can withdraw from the account.

[29] The April 20, 2019 payment was not successful, being returned with a note "Account Frozen".

[30] On May 2, 2019, Mr. Caddick emailed Ms. Prior to advise that he had some cash "to pay this stuff off", but was just waiting for the government to pay him.

[31] The payment on May 20, 2019, was returned with a note "Account Closed".

[32] On June 19, 2019, Ms. Prior emailed Mr. Caddick to advise:

You are currently 9 payments behind which is against the law in a consumer proposal, you need to bring your account up to date by June 26/19. The amount owing is \$2025.

Under the BIA act for your consumer proposal we (government) are required to annul/cancel your proposal after 3 missed payments. We have given you quite a bit of leeway in this regard and now we have run out of time.

Please advise me as to how you will be making this payment as we do not current banking information for you.

[Emphasis added.]

[33] Mr. Caddick replied on June 27, 2019, commenting that:

everytime I think Im going gonna be money to pay off What We owe something always goes wrong like the gov taking 2 months to look at my taxes when they owe me a few thousand!!!

Can we do double payments until we get caught up? Also do you have a firm that I need to fill out to update banking info?

[34] Ms. Prior responded on July 3, 2019, that:

I've spoken with the trustee and he is willing to work with you.

If we can take out double payments each month and not missing anymore we will keep the file open. I would need your new banking information (void cheque) also which date, please choose from (1, 15, 20, 21 or 30/31) of each month. This has to start immediately.

If you NSF one payment then we will be required to annul (close) your proposal.

[35] Mr. Caddick replied on July 16, 2019 that:

Sorry life has been insane lets do the 20th of each month please

Hust [sic] let me know the exact total so I can make sure it's covered thanks for working with us while we figure this stuff out

[36] Ms. Prior replied on July 17, 2019, that:

Your payments will be \$450 for the next 10 months starting July 20, 2019 to April 20, 2020. April 20, 2020 will be your final payment then your proposal will be completed.

[37] The Debtors made \$450 payments in each of July, August, September and October 2019. The November 2019 payment was only \$225 - there is nothing in the materials to show why only \$225 was withdrawn, but presumably there was some discussion with Ms. Peet (who by that time had assumed conduct of the file).

[38] The December 20, 2019 payment was returned NSF. A letter was sent by the Administrator to Mr. Caddick on January 6, 2020, the wording of which was identical to that sent by Ms. Prior in November 2018 - other than that the amount of the returned payment was \$450. Ms. Peet, who arranged this letter, commented in her affidavit that "Because I was so new to Ms. Prior's position at the time I simply used a template letter Ms. Prior had apparently used before to address NSF payments." She also stated that at the time of the letter, she was "unaware of the existence of" the Dondale clause in the Proposal, or of the "effect and implications" of it. Rather, her "sole objective at the time I sent the letter was to encourage the debtors to make good on the missed payment".

[39] Monthly payments were successfully taken as follows:

- a) January 20, 2020 - \$450;
- b) February 20, 2020 - \$225;
- c) March 20, 2020 - \$225;
- d) April 20, 2020 - \$225.

[40] On April 22, 2020, Ms. Peet emailed Mr. Caddick stating:

the next payment is coming out April 30 for \$225.00 but we need to get this paid up to date you are supposed to be finished the proposal in May 2020. The balance owing will be \$1350.00 after April payment. Can you give me some suggestions on payment?

[41] Mr. Caddick responded the next day, asking:

On the 30th do a double payment and I will advise in may when to take the rest out insuke [sic] around the 18th but will let you know.

[42] A \$225 payment was taken on April 30, 2020.

[43] On May 12, 2020, Mr. Caddick emailed Ms. Peet asking her to "take 2 payments on the 15th", and commenting that "we should be able to pay the remainder at the end of month". Ms. Peet responded that she would take out \$450.00 on May 15. Mr. Caddick then asked for the balance after that payment, to which Ms. Peet responded \$675.

[44] A \$450 payment was taken on May 15, 2020. After some follow-up emails on May 27, 2020, the remaining balance of \$675 was taken on May 28, 2020.

[45] On June 9, 2020, the Administrator sent the Debtors a Certificate of Full Performance, showing that as of May 28, 2020, the Proposal had been completed.

[46] Thereafter, the Administrator made a final distribution to the creditors (who had received interim distributions on October 20, 2018, September 24, 2019 and February 27, 2020).

[47] The Administrator's accounting shows total receipts of \$13,554.14 (including a small amount of interest), of which fees of \$100 were paid to the Official Receiver, counselling fees of \$170 were paid, and fees of \$3,840.13 (plus taxes) were reserved to the Administrator. This left \$9,243.50 for distribution to the creditors.

[48] The Administrator's final report was provided to the creditors and to the OSB. As noted above, the OSB provided an initial and then an amended comment letter, which acknowledged the existence of the Dondale clause but stated:

However, the LIT did not follow the proper steps of documenting the file that he was invoking the clause nor did he send notice to the creditors and OSB his intentions to alter the payment schedule and automatically revive the proposal. As a result, the proposal was deemed annulled.

[49] The effect of the OSB providing a comment letter was to require the Administrator to seek court approval of its fees.

Preliminary Issue - Should this be before a Registrar?

[50] The present application is for approval of the final statement of receipts and disbursements of the Administrator, and for the consequent discharge of the Administrator. Such an application would ordinarily be heard by a registrar, with a right of appeal in the first instance to a judge.

[51] Section 192(1) of the BIA includes the following:

192 (1) The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,

- (i) to tax or fix costs and to pass accounts;

[52] Rules 102 and 103 of the Bankruptcy and Insolvency General Rules, C.R.C. c. 368, provide:

102 (1) If the Superintendent issues a letter of comment pursuant to section 99 requesting the taxation of an administrator's accounts, the administrator shall, after obtaining a hearing date from the registrar and within 30 days after the day of receipt of the letter of comment, send to each creditor who has proved a claim and to the Division Office

- (a) a notice of hearing for the taxation of the administrator's accounts and the discharge of the administrator, in prescribed form,

103 (1) At the time of the hearing, the registrar shall consider the creditors' objections and the letter of comment issued by the Superintendent, and shall tax the administrator's accounts accordingly.

[53] Section 192(4) of the BIA provides that a person dissatisfied with a decision of a registrar may appeal to a judge.

[54] The Administrator relies on s. 192(2) of the BIA, which states:

- (2) The powers and jurisdiction conferred by this section or otherwise on a registrar may at any time be exercised by a judge.

[55] The Administrator says that the specific provisions in Bankruptcy Rules 102 and 103 are subject to the general grant of jurisdiction in s. 192(2) of the BIA. The Administrator says that the jurisdiction for a judge to hear an application like this cannot be doubted - the issue is whether a judge should exercise their discretion to hear such an application.

[56] The Administrator says that the Court should exercise its discretion to deal with this matter, notwithstanding that it is within the jurisdiction of a registrar, for several reasons:

- a) There are at least five other estates in which similar issues arise to the present, and the outcome of this application will directly affect those five other cases. It is, in that sense, a test case.
- b) At the heart of the parties' dispute is disagreement as to what is decided in *Graham (Re)*, Victoria Registry Docket No. 02-2624, November 1, 2012 (B.C.S.C.), an unreported oral judgment of a Master of this court, sitting as a registrar. The OSB takes the position that *Graham* governs the result in the present case, and any registrar hearing this case would presumably consider themselves bound by it. Thus, the Administrator argues that having this application dealt with by a judge at first instance eliminates a level of appeal and a multiplicity of hearings.

- c) Because this application deals with a consumer proposal, the amount of the Administrator's fees is mandated by a statutory formula. What is at issue on this application is the proper administration of a consumer proposal containing a Dondale clause. There is no subjective evaluation of the Administrator's time records and hourly rates, as there might be in a bankruptcy.
 - d) At the time the hearing was scheduled, the parties were able to obtain a half-day hearing before a judge more quickly than before a registrar.
- [57] The OSB, on the other hand, says that ultimately this is an application to tax the Administrator's accounts, and that taxations are a matter clearly within the scope of a registrar's experience and expertise: *Gidda (Re)*, 2021 BCSC 1460 at para. 72; *Murphy v. Sally Creek Environs Corporation*, 2010 ONCA 312 at para. 71. The OSB says that Bankruptcy Rules 102 and 103 are mandatory, and reflect the policy of the BIA to have registrars deal with taxation issues.
- [58] I note that, in a judgment under the Supreme Court Civil Rules, the Court of Appeal has encouraged judges to use their discretion to summarily assess costs under Rule 14-1(15) sparingly, noting that the court officer best placed to determine if the fees billed by a lawyer are objectively reasonable is usually the registrar: *Gichuru v. Smith*, 2014 BCCA 414 at para. 106. While this is an application under the BIA, and not the Supreme Court Civil Rules, I consider the principle of recognizing the expertise of a registrar to be of common application.
- [59] In my view, having heard the submissions of the parties, the present application turns on questions related to the proper interpretation of Dondale and the proper administration of a consumer proposal. The application of the statutory scale is uncontroversial - the issue is whether the Administrator should be compensated in respect of payments made by the Debtors after they were three months in arrears in the absence of a formal, documented revised payment schedule.
- [60] Section 192(2) of the BIA clearly gives a judge of this court the discretion to hear a matter that is within the jurisdiction of a registrar. Rules 102 and 103 do not take away from that jurisdiction. They deal with the processes applicable to matters that are within the jurisdiction of a registrar.
- [61] I see this as an appropriate case in which to exercise my discretion pursuant to s. 192(2) of the BIA to hear this application notwithstanding that it is within the jurisdiction of a registrar.

Legal Context

Consumer Proposals

- [62] The nature of a consumer proposal was conveniently summarized in *Toronto-Dominion Bank v. Phillips*, 2014 ONCA 613 at paras. 19-22:

- [19] Under the BIA, insolvency may be addressed by proposals and by bankruptcy. In general terms, a proposal provides a debtor with an opportunity to restructure debt, whereas bankruptcy provides a mechanism for liquidation of assets.
- [20] Proposals enable debtors to make arrangements with their creditors, including settlement of debts and extensions of time for payment. They are available under Divisions I and II of Part III of the BIA. Division I proposals are available to an insolvent or bankrupt debtor, including a corporation. A Division II proposal, which is at issue in this appeal, is known as a consumer proposal. A consumer proposal is available to an insolvent or bankrupt individual who has indebtedness of not more than \$250,000 (or any other prescribed amount) excluding debts secured by the individual's principal residence.
- [21] Consumer proposals are described in s. 66.11 and following of the BIA. A consumer proposal is to be made to the creditors of the debtor generally: s. 66.12(3). A consumer proposal that is accepted, or deemed to have been accepted, by the creditors, and approved, or deemed to have been approved, by the court, is binding in respect of all unsecured claims: s. 66.28(2)(a).
- [22] Unlike a bankruptcy where the debtor's property vests in the trustee in bankruptcy, in a proposal property may remain with the debtor. Like a bankruptcy, however, a stay of proceedings is available to a debtor on the filing of a consumer proposal.
- [63] A consumer proposal is, in essence, a contract between the debtor and the creditors - albeit one that operates within the parameters of a statutory scheme: *Bruncor Leasing Inc. v. Zutphen Bros. Construction Ltd. (Trustee of)* (1994), 116 D.L.R. (4th) 692, 1994 NSCA 122 at paras. 18-19; *Sefel (Re)* (1989), 76 C.B.R. (N.S.) 48, 1989 CanLII 3193 at para. 6.
- [64] A consumer proposal must be made to the debtor's creditors generally: BIA s. 66.12(3). It must provide that its performance is to be completed within five years: BIA s. 66.12(5).
- [65] Pursuant to s. 69.2(1), where a consumer proposal is filed:
- no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy until
- (a) the consumer proposal or the amended consumer proposal, as the case may be, has been withdrawn, refused, annulled or deemed annulled; or
 - (b) the administrator has been discharged.
- [66] In terms of the contents of a consumer proposal:
- a) S. 66.12 provides that:
 - (5) A consumer proposal must provide that its performance is to be completed within five years.
 - (6) A consumer proposal must provide

- (a) for the payment in priority to other claims of all claims directed to be so paid in the distribution of the property of the consumer debtor;
- (b) for the payment of all prescribed fees and expenses
- (i) of the administrator on and incidental to proceedings arising out of the consumer proposal, and
- (ii) of any person in respect of counselling provided pursuant to paragraph 66.13(2)(b); and
- (c) for the manner of distributing dividends.

b) S. 66.2 provides that:

The creditors, with the consent of the consumer debtor, may include such provisions or terms in the consumer proposal with respect to the supervision of the affairs of the consumer debtor as they may deem advisable.

[67] The duties of an administrator on the making of a consumer proposal are set out in s. 66.13(2) of the BIA:

- (2) An administrator who agrees to assist a consumer debtor shall
 - (a) investigate, or cause to be investigated, the consumer debtor's property and financial affairs so as to be able to assess with reasonable accuracy the consumer debtor's financial situation and the cause of his insolvency;
 - (b) provide, or provide for, counselling in accordance with directives issued by the Superintendent pursuant to paragraph 5(4)(b);
 - (c) prepare a consumer proposal in the prescribed form; and
 - (d) subject to subsection (3), file with the official receiver a copy of the consumer proposal, signed by the consumer debtor, and the prescribed statement of affairs.

[68] The consumer proposal, and the statement of affairs completed by the consumer debtor, must be sent to the OSB and to every known creditor: s. 66.14. Creditors are then given an opportunity to prove their claims, and any creditor who has proven a claim may either assent to or dissent from the consumer proposal, either in writing or at a meeting of creditors. If nothing occurs to necessitate the calling of a meeting of creditors within 45 days following the filing of the consumer proposal, then the proposal is deemed to be accepted by the creditors: s. 66.18(1).

[69] Section 66.26(1) provides that:

All moneys payable under the consumer proposal shall be paid to the administrator and, after payment of all fees and expenses mentioned in paragraph 66.12(6)(b), the administrator shall distribute available moneys to the creditors in accordance with the terms of the consumer proposal.

[70] If there has been default in the performance of any provision in a consumer proposal, a court may order that the consumer proposal be annulled: s. 66.3(1). Pursuant to s. 66.3(4):

Where an order annulling the consumer proposal of a consumer debtor who is not a bankrupt has been made pursuant to this section, the administrator shall forthwith so inform the creditors and file a report thereof in the prescribed form with the official receiver.

[71] Section 66.31 provides for a "deemed annulment":

- (1) Unless the court has previously ordered otherwise or unless an amendment to the consumer proposal has previously been filed, a consumer proposal is deemed to be annulled on
 - (a) in the case when payments under the consumer proposal are to be made monthly or more frequently, the day on which the consumer debtor is in default for an amount that is equal to or more than the amount of three payments; or
 - (b) in the case when payments under the consumer proposal are to be made less frequently than monthly, the day that is three months after the day on which the consumer debtor is in default in respect of any payment.
- (3) Without delay after a consumer proposal is deemed to be annulled, the administrator shall
 - (a) file with the official receiver a report in the prescribed form in relation to the deemed annulment; and
 - (b) send a notice to the creditors informing them of the deemed annulment.

[72] Section 66.31 also provides an expedited mechanism to revive a proposal that has been deemed to be annulled:

- (6) In the case of a deemed annulment of a consumer proposal made by a person other than a bankrupt, if the administrator considers it appropriate to do so in the circumstances, he or she may, with notice to the official receiver, send to the creditors -- within 30 days, or any other number of days that is prescribed, after the day on which the consumer proposal was deemed to be annulled -- a notice in the prescribed form informing them that the consumer proposal will be automatically revived 60 days, or any other number of days that is prescribed, after the day on which it was deemed to be annulled unless one of them files with the administrator, in the prescribed manner, a notice of objection to the revival.
- (7) If the notice is sent by the administrator and no notice of objection is filed during the period referred to in subsection (6), the consumer proposal is automatically revived on the expiry of that period.

[73] Alternatively, an administrator may apply to the court for an order reviving a consumer proposal: s. 66.31(9).

[74] If a consumer proposal is revived, then:

- (10) Without delay after a consumer proposal is revived, the administrator shall
- (a) file with the official receiver a report in the prescribed form in relation to the revival; and
 - (b) send a notice to the creditors informing them of the revival.

[75] If a consumer proposal is deemed annulled, and is not revived, then pursuant to s. 66.32:

- (1) Unless the court otherwise orders, where a consumer proposal is annulled or deemed annulled, the consumer debtor
 - (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).

- (2) Where a consumer proposal is annulled or deemed annulled, the rights of the creditors are revived for the amount of their claims less any dividends received.

The Dondale Case

[76] In Dondale, the OSB had required, pursuant to s. 66.22(1) of the BIA, that prior to the implementation of a consumer proposal the administrator make application to the court for it to be reviewed. Before the court, the OSB objected that provisions in the consumer proposal giving the administrator the powers to waive any default, approve any amendment to the proposal, and to extend the time for making of any payment, were inconsistent with the BIA. The clause in Dondale (quoted at para. 2 of the judgment, and numbered in that proposal as clause 7) is identical to that in the present Proposal (section 6 of the Proposal, quoted above at para. 2). Justice Burnyeat approved the proposal, and the OSB appealed.

[77] Justice Low noted, by way of introduction, that:

[3] The Superintendent contends that clause 7(b) overrides a provision in the Act that mandates the consequences of default by a debtor in making payments under the proposal, and that it permits the administrator of the proposal to amend it without resort to the proposal amendment provision in the Act.

[4] Division II creates a summary process for an insolvent person to make a proposal to creditors to retire debt by making payments over time.

[78] He described the objections of the OSB as follows:

[12] The official receiver required the administrator to apply for court review of the proposal. In an earlier letter to the administrator, the official receiver set out a number of concerns about the proposal. The principal concern related to clause 7 and was expressed in the letter as follows:

· It is not reasonable to expect creditors to recognize that paragraph (7) bypasses the requirement to send the Notice of Deemed Annulment when payments are not made. As a result, the Administrator may (or may not) send notice when payments are not made - for up to five years.

· It appears the purpose of paragraph #7 is to bypass the Notice of Deemed Annulment when payments are in arrears in excess of 3 months; which diminishes the integrity of Bankruptcy and Insolvency Act and compromises the credibility of the proposal process.

[18] The Superintendent contends that clause 7(b) of the proposal in question cannot be approved because it provides for an amendment of the proposal unilaterally and without compliance with the legal requirements for amendment found in the statute. The Superintendent says that the clause forestalls the effect of default as dictated by the statute. The sections in question are ss. 66.3(1), 66.31(1), 66.31(2), and 66.37(1).

[79] With respect to the statutory scheme, Justice Low noted at para. 15 that "Parliament has seen fit to give sparse direction under the Act as to the form and content of consumer proposals." He quoted s. 66.12(5) and (6) (which are cited above), then went on to note that:

[16] Section 66.2 of the Act provides that the creditors may include in the proposal, subject to the consent of the debtor, "such provisions or terms with respect to the supervision of the affairs of the consumer debtor as they may deem advisable" [emphasis added]. In my opinion, whether it was initiated by the debtors or by the creditors, clause 7(b) in the subject proposal is such a provision. Supervision must be seen to include adjustment of the payment schedule.

[17] Just as s. 66.12 is sparse, so s. 66.2 is very broad. Together they evince an intention of Parliament to permit creditors to consent to, and to permit the court to approve, consumer proposals containing flexible provisions. These two sections of the Act permit the parties to structure the payment provisions and the supervision of payment in such manner as they see fit.

[Emphasis in original.]

[80] Justice Low also noted at para. 19 that the BIA is a commercial statute used by business people and should not be given an overly narrow or legalistic approach.

[81] The crux of Justice Low's analysis is found at paras. 23-28:

[23] The Superintendent contends that the Dondale proposal is not legal because clause 7(b) has the effect of permitting the debtors to miss three monthly payments with the administrator then having the power to effectively override the legal effect of those missed payments under s. 66.31(1). In other words, says the Superintendent, a deemed annulment under that section can be excused by the administrator. The Superintendent argues further that clause 7(b) conflicts with the proposal amendment provision, s. 66.37(1).

- [24] I do not agree with these submissions. The purpose and effect of clause 7(b) is not to override the annulment provision in the Act. Rather, it is to avoid it before it becomes operative. If the Dondales have legitimate difficulty in meeting the payment schedule at any time during the five-year period because their income flow is erratic, the administrator can rearrange the payment schedule from time to time to make the monthly payments correspond more closely to the flow of their income. However, if they miss three payments in a row before the schedule can be adjusted by the administrator, or if they miss three payments in a row under the adjusted schedule (or if the adjusted payment schedule provides for payments less frequently than monthly and one payment falls in arrears for more than three months), s. 66.31 will become operative and there will be a deemed annulment.
- [25] In my opinion, s. 66.31(1) does not purport to dictate the content of proposals and how they are to be administered. It only provides that a proposal is automatically annulled if the debtor is in default for three months, except as provided therein. It does not define default and is not specific as to how default may come about. In the present case, the creditors have agreed that the administrator can alter the payment schedule to create flexibility to meet changing conditions during the term of the proposal. The provision would likely reduce administration costs that otherwise might be incurred. It does not give the administrator the power to forgive any part of the debt payment. Nor does it offend s. 66.12(5) by permitting the debtor to make payments beyond the five-year term.
- [26] Section 66.31(1)(a) requires default under a consumer proposal for three months before there is an automatic annulment of the proposal. Clause 7(b) of the subject proposal permits a summary and efficient rearrangement of the payment schedule by the administrator. It seems to me that this does not offend s. 66.31(1)(a) because there can be no default under the consumer proposal until the debtors have missed three months of payments or have been in default for three months under the payment schedule as modified by the administrator under his delegated authority. This is what the creditors and the debtors agreed to and I see no reason under the statutory scheme to reject the proposal as being in conflict with the Act. To the contrary, it seems to me that it builds into the proposal flexibility that is administratively efficient and potentially less costly.
- [27] I do not see clause 7(b) as being in conflict with s. 66.37(1) of the Act. Empowerment of the administrator to adjust the payment schedule during the five-year term of the proposal is simply designed to make the payment schedule flexible, to make it adjustable to future exigencies. If such an adjustment is properly viewed as an amendment of the proposal and not just its implementation (which I am inclined to think is the case), there is nothing in the Act that says that the procedure under s. 66.37(1) is the only way that an amendment can be brought about. That section is concerned with the filing of an amendment by the administrator. It does not provide that its procedure is the only available mechanism for adjustment of a payment schedule. The creditors and the debtors can agree to a procedure that is more efficient administratively and is less costly.

- [28] The above is in keeping with Parliament's overall purpose in enacting Division II of Part III. If Parliament had intended to restrict the way consumer proposals are to be worded and administered, it would have used more specific and restrictive language in ss. 66.12(5) and (6), and in s. 66.2.
- [82] The Administrator noted in its submissions that, despite the passing of over fourteen years since Dondale was decided, Parliament has not seen fit to make any amendment to the BIA which would diminish or alter the effect of the judgment in Dondale.
- [83] Dondale concludes that what has become known as a "Dondale clause" is permissible. However, it does not directly decide issues as to how the discretion given to an administrator by such a clause is to be administered.

Administrator Compensation

- [84] In this case, differences of opinion as to the proper administration of a Dondale clause have manifested themselves in the context of an application for approval of the Administrator's fees.
- [85] The fees of an administrator of a consumer proposal are "capped" by virtue of Bankruptcy Rule 129(1), which provides that:
- (1) For the purposes of paragraph 66.12(6)(b) of the Act, the fees and expenses of the administrator of a consumer proposal that must be provided for in a consumer proposal are as follows:
 - (a) \$750, payable on filing a copy of the consumer proposal with the official receiver;
 - (b) \$750, payable on the approval or deemed approval of the consumer proposal by the court;
 - (c) 20 per cent of the moneys distributed to creditors under the consumer proposal, payable on the distribution of the moneys;
 - (d) the costs of counselling referred to in subsection 131(1);
 - (e) the fee for filing a consumer proposal referred to in paragraph 132(c);
 - (f) the fee payable to the registrar under paragraph 3(b) of Part II of the schedule; and
 - (g) the amount of applicable federal and provincial taxes for goods and services.
- [86] In *Re Carde*, 2022 ABQB 154, Registrar Schlosser dealt with taxation of a trustee's account in a summary administration estate, which has its own form of formula that caps compensation, noting at para. 28 that:

Taxation is not a disciplinary matter, nor is directly about competence. Taxation is really about efficiency and return. Ultimately, it is about preserving the intended scheme of the bankruptcy system.

- [87] At para. 48, Registrar Schlosser noted in this context the comments of Justice Henry in *Re Hess* (1977), 23 C.B.R. (N.S.) 215, [1977] O.J. No. 1642. *Re Hess* was an appeal from a judgment of a registrar disallowing the fees of a trustee in a regular bankruptcy, and Justice Henry set out what he considered to be general principles to be applied in taxing the fees of a trustee. At paras. 13 and 15, he noted specific matters that should be recognized in the course of a taxation:
- [13] (4) Clearly, these items should *prima facie* be disallowed if they comprise any of the following:
- (a) Services not authorized by law;
 - (b) Irresponsible decisions producing no positive results;
 - (c) Conduct contrary to the instructions of the creditors or inspectors, or the court;
 - (d) Patent attempts to take advantage of the estate by performing unproductive or unnecessary services not authorized by the inspectors;
- [15] (5) In more positive terms, as I see it, in relation to the overall objectives of the Act, the trustee should, in the absence of compelling reasons to the contrary, be permitted to charge as fees:
- (b) For obtaining a positive result, in getting in or saving assets for distribution to creditors; this might be termed successful performance.
- [88] While these principles provide useful context, their application is limited by the formula set out in Rule 129(1). Although the fee of an administrator may not be increased for a positive result, it may be decreased if circumstances reflected in para. 13 of *Hess* exist.

The Graham Case

- [89] In *Graham*, as in the present case, the OSB challenged the entitlement of the administrator of a consumer proposal to fees incurred over a period of several years. As in this case, the proposal contained a Dondale clause.
- [90] Specifically, the proposal provided for payments of \$300 per month from February 2006 to November 2008. It was deemed to be approved on February 7, 2006. By May 1, 2007, the debtor was three months in arrears. Rather than relying on the Dondale clause, the administrator filed a court application and, on July 4, 2007, obtained an order that the proposal be "allowed to continue under the original terms and conditions". Minimal payments were made over the balance of 2007 and 2008. In November 2008, the administrator obtained another court order extending the consumer proposal to November 2010. As noted by Master Bouck:

- [17] Unfortunately, the debtor was still not able to meet his obligations under the proposal. The proposal could have been deemed in default again by at least April 1, 2009; however, the proposal continued to be administered with the last payment received in January 2011. The administrator made no further application to extend the proposal resulting in a deemed annulment and thus this taxation.
- [91] Master Bouck, sitting as a registrar, summarized the parties' respective positions at paras. 3-5:
- [3] The official receiver submits that the fees should be reduced although does not make any submissions on the particular amount of the reduction.
- [4] The rationale for the reduction is the trustee's "failure to recognize the deemed annulment and without delay so inform the creditors and file a report" in accordance with s. 66.31 of the [BIA].
- [5] The trustee submits that it has done nothing wrong, having obtained court approval to allow the proposal to continue despite the defaults.
- [92] Master Bouck provided a more detailed recitation of the parties' positions at paras. 19-21:
- [19] The official receiver submits that the proposal has not been administered in accordance with the BIA with the result that the administrator's fees ought to be reduced. The official receiver submits that the BIA requires that the administrator to give notice of the defaults to the creditors and the OSB rather than apply after the fact for court approval for an extension to complete the proposal.
- [20] Even if there has been no demonstrated loss to the creditors, the integrity of the system requires a reduction in fees.
- [21] The administrator submits that it can rely on the court's orders extending the proposal and thus forgiving any failure to notify the creditors and/or the OSB. In addition, the administrator cites [Dondale] for the proposition that it was acting appropriately throughout pursuant to clause 7(a)(ii) of the proposal.
- [93] Master Bouck quoted from para. 24 of Dondale (which is quoted above), and set forward her view of what was decided in Dondale, and how it was distinguishable from the case before her, at paras. 24-27:
- [24] In other words, the clause allows the administrator some flexibility to adjust the monthly payments required without seeking court approval in order to achieve the overall objective of the proposal.
- [25] Importantly, the clause is not to be used to avoid the application of the deemed annulment provisions in the BIA.

- [26] In this case, I agree that the administrator is given some flexibility under clause 7(a)(iii) of the proposal. However, there is no evidence of any agreement between the administrator and the debtor with respect to reduced payments or an adjusted payment schedule. Rather, what appears to have occurred here is that the administrator simply forgave the late or omitted payments until, in its own subjective assessment, there would be no chance of the proposal succeeding. It was at this juncture that the notice of deemed annulment was issued.
- [27] In my view, the court in *Dondale (Re)* did not approve this particular practice. There is an expectation by the court that the administrator would follow the deemed annulment provisions if the debtor failed to meet the adjusted payment requirements.
- [94] Master Bouck concluded at paras. 31-32 that:
- [31] I have no doubt that the administrator's course of action in this matter was intended to benefit both the creditors and the debtor. However, I am persuaded that the approach taken in this administration is not correct at law. The approach places the onus on the creditors and the OSB to investigate and determine whether there has been a default under the proposal which should result in a deemed annulment. Such a determination is within the purview and knowledge of the administrator.
- [32] If the practice used in this administration is sanctioned that could mean that the administrator could ignore the obligations under s. 66.31 by simply accepting any payments made during the five-year term of the proposal and collecting fees along the way. This is not a practice sanctioned by the court in *Dondale (Re)*, although I do not find that the collection of fees was the administrator's objective in prolonging this proposal.
- [95] With respect to remedy, she noted authorities said to establish that a trustee's fees can only be based on monies received while the proposal was extant, including:
- a) *White (Re)* (2001), 31 C.B.R. (4th) 128, 2002 CanLII 25275 (N.S.S.C.), in which Registrar Hill disallowed fees collected by an administrator after a deemed annulment on the basis that fees "could only be based on monies received from the debtor while the proposal was extant", and
 - b) *Nelson (Re)* (2006), 24 C.B.R. (5th) 40, 2006 CanLII 23396 (O.N.S.C.), a case involving a bankruptcy rather than a consumer proposal, where Justice Lax commented that "trustees who do not perform their statutory duties are at risk of having a Registrar reduce the fees on taxation" (para. 30), and this was applied even where there was no prejudice to either the creditors or the OSB (para. 5).
- [96] After referencing these judgments, Master Bouck commented at para. 34 that, by April 2009, the debtor was unequivocally in default. She determined that:

[38] In the circumstances of this case the administrator could have notified the creditors and the OSB of the deemed annulment by April 2009. In the result, I disallow the trustee's fees of \$522.24 taken after that date.

[97] The judgment in Graham was not appealed, nor were the reasons for judgment published.

Positions of the Parties

The Administrator

[98] The Administrator argues that there is no requirement in the BIA, the Bankruptcy Rules, or the Dondale clause itself that any variation with respect to payments take the form of a formally documented agreement. The Administrator submits that its ongoing communications with the Debtors were all aimed at encouraging the Debtors to make their payments, make good on any missed payments, and to continue to work toward completion of the terms of the Proposal within the five years provided. The Administrator submits that is a practical and effective approach, making appropriate use of the discretion and flexibility allowed by the Dondale clause, in order to achieve the overall goals of the BIA provisions for consumer proposals.

[99] The Administrator notes that a proposal, once approved by the creditors and the court, is nothing more or less than a contract between the debtor and his or her creditors - albeit one made within the context of a statutory framework. The Administrator submits that a Dondale clause is not only a permissible term for a consumer proposal, but also one that has been recognized in Dondale as something which advances the objects and purposes of the consumer proposal process. The Administrator notes the comments of Justice Low in Dondale that:

- a) The process created by Division II is intended to be a summary process (para. 4);
- b) Parliament has seen fit to give sparse direction under the BIA (para. 15), and expressly permitted the parties to include provisions as to the supervision of the affairs of the debtor that the parties may deem advisable (para. 16); and
- c) The BIA, and in particular the broad language of s. 66.2, evince an intention of Parliament to permit flexible provisions in a consumer proposal that allow the parties to structure the payment provisions and the supervision of payment in such manner as they see fit (para. 17).

[100] The Administrator submits that no deemed annulment occurred. In this case, there was active ongoing engagement between the Debtors and the Administrator, with proactive management of the Proposal so that payments continued notwithstanding the various financial challenges faced by the Debtors, with time and "leeway" given where necessary and appropriate in order to keep the process moving forward. As a result, there was no need for steps to be taken to revive the Proposal, nor was there any need for the Administrator to give notice to anyone that a deemed annulment had occurred.

[101] Specifically, the Administrator submits that:

- a) There is no minimum requirement for the appropriate documentation of an administrator's exercise of those powers granted to an administrator by a Dondale clause;
- b) The Administrator has provided evidence regarding its ongoing dealings with the Debtors; and
- c) Rather than any of the adverse considerations referenced in the Hess case, the administration of the estate in this case fully engages the statutory objectives of successful performance, efficiency and return.

[102] The Administrator notes that White (Re) is distinguishable on its facts, as there was no Dondale clause in that case - rather, there seemed to be no dispute that a deemed annulment had occurred.

[103] With respect to Graham, the Administrator argued that depending on how it is interpreted, the case is either distinguishable or, alternatively, inconsistent with Dondale. The Administrator notes that Graham has never been published, nor has it been judicially considered in any published decision. The Administrator further notes that the amount of the fee reduction in Graham was only \$522.24, which would have made it not economically worth pursuing further.

[104] In terms of distinguishing Graham, the Administrator notes that it involved two court-ordered extensions of the proposal, and the proposal itself was never completed. There also is no evidence of the sort of ongoing oversight of the proposal that is reflected in the evidence before the Court in the present matter.

[105] The Administrator also submits that Graham wrongly reinterpreted that conclusion in Dondale that "the purpose and effect of [the clause] is not to override the annulment provisions [but] [r]ather it is to avoid it before it becomes operative" and instead formulates the proposition that "importantly, the clause is not to be used to avoid the application of the deemed annulment provisions in the BIA".

[106] The Administrator argues that the recognized purpose of the Dondale clause is to avoid the application of the deemed annulment provisions. What Dondale concludes is that this must be done in a proactive manner, not after the fact. The Administrator submits that it did so in this case.

The OSB

[107] The OSB submits that there is no properly documented exercise of the Dondale clause in this case other than, arguably, the July 3, 2019 email with respect to doubling up of payments. Rather, the OSB submits that the Debtors in this case were three payments or more in default more or less continuously from July 2018 onward. The OSB submits that a deemed annulment occurred by August 2018, the Administrator failed to act on that

deemed annulment, and that the Administrator is thus not entitled to its fees after the date of deemed annulment.

[108] With respect to the emails exchanged in early July 2019, with respect to doubling up of payments, the OSB submits that correspondence was nearly a year after there had been, in its submission, a deemed annulment. In any event, the OSB submits that the Debtors had fallen off the revised payment schedule by November 2019, and were three months in arrears of that amended payment schedule by at least February 2020 - meaning that a further deemed annulment would have occurred by that point in time.

[109] The OSB acknowledges that the administration of consumer proposals is a "volume practice", but says that does not eliminate the requirement to ensure that the requirements of the BIA are met in respect of each individual consumer proposal.

[110] The OSB says that once the deemed annulment provisions have been triggered, an administrator cannot go back and revive the proposal through exercising the powers in the Dondale clause. The OSB notes that in Dondale, the Court of Appeal reconciled the Dondale clause with the mandatory provisions of the BIA by saying that the clause allowed an administrator to act before a deemed annulment occurred. In the excerpt from para. 24 of the judgment (cited above), Justice Low explained that:

The purpose and effect of clause 7(b) is not to override the annulment provision in the Act. Rather, it is to avoid it before it becomes operative.

[Emphasis added.]

Thus, a Dondale clause can be preventative but not curative.

[111] The OSB argues that the comments of Master Bouck in Graham (para. 25) - that the Dondale clause "is not to be used to avoid the application of the deemed annulment provisions in the BIA" - are to similar effect.

[112] The OSB also relied on the comments of Registrar Cregan in Donald-Reagh (Re), 2008 NSSC 390 at para. 17, that:

the court has no express nor inherent jurisdiction to revive a consumer proposal annulled or deemed to have been annulled. Specifically, the BIA makes it quite clear what happens to a consumer proposal after default and annulment. It just no longer is and certain things must follow. There is no discretion to forgive. The parties are left to pursue the available remedies To find otherwise would conflict with these provisions in the BIA.

[113] Rather, the OSB says that an administrator must follow one of the statutory procedures if it seeks to revive a proposal - either the expedited mechanism provided in s. 66.31 (6) and (7), or a court application under s. 66.31(9). The OSB argues that these provisions reflect a policy underlying this part of the BIA that, if there is default of a proposal, the creditors and the OSB both need to be notified and given an opportunity to take action. This is particularly so in a proposal like the present, where the distribution of funds is to be made at the discretion

of the Administrator, and the creditors would have no basis to know whether there has been a default. The OSB notes that the procedures in the BIA are not particularly onerous, but they do provide the creditors with notice and an opportunity, should they wish to do so, to object to the revival of the proposal, but in the absence of objection, the proposal is revived.

[114] The OSB submits that the importance of keeping the creditors informed is confirmed by s. 66.251, which would apply in a case like the present where distributions to creditors are at the discretion of the administrator:

66.251 Where a proposal is approved or deemed approved by the court and the terms of the proposal do not provide for the distribution of available moneys at least once every three months, the administrator shall forthwith, upon ascertaining any change in the consumer debtor's circumstances that leads the administrator to conclude, after consultation with the debtor where practicable, that such change could jeopardize the consumer debtor's ability to meet the terms of the proposal, in writing, notify the official receiver and every known creditor of the change.

[115] As can be seen, one of the key distinctions between the positions of the Administrator and the OSB is the nature and documentation of any steps taken by the Administrator pursuant to the Dondale clause. The Administrator, in the excerpt from his affidavit quoted above, frankly acknowledged that extra time was given to the Debtors without a formal agreement being entered into, which the Administrator says reflects appropriate management of the Proposal, while the OSB insists that both Dondale and Graham make clear that a formal agreement including a new payment schedule is required in advance of any deemed annulment having occurred.

[116] The OSB acknowledges that the Dondale clause includes powers to waive default and extend time for payment. However, the OSB submits that the Court in Dondale effectively read down the Dondale clause, having concluded that its legitimate function was limited to actual amendments to the payment schedule. The OSB supports this argument by referring to:

- a) para. 24 of Dondale, in which Justice Low accepts that an administrator can "rearrange the payment schedule from time to time",
- b) para. 25 of Dondale, in which Justice Low comments that the creditors have agreed by the clause "that the administrator can alter the payment schedule to create flexibility", and
- c) para. 27 of Dondale, in which Justice Low describes the clause as empowering the administrator to "adjust the payment schedule", and comments that:

If such an adjustment is properly viewed as an amendment of the proposal and not just its implementation (which I am inclined to think is the case), there is nothing in the Act that says that the procedure under s. 66.37(1) is the only way that an amendment can be brought about. That section is concerned with the filing of an amendment by the administrator. It does not provide that its procedure is the only available mechanism for adjustment of a payment schedule. The creditors and the debtors can agree to a procedure that is more efficient

administratively and is less costly.

[117] The OSB submits that it is implicit in Dondale that what the Court of Appeal was approving, and finding to be consistent with the intent of the BIA, was the provision allowing an administrator to "approve an amendment to the consumer proposal" [s. 6(a)(ii)]. The OSB submits that it is implicit in Dondale that the other powers given by the clause - to "waive any such default" [s. 6(a)(i)] or to "extend the time for the making of any payment" [s. 6(a)(ii)] - should be considered on the reasoning of Dondale to be inapplicable as contrary to the provisions of the BIA unless made part of a properly documented, amended payment schedule.

[118] The OSB submits that this interpretation of Dondale is confirmed by the comments of Master Bouck in Graham, particularly:

- a) At para. 24, where she noted that the clause allows flexibility "to adjust the monthly payments required";
- b) At para. 25, where she commented that "the clause is not to be used to avoid the application of the deemed annulment provisions", and
- c) At paras. 26-27, where she noted the lack of "evidence of any agreement", and concluded that the practice of simply forgiving the late or omitted payments was a practice not approved in Dondale.

[119] The OSB submits that on a proper reading of these two cases, and the provisions of the BIA they review, it is clear that:

- a) If there is to be a waiver or extension of time, it must take the form of an amendment to the payment schedule, and
- b) Any amendment to the payment schedule must occur prior to a deemed annulment and must be formally documented.

[120] Finally, the OSB argued that, even if the Administrator's interpretation of the Dondale clause is correct, the correspondence that does exist is inconsistent with the Administrator having granted waivers or extensions of time. In particular, the OSB notes that:

- a) The November 27, 2018 letter, sent at a time when the Debtors were four months in arrears, asserts a failure to make payments on time and threatens that the Administrator will "close your proposal and notify all your creditors that the restrictions on the collection of their debts has been removed";
- b) The April 11, 2019 email asserts that the Debtors are "quite a few months behind (7 months)";

- c) The June 19, 2019 email, which asserts that the Debtors were at that time "9 payments behind", and stating that being that far behind was "against the law in a consumer proposal", asserts that "We have given you quite a bit of leeway", but says that "we have run out of time";
 - d) The July 3, 2019 email, in which the new double payments are agreed to, but insisting that if there are any further NSF payments "then we will be required to annul (close) your proposal"; and
 - e) The January 6, 2020 letter, which was identical in form to the November 27, 2018 letter.
- [121] The OSB submits that the first three of these communications are all inconsistent with there having been an amended payment schedule, and none of them appear to be confirmatory of any specific extension of time or waiver of a payment deadline.
- [122] Finally, dealing with the impact of a deemed annulment, the OSB submits that the Court should adopt the approach taken in *White (Re)* and *Graham (Re)*. It submits that the effect of an annulment is that the proposal, which is in the nature of an agreement amongst the debtors, creditors and administrator, is no longer in effect, and there is therefore nothing in place that would entitle the administrator to any fees. If the administrator has no legal right to collect fees from and after the date of a deemed annulment, then the Court should not order payment of such fees.
- [123] The OSB acknowledges that, in this case, the amounts provided for in the consumer proposal were fully paid within the five years, and all of the creditors received the amounts they bargained for. The OSB submits that a taxing officer should not apply a "no harm no foul" approach and overlook the errors that it says occurred in this case. It submits that both the process and the outcome must be protected. It submits that in this case, the Administrator's failure to keep the creditors and the OSB informed of the many defaults that occurred during the administration of this proposal, thus depriving them of the opportunity to raise concerns, is such that the Court should follow the lead of *Graham* and disallow any fees incurred after the deemed annulment.

Analysis

- [124] It is important to recall at the start Justice Low's comments that:
- a) the BIA is a commercial statute used by business people and should not be given an overly narrow or legalistic approach, and
 - b) what is intended by the division providing for consumer proposals is a summary process for creditors whose indebtedness does not exceed \$250,000.

- [125] The Dondale clause, on its face, provides three different mechanisms by which an administrator (if no inspectors are appointed) can act to deal with defaults in performance of the proposal. The administrator can waive a default, can approve an amendment to the payment schedule, and can extend the time for the making of any payment. On their face, any one of these actions could have the impact of avoiding the situation where a debtor falls three months in arrears.
- [126] Justice Low makes clear that the powers provided by the Dondale clause must be exercised before a deemed annulment has occurred. While his commentary focuses on one of the three mechanisms provided by the clause (i.e. the power to amend the payment schedule), there is nothing either express or implicit in his analysis that leads to the conclusion that the other mechanisms provided by the clause cannot be used.
- [127] Nor does anything in the analysis of Justice Low require that the exercise of these powers take the form of a formal written amendment to the proposal. An oral agreement, or an oral waiver, is generally valid and enforceable at law. Nothing in the comments of Justice Low, or in the provisions of the BIA to which I have been directed, gives rise to a requirement that such actions by an administrator would have to be documented in a particular matter.
- [128] This interpretation is consistent with the nature of the BIA as a commercial statute, and the nature of the division dealing with consumer proposals, which is intended to provide an efficient and summary process. The Dondale clause is intended to, and should, provide a practical approach to the day-to-day administration of such proposals as administrators deal with the challenges that are bound to arise with some proposals.
- [129] That does not mean that an administrator might not be required to produce evidence of a waiver, agreement or extension of time at some point during the process, nor does it mean that the administrator is relieved from the need to - at some point prior to a deemed annulment - put their mind to the question of what steps are being taken pursuant to the Dondale clause. The Dondale clause permits an administrator to exercise the powers it provides. It is not, however, a licence for an administrator to simply ignore the deemed annulment provisions of the BIA.
- [130] On my reading of the Graham case, it seems to me that Master Bouck concluded on the evidence before her that the administrator in that case fell into exactly that error.
- [131] I disagree with what is said in para. 25 of the Graham judgment (i.e. that the Dondale clause is "not to be used to avoid the application of the deemed annulment provisions in the BIA"). The very purpose of a Dondale clause is to avoid having a deemed annulment occur when the inspectors or the administrator are of the view that there is a reasonable prospect of the debtor getting back on track, and proactive steps are taken in advance of a deemed annulment to facilitate that happening. I would agree that the Dondale clause is not to be used to reverse a deemed annulment that has already occurred.

- [132] While oral agreements, and other oral acts that might for example constitute a waiver, may be effective at law, one of their disadvantages is that they may be challenging to prove. However, one would assume that an administrator dealing with a debtor who is in default of a proposal would instruct their staff to, at the very least, maintain some sort of notes (either in paper or electronic form) of any significant conversations with a debtor in order to be able to provide evidence, if ever required to do so, of the steps taken that would have the effect of avoiding a deemed annulment.
- [133] The challenging question for purposes of the present application is whether, on the evidence before the Court on this application, I can conclude that the Administrator exercised the powers granted by the Dondale clause in a timely manner so as to avoid the occurrence of the deemed annulment that would otherwise have occurred by the end of July 2018 (and on multiple occasions thereafter).
- [134] I have concluded that I am not in a position to make that finding on the evidence before me. As I noted in the course of reviewing the factual chronology, it seems clear that there were many telephone conversations between the debtor, Mr. Caddick, and representatives of the Administrator. Unfortunately, the contents of those telephone conversations are not before the Court.
- [135] The emails provide some scope to infer that at least some steps were taken pursuant to the Dondale clause. The email of June 19, 2019, refers to "leeway" having been given, but unfortunately does not provide sufficient detail to identify when and how leeway was given. The email of July 3, 2019, appears to reflect an amendment to the payment schedule, but that of course is some 11 months after the Debtors first appear to have gone three months in arrears.
- [136] Nor does the explanation of Mr. McMahon assist in identifying actions taken pursuant to the Dondale clause in a timely manner to avoid a deemed annulment. The excerpt quoted at para. 13 above indicates that the Administrator received information from the Debtors. The excerpt quoted at para. 14 above indicates that information coming to the Administrator was provided to Mr. McMahon for decision - but it does not indicate what decisions he made at what times. The excerpt quoted at para. 15 implicitly suggests that "indulgences" were granted, but again does not say what indulgence was granted at what time.
- [137] It may well be that the Administrator in this case took all necessary steps to avoid a deemed annulment ever occurring. However, I am not in a position to draw that conclusion based on the evidence before me on this application. The onus is on the Administrator to justify the actions taken in order to obtain court approval of their fee. In my view, the Administrator has not met that onus. This taxation must thus proceed on the basis that a deemed annulment occurred by the end of July 2018.

[138] I accept the reasoning in White (Re) and Graham (Re) that, where a deemed annulment has occurred, an administrator should not be entitled to fees earned after the date of the annulment.

Conclusion

[139] I conclude that the Administrator's entitlement to fees should be reduced so that it is not compensated in respect of payments made by the Debtors after July 2018.

[140] The parties asked to speak to costs after the merits of the application have been dealt with. If the parties are unable to resolve the question of costs, I would ask the party seeking costs to provide its submission to me through Supreme Court Scheduling within 45 days of this judgment, with the other party to provide its submissions two weeks thereafter.

"Veenstra J."

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