SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Eastern Infrastructure Inc. (re),* 2020 NSSC 220

Date: 20200812
Docket: No. 43712
Registry: Halifax
Estate number: 51-2850160

IN THE MATTER OF: The bankruptcy of Eastern Infrastructure Inc.

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	August 10, 2020 (by correspondence), in Halifax, Nova Scotia
Final Written Submissions:	August 10, 2020
Counsel:	Stephen Kingston, for the Trustee, Ernst & Young Inc. Matthew J.D. Moir, for Brian Wheaton Gavin D.F. MacDonald, for Royal Bank of Canada

Balmanoukian, Registrar:

[1] On August 10, 2020, I was forwarded correspondence from Mr. Kingston, counsel for the trustee in this matter; from Mr. Moir, counsel for Brian Wheaton; and from Mr. MacDonald, counsel for the creditor Royal Bank of Canada. They disagree as to who may attend a Trustee's examination before me under Section 163(1) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). There may have been a slight delay in my receipt of these submissions as they were, quite properly, routed from the Deputy to myself. The person sought to be examined is one Brian Wheaton, an officer of the bankrupt.

[2] Royal Bank of Canada seeks to attend but not to participate in this examination. Counsel for the Trustee takes no position. Counsel for Mr. Wheaton objects. I understand two other creditors also seek to attend. My comments apply to those creditors as well, *mutatis mutandis*.

[3] In light of the fact that this examination was scheduled for August 12, I provided the Deputy Registrar with my "bottom line" ruling dismissing Mr. Moir's objections, for distribution. I indicated that my reasons would follow, if necessary;

and, in accordance with *R. v. Desmond*, 2020 NSCA 1, I reserved the right to supplement that bottom line decision with these reasons.

[4] In *Desmond*, Justice Scanlan said, for the Court, at paragraph 10:

> [10] In some cases a judge may find it necessary to indicate they are providing a brief explanation or even just a bottom line in terms of a decision. When that is done the judge should make it clear that more detailed reasons are to follow. This often occurs in the context of a trial, especially if there is a jury. When a ruling is made in the context of a jury trial, reasons will likely never be put before the jury. Reasons may be delivered at a later date for the benefit of the parties, for appeal, or for precedential value. The delayed rendering of reasons facilitates continuation of the trial.

[5] The timeline I have noted above will make it self-evident that this was such a case.

[6] Counsel for Mr. Wheaton cites *Re Goode* (1979), 33 CBR (NS) 101 (BCSC), a decision of Justice Toy, for the proposition that third parties – in this case, creditors – are to be excluded from the examination. At paragraph 6, Justice Toy stated:

> The examinations authorized by s. 133(1) are investigative tools or processes that the trustee may avail himself of, firstly, insofar as the bankrupt himself is concerned, and secondly, "any person reasonably thought to have knowledge of the affairs of the bankrupt''. As a result or consequence of such an examination, there is no finding, no decision and no "lis'' or issues struck between parties that would bring into play the rules of natural justice giving the right to the bankrupt or anyone else except counsel of the person being examined to be in attendance at such an examination.

[7] Mr. Moir submits, correctly, that this decision has been favourably received elsewhere. It has not, to my knowledge, been considered in Nova Scotia.

[8] Counsel for Royal Bank of Canada says that the world has changed since *Goode* was decided in 1979, and that open courts prevail. He also submits that there are efficiencies to be gained by the presence (if not participation) of an interested creditor. He further cites the decision of the late Justice Murphy in *Re Chemtura*, 2008 NSSC 14, for the proposition that open courts are the norm, even in the absence of interest of or objection by non-parties.

[9] I have considered the dicta in, and have noted up, the *Goode* decision with interest. Justice Toy considered a s. 163(1) examination off-limits to third parties as there was no *lis* at hand in the matter – that is, a s. 163(1) examination is an inquiry and not a "proceeding," in the usual sense of the word. I also note with interest that *Goode* was considered with approval by Justice Farley in *Re Sun Squeeze Juices*, 1994 CanLii 7467 (Ont. SC).

[10] However, in the absence of binding adverse authority on me, I respectfully find myself thinking that the questions of whether or not there is a *lis* at issue, or whether issues of natural justice arise, are not the germane ones when the examination is before the Registrar. To me, in the modern context of limited public resources and issues of perceived and actual access to justice, the questions are:

- First, whether a matter that is before the Court should *prima facie* be open to all, particularly where a proposed attendee is not seeking to lengthen, intervene, examine, or otherwise participate in the process – in other words, to be a bystander (officious or otherwise);

- Second, whether any prejudice or evil could result and whether an attendee seeks to do so for an improper motive – for example, to intimidate or disrupt a witness or the proceedings;

- And third, whether it is within the authority of the Court to control its own practice and procedure and, if so, how that discretion should be exercised.

[11] Counsel for Royal Bank of Canada emphasizes the first and second grounds. I am inclined to agree with the result he invites me to reach, although not necessarily for all of the same reasons as set forth by him.

[12] I note that Section 163(1) permits *but does not require* an examination to take place in Court. It may take place before the Registrar "or other authorized person." That "other authorized person" is defined in Rule 115 of the BIA General Rules as including "a person who is qualified to hold examinations for discovery."

[13] In other words, it is open to the parties to hold this examination in a place and in a manner other than this public and publicly funded forum. That is not a consideration that appears to have been taken into account in *Goode*.

[14] If a Trustee chooses to conduct a s. 163(1) examination using public resources, the public has *prima facie* rights as a result. I emphasize *prima facie*; it will not be so in all cases, as I have had occasion to outline in *Re Haring,* 2018 NSSC 241, and in my brief analysis of the DMS test therein.

[15] It logically follows that if the proverbial man on the Clapham omnibus or the scribe from the fourth estate could generally be in the Courtroom (but for current COVID-19 protocols), certainly an interested stakeholder who seeks only to remain quietly in the corner may do so.

[16] Second, I agree with Mr. MacDonald that there are possible efficiencies that can result from this procedure, and no resultant downside. A creditor has a more limited right to seek examination under s. 163(2). That requires an order, unlike s. 163(1); it also is more restricted in scope, being an inquiry into "the administration of the estate of the bankrupt." It will readily be seen, however, that there is considerable overlap. The case law is also clear that the latitude of the Court in

both situations is considerable. I see no reason to trod the same, or much of the same, ground twice.

[17] Third, if either a section 163(1) or 163(2) examination is transcribed, it is filed and may be used in proceedings "to which the person examined is a party." (Section 163(3)). It is incongruous to think that someone may walk into a Court some time down the road, pull the file, and read a transcript if it exists but cannot be in the room as it happens in real time.

[18] I turn to my second factor, that of potential mischief or improper motive. There is no allegation that Royal Bank of Canada or its counsel (or any other creditor) comes bearing anything remotely of the sort. I add, however, that this was set down on the basis that we would need a large courtroom to accommodate requisite social distancing. It is apparent that the Trustee knew or at least suspected that there would be creditor interest in the examination. I would doubt Mr. Wheaton would have been surprised, either.

[19] With that, I pass to my third and final question, that of the Court's control over its own process. Again, this does not appear to have been weighed in *Goode*.

[20] Section 192(1)(b) of the BIA is my authority to hold examinations of bankrupts and other persons. Sections 192(1)(k) and 192(1)(m) fix my jurisdiction

with respect to "any matter relating to practice and procedure in the courts" and "all necessary administrative duties relating to practice and procedure in the courts." Put in the vernacular, and subject to any binding authority or rule to the contrary, it's my rink and my ice. It is worth remembering that unless supplanted to the contrary by the BIA or the BIA General Rules, the ordinary rules of Civil Procedure in Nova Scotia apply to BIA proceedings: BIA General Rule 3.

[21] The Registrar's position, although under the rubric of the Supreme Court, is a statutory one. My station is cloaked with a limited jurisdiction. Our Court of Appeal has just had occasion to comment on the ambit of a statutory court's mastery of its procedural fate in *Reference re Public Services Sustainability (2015) Act*, 2020 NSCA 53. That case involved whether the Court of Appeal, itself a creature of statute, could order production of documents. The Court said it could (without yet deciding the question of whether it *should* in that particular case).

[22] At paragraphs 13-15, Chief Justice Wood, for the Court, said:

> [13] Once a matter is properly within the jurisdiction of a court of appeal, that court has a wide discretion to control its own process. This is sometimes described as inherent jurisdiction. For example, Saunders, JA in *National Bank Financial Ltd. v. Barthe Estate*, 2015 NSCA 47 said:
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> > [178] Likewise, the Supreme Court of Canada has confirmed in *United States v. Shulman*, 2001 SCC 21 (S.C.C.), ¶33 and *United States v. Cobb*, 2001 SCC 19 (S.C.C.), ¶37 that a Court of Appeal "has, *like all courts*, an implied, if not inherent, jurisdiction to control its own process, including

> through the application of the common law doctrine of abuse of process" [underlining mine]. In *Cunningham v. Lilles*, 2010 SCC 10 (S.C.C.), Justice Rothstein indicated at ¶18 that "[i]nherent jurisdiction includes the authority to control the process of the court, prevent abuses of process, and ensure the machinery of the court functions in an orderly and effective manner."

[14] Other courts have expressed this view. For example in *R. v. Buencamino,* 2012 BCCA 265 the court noted:

> [10] … The Court of Appeal is a statutory court, and has no inherent jurisdiction, unlike the Supreme Court. If the jurisdiction does not exist in a statute, then there is none. (**The exception is controlling the process of the Court,** which has no application here).
>
> [emphasis added]

[15] The Ontario Court of Appeal made a similar comment in *R. v. Fercan Developments Inc.*, 2016 ONCA 269 at para. 51:

> A statutory court also has the power to control its own process. That power is necessarily implied in a legislative grant of power to function as a court of law: *Cunningham v. Lilles*, 2010 SCC 10, [2010] 1 S.C.R. 331 (S.C.C.), at para. 19.

[23] This court, similarly, both by s. 192 BIA and by common law cited above, has that same "power to control its own process." In my court, at least, that will mean that absent a compelling reason in law or binding authority to the contrary, the default position and presumption will be that of an open court. When public resources are brought to bear, the presumptive result will be exposure to the garish light of day. *A fortiori*, that presumption will extend to the liberty of attendance by an interested creditor.

[24] I leave to another day the question whether a creditor could combine a Section163(2) examination with a Trustee's Section 163(1) examination,

particularly over an objection by the Trustee or the person being examined. It strikes me that should there be a confluence of scheduling and issues, it would make perfect sense, subject to the more restricted ambit of 163(2); but I need not and do not decide this today as such a request is not before me.

[25] As I have said above, to the extent that COVID-19 protocols limit physical attendance in a particular space, would-be attendees might not be able to do so in person. In such instance, they are to be provided with relevant call-in particulars, and I am to be informed if the associated telephone equipment is required.

[26] The objection is dismissed without costs.

Balmanoukian, R.