SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Savary (Re)*, 2018 NSSC 337

Date: 20181213
Docket: No. 40060
Registry: Halifax
Estate Number: 51-2050588

In the Matter of: The bankruptcy of Brian Andrew Savary

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	December 13, 2018, in Digby, Nova Scotia
Counsel:	Lawrence Crandall, for the Trustee, Grant Thornton Limited
	Mark Charles (limited retainer), for the Bankrupt, Brian Andrew Savary
	Sharon Cochrane, for the objecting creditor, Kimball Law Inc.
	Oliver Janson, notified person, on his own behalf
	D. Bruce Clarke, QC, for a notified entity, Nova Scotia Barristers' Society (written submissions only)

Balmanoukian, Registrar (orally):

[1] Good afternoon everyone. This is a decision in the motions before me in the matter of the bankruptcy of Brian Andrew Savary. I will say at inception as I do with most oral decisions: that if this is transcribed, I reserve the right to edit for grammar and syntax, although not the substantive outcome of this decision[1].

[2] There are three applications before me. First, for the discharge of the bankrupt. Second - and if I may say so primarily - for an examination under subsection 163(2) of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended; and third, for a review of an *ex parte* Order restricting registrations and recordings on certain parcels of land.

[3] For the record, we had in attendance Mr. Crandall for the Trustee Grant Thornton; Ms. Cochrane for the objecting creditor of Kimball Law; Mr. Janson (a solicitor who had been involved with file matters that are the subject of a portion of this motion); and Mr. Charles for Mr. Savary personally.

[4] It's common ground that the discharge application be adjourned *sine die* and it is so ordered.

[1] I have done so for clarity and organization, to effect punctuation that may not have been apparent from the oral transcript, and to insert citations. These footnotes are added to the oral transcript as well.

[5] The real property application is ancillary to the issues raised in the application for examination and I will return to that in due course.

[6] As to the Section 162 application: I have no hesitation in finding that there are serious questions to be answered by the bankrupt and an examination under 162(2) and/or 162(1) is warranted. At present a 162(1) examination is contemplated but not yet in motion.

[7] It is also common ground that if there is more than one exam - that is, by creditor and the Trustee - that they be held in common and that they be held before me as Registrar under subsection 192(1)(b) of the *Bankruptcy and Insolvency Act* and Rule 115 of the *Bankruptcy and Insolvency Act General Rules*.

[8] I indicated this morning that I would not yet preside over an examination of any counsel encompassed in Ms. Cochrane's motion under 192(1)(g), although the parties may make such an application if the admissible evidence of Mr. Savary so warrants.

[9] The real question at this point is the scope of the examination. In my opinion, subsection 163(2) is more limited than subsection 163(1), and I agree with the able written submissions of the Nova Scotia Barristers' Society in this

regard. If the Trustee proceeds with this examination - that is under subsection 162(1) - the gap between the two is essentially moot.

[10] If not, in my view the "administration of the estate" wording in subsection 163(2) is broad enough to capture most, if not all of the financial issues at stake in Ms. Cochrane's motion. I remain seized for any residual evidentiary objection or objections that a particular line of inquiry falls outside the scope of 163(2).

[11] Turning to the real point of contention, the motion calls for production of files or parts of files from various law firms and others. There is a very open question in many of them as to who was the client and whether there was more than one client, or whether Mr. Savary was *a* or *the* client.

[12] Questions exist as to whether there are exceptions to privilege that will compel production. I'm not prepared to so rule at this juncture. In my opinion, suspicion of the bankrupt's conduct - to be clear, there is no current allegation of malfeasance against any solicitor - is not adequate to lift the lid on the sacrosanct protection of privilege.

[13] It is for the client, whomever it may be, to waive this privilege. Not for the solicitor or for the Court, subject to limited recognized exceptions. Privilege can

not be a cloak for fraud, but neither can it be a bootstraps argument based solely upon hypothesis or supposition or suspicion.

[14] So, turning to the specific items in Ms. Cochrane's motion, at the Section 163 exam which I will discuss in due course, I am ordering as follows:

[15] First - the Credit Union records: these are not privileged and must be obtained and produced by Mr. Savary to the Trustee and to the objecting creditor.

[16] Second - the files of Messers. Melnick, Bureau, Enman, Janson, and of Ms. MacLean[2]: Mr. Savary may be asked if he, alone or in conjunction with others, engaged these lawyers or law firms for the financial transactions noted in the Notice of Motion. He may also be asked about the underlying financial matters raised in the motion and his involvement, if any, with those transactions, including funds or property received or disbursed by or to him or at his order; but not as to any legal counsel sought or received. In other words, he may be asked what the case law calls the "facts of engagement" but not the "communication". He may also be asked about documentation pertaining to facts but not solicitor/client communications.

[2] These are all practicing lawyers in Nova Scotia, and all received notice of this hearing. Various financial transactions are at issue pertaining to real properties and to an estate.

[17] Third - the Auto Capital file does not include any known questions of privilege and must be disclosed to the Trustee and to the objecting creditor.

[18] Fourth - I've had more difficulty with the MacGillivray [Law] file[3]. There is sufficient ambiguity around lawyers' accounts and their context and content that I do not consider it appropriate to order financial disclosure at this time. See for example **Maranda v. Richer, [2003] 3 SCR 193[4].** What I can and will order is disclosure by MacGillivray Law and [by] the bankrupt of all disbursements, net of fees, to Mr. Savary or his order, other than to fees, experts, reimbursement of medical expenses, or other litigation expenses. In other words: how much was disbursed to Mr. Savary or his order, net of these sums, and when? I also order them to disclose how much of this pertains to pecuniary and non-pecuniary damages if this was not on a global or all-inclusive basis.

[19] I also make the following ancillary orders.

[20] First, there will be an examination of Mr. Savary at a time to be determined at the conclusion of this hearing.

---

[3] This was a motion for a "copy of MacGillivray Law's financial records regarding Mr. Savary's settlement including Mr. Savary's complete trust account ledger, trust records and copy of all cancelled cheques (front and back of cheque) issued by MacGillivray Law out of the settlement proceeds of Savary v. Kobe & Kobe, Dig. No. 413602"

[4] I misspoke myself in referring to this decision orally as R. v. Maranda

[21] Second, Mr. Savary is to receive notification through Mr. Charles of this ruling and the date, time and place of examination forthwith. Mr. Savary is further to be advised that absent exigent circumstances this will not be postponed or adjourned. Late engagement or changing counsel is not an exigent circumstance.

[22] The same comments go for the Trustee, who has indicated that it may or may not engage counsel.

[23] I note for the record, that Mr. Charles attended this morning as a watching brief; if he is no longer engaged in the file, he is to advise the Court forthwith on the happening of such event. He's also to advise the Trustee.

[24] Third, Mr. Savary is to produce the documentation in this decision to the Trustee and the objecting creditor no later than 20 days prior to the examination.

[25] Fourth, the Trustee is to advise all persons noted in Ms. Cochrane's amended motion no later than 20-days prior to the examination, if it is proceeding under 162(1).

[26] Fifth, if desired I will act as referee with respect to any disputed documentation. This may be submitted to me under seal at or before, but ideally before, the hearing.

[27] Sixth, all persons noted in Ms. Cochrane's amended Notice of Motion are to receive a copy of the order arising from this decision upon issuance.

[28] Seventh, nothing in this ruling precludes any person from making an application for further examination, production, evidentiary ruling, or examination of third parties.

[29] Eighth, the order with respect to real property will remain in effect pending further order of a Court of competent jurisdiction.

[30] Ninth and to reiterate, the application for the discharge of the bankrupt is adjourned *sine die*.

[31] Tenth, any person wishing to intervene, object, participate in, or make written submissions shall do so not later than 20 days prior to the examination, with notice to the Court and all persons noted in Ms. Cochrane's amended motion.

[32] Eleventh and finally, I will hear from the parties as to costs, if they are unable to agree, or at the examination if they so wish.

[33] [The Court then discussed the form of order and scheduling with those in attendance; the matter was set down for March 18, 2019 at 10:00 at the Courthouse in Digby, Nova Scotia]

[34] Ok, so we are adjourned.

Balmanoukian, R.