Financial Services Flash

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Courts Hesitant to Lift Stay of Proceedings Early

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In the 2012 decision of *SWP Industries Inc., Re*, Justice McLellan of the Court of Queen's Bench of New Brunswick (the "**Court**") declined to lift the stay of proceedings one week in advance of its expiry, despite the assertion of material prejudice advanced by Bank of Nova Scotia ("**BNS**").

On September 20, 2012, SWP Industries Inc. ("**SWP**") filed a Notice of Intention to Make a Proposal under the *Bankruptcy and Insolvency Act* (the "**BIA**"), which gave rise to an automatic stay of proceedings in favour of SWP until Monday, October 22, 2012. BNS was a major secured creditor of SWP and applied to the Court under section 69.4 of the BIA to lift the stay of proceedings on October 15, 2012, one week in advance of its expiry. Section 69.4 allows a creditor that is affected by a stay of proceedings to apply to court to lift the stay if the creditor is likely to be materially prejudiced by the continued operation of the stay. The test to be met is an objective one which requires the applying creditor to advance quantitative evidence of the prejudice it will suffer if the stay is not lifted. Subsection 50.4(11)(a) of the BIA also allows the court, on the application of a trustee in bankruptcy, an interim receiver or a creditor, to lift the stay early if the court is satisfied that the insolvent person has not acted in good faith and with due diligence.

In this case, SWP was found not to have fully disclosed its financial position to BNS – certain financial statements were not provided and SWP opened operating accounts at other banks. Despite that fact, Justice McLellan adjourned BNS's application to lift the stay in order to provide time to SWP to satisfy its disclosure obligations to BNS. The Court, therefore, put the onus on SWP to make full disclosure to BNS and to file a proposal to its creditors by the adjournment date – which was the date on which the stay of proceedings was originally set to expire. The adjournment was therefore tantamount to a refusal to lift the stay of proceedings in advance of its maturity. In reaching this decision, Justice McLellan placed emphasis on the decision of the Court of Appeal for Ontario in *Ma, Re*, which held that lifting an automatic stay of proceedings is far from a routine matter.

The result illustrates the Court's hesitation to exercise its discretion to lift a stay of proceedings early, even in the face of a creditor, like BNS, whose ability to prove material prejudice quantitatively and objectively is hindered by the debtor's own omissions. This result confirms that judges will seek a balance between the interests of the debtor and of the creditors generally, and provide the debtor with the opportunity to furnish evidence upon which the Court can make a proper determination of objective quantitative prejudice.

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