SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Rafter (Re)*, 2018 NSSC 331

Date: 20181224
Docket: No. 42729
Registry: Halifax

In the Matter of: The bankruptcy of Lila Diana Rafter

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	December 7, 2018, in Halifax, Nova Scotia
Final Written Submissions:	December 7, 2018
Counsel:	Tina Powell, for the Trustee, MNP Ltd. Lila Diana Rafter, personally

Balmanoukian, Registrar:

[1] Writing in mid-December, I consider it apt to begin with a parable.

[2] A Renaissance scholar, an Enlightenment scholar, and an Insolvency scholar are each instructed to write an essay about the elephant. In due course, each turn in their works.

[3] The Renaissance scholar's effort is entitled, "Art and the Elephant." The Enlightenment scholar's, "The Elephant and Reason."

[4] The Insolvency Scholar submits, "The Elephant: Is it property or income?"

[5] This case begs the same question and, for the reasons which follow, with one minor exception I say it is neither.

[6] The issue is whether disability tax credits which are attributable to a period prior to a bankruptcy, but which were paid after the bankrupt's discharge, are property or income which in any way form part of the bankrupt's estate or are subject to any claim by creditors.

[7] If they are "property of the bankrupt" within the meaning of s. 67 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended (the "BIA"), then

they are 100% distributable amongst estate creditors in accordance with the priority scheme set out in the BIA. If they are "income" within the meaning of s. 68 of the BIA, they are subject to contribution by the bankrupt in accordance with Directive 11R2 (that is, up to half of the applicable amount depending on the debtor's other income and period of time under consideration) or as otherwise determined by the Court.

[8] If they are neither, they are monies for the debtor's own account, to do with as she pleases.

[9] In order to understand Ms. Rafter's situation, and the scope of this decision, it is useful to set out the following timeline:

1. June 23, 2005 – Ms. Rafter's first assignment in bankruptcy
2. March 24, 2006 – Ms. Rafter's absolute discharge
3. March 13, 2014 – Ms. Rafter's second assignment in bankruptcy
4. 2015-16 - Ms. Rafter is declined CPP disability benefits
5. 2016 – Ms. Rafter begins receiving regular (age-related) CPP benefits
6. March 14, 2016 – Ms. Rafter's absolute discharge
7. September 14, 2016 – Trustee's discharge

8. January 2018 – Ms. Rafter leaves the workforce, on medical advice

9. During 2018 – Ms. Rafter receives tax advice and applies for disability tax credits ("DTC"), retroactive to 2010

10. September 27, 2018 – CRA reassesses Ms. Rafter's 2010 through pre-bankruptcy 2014 tax returns, resulting in a total refund and interest of $7,145.06; this continues to be held by the Trustee

11. November 20, 2018 – the Trustee is appointed for the express purpose of this application. I will raise an administrative point on this s. 41(11) Order at the conclusion of this decision.

12. November 29, 2018 – the Trustee files this application for direction, pursuant to Section 34 of the BIA.

[10] It may thus be seen that in this case, the major question I am called upon to decide is what happens to these credits which, in their entirety, pertain to a period after the first discharge and before the second assignment, and which are *bona fide* claimed and received after the second discharge. Only some $390.36 represents the amount within the 2014 calendar year of bankruptcy, but before the March 13, 2014 assignment. As I outline later, I make no finding with respect to other

circumstances, or in which there is a delay in claiming the credits through bad faith or for the purpose of obtaining the credit/refund outside of the bankruptcy period.

POSITION OF THE OFFICE OF THE SUPERINTENDENT OF BANKRUPTCY

[11] The OSB has, as of May 18, 2010 taken the position (for assignments filed after July 7, 2008) that the disability tax credit

> for the calendar year the assignment is filed, is an asset that vests with the trustee unless one of the two exceptions outlined in the BIA….exists…..Therefore, if it can be determined that the DTC (disability tax credit) relates to the year of bankruptcy or a prior year, it will vest in the trustee.[1](emphasis added)

[12] OSB commentary is not binding on the Court. It is, however, to be accorded the due consideration afforded to experts and specialists.

[13] With respect, I have concluded that this commentary is over-inclusive insofar as it relates to pre-bankruptcy years, at least insofar as a DTC is *bona fide* claimed and received after the bankrupt's discharge, and excluding the calendar year of the bankruptcy assignment itself.

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[1] http://www.ic.gc.ca/eic/site/bsf-osb.nsf/eng/br02286.html retrieved December 21, 2018

PROPERTY OF THE BANKRUPT

[14] It is important to note that “property,” and “property of the bankrupt” are related but distinct concepts. It is only the latter, as defined in s. 67 of the BIA, that is distributable amongst creditors.

[15] The relevant portion of that section, as it reads and has read at all material times, is as follows:

> **67** (1) The property of a bankrupt divisible among his creditors shall not comprise
>
> - (a) …
>
> but it shall comprise
>
> - (c) all property wherever situated of the bankrupt at the date of the bankruptcy or that may be acquired by or devolve on the bankrupt before their discharge, including any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year — or the fiscal year of the bankrupt if it is different from the calendar year — in which the bankrupt became a bankrupt, except the portion that
>   - (i) is not subject to the operation of this Act….
>
> (emphasis added)

[16] It will thus be seen that “property of the bankrupt,” insofar as it pertains to tax refunds, only extends to refunds “in respect of the calendar year….in which the bankrupt became a bankrupt.” If Parliament had intended tax refunds for prior taxation years to vest in the estate, it would simply have said “including any refund owing to the bankrupt under the *Income Tax Act*” or “including any refund owing

to the bankrupt under the *Income Tax Act* which the bankrupt could have claimed prior to the bankrupt becoming bankrupt," or similar language. It did not do so.

[17] Therefore, with respect, I consider the OSB's commentary with respect to years prior to the bankruptcy year to be over-inclusive, at least insofar as the DTC is claimed and paid subsequent to the bankrupt's discharge, and the timing of such claim is *bona fide*. Again, I emphasize that I make no finding with respect to other circumstances.

[18] Master Robertson exhaustively canvassed this issue in *Re Chomistek*, 2018 ABQB 434. I do not see any utility in re-inventing the wheel so fully crafted by the learned Master, who had the aid of extensive submissions and argument. For at least the limited scope of this case, I adopt the reasoning and outcome; that is, I adopt them insofar as they pertain to years prior to bankruptcy, and the pre-assignment portion of the calendar year of bankruptcy. I make no finding as to the portion of the calendar year of bankruptcy that post-dates the assignment, as that is not before me. I will repeat that caveat for sake of completeness at the end of this decision.

[19] *Chomistek* dealt with a DTC claimable by the bankrupt respecting a disabled child. The amounts in issue were identifiable for the respective years 2005 to

2014, which included the bankruptcy period. Master Robertson concluded that only the year of bankruptcy vested that year's DTC with the estate. Again, subject to my comments on the scope of the case before me, and with some concern respecting what appears to be the post-assignment year of bankruptcy treatment of refunds under s. 68 versus s. 67, I adopt the result.

[20] As a consequence, only the pre-bankruptcy 2014 refund, which I am advised is $390.36, is "property of the bankrupt" within the meaning of the current s. 67. That is because it is part of the "calendar year" of the bankrupt's year of bankruptcy. The other sums are not. I will speak below to the balance of the 2014 calendar year.

[21] The question then becomes, to follow my parable, whether any of the remaining sums come within the meaning of "total income," as s. 68 now reads?

"TOTAL INCOME"

[22] Section 68(2) of the BIA reads (and at all time germane to this decision read), in part,

> *total income*
>
> - (a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's

discharge, including those received as damages for wrongful dismissal, received as a pay equity settlement or received under an Act of Parliament, or of the legislature of a province, that relates to workers' compensation; but

- (b) does not include any amounts received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, as a gift, a legacy or an inheritance or as any other windfall. (revenu total)

(emphasis added)

[23] The underlined portion of the above legislation was central to the reasoning of my predecessor, Registrar Cregan, in *Re Ford*, 2009 NSSC 124. At the time of his decision, this limitation had been enacted but not proclaimed.

[24] *Ford* involved the "caregiver amount" tax credit. The bankrupt made her assignment in 2005, was discharged in 2006, and applied for and received the relevant tax credit some time after 2007 – but for a period prior to the bankruptcy, namely 1998 to 2005. Registrar Cregan concluded that the sums in question were income within the meaning of Section 68 as it then read, but went on to consider the pending amendments (which included the underlined portion above) and stated:

> [50] If the unproclaimed amendment to s. 68 were in effect, the task would be quite easy. It speaks of "surplus income" as being "the portion of a bankrupt individual's total income", and then says that "total income" includes "a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge". . . . (underlining added by Registrar Cregan)
>
> [51] That which accrued or was earned before bankruptcy but not received between the date of bankruptcy and the date of discharge would apparently not be covered by s. 68. I understand this amendment is intended to clarify the confused state of affairs with which I am now addressing. (emphasis in this paragraph added by me)

[25] In this respect, again subject to my limiting comments, I agree with my learned antecedent, including his opinion that the current language excludes such credits “accrued or….earned” but not received. In other words, at least for current purposes, the s. 68 exclusion is on a cash not accrual basis.

[26] I note that *Ford, supra,* was considered in *Chomistek, supra*. The Registrar in the latter case appears to have concluded that refunds generated in the calendar year of bankruptcy, but after the date of assignment, are “income” within the meaning of s. 68 of the BIA on the basis that it is revenue “earned or received” between assignment and discharge as, in effect, “deferred income.” I do not have to decide the point based on the years (or portion thereof, in the case of 2014) before me, but given the wording of s. 67 with respect to refunds during the “calendar year” of bankruptcy, I may in passing express my doubts on this point, without deciding the issue.

[27] I therefore conclude that none of the sums in issue are captured, in this case, by s. 68.

SCOPE OF THIS DECISION

[28] I have come to these conclusions with some hesitation. There may be an unintended consequence in the gap created by the “year of bankruptcy” and

"between bankruptcy and discharge" language in ss. 67 and 68. That is not for me to modify, but to apply. I do so, but with some significant caveats.

[29] First, I make no finding or decision on what I may call "bad faith delay." That is, if a bankrupt or a Trustee becomes (or should have become) aware of an unclaimed tax credit or refund prior to or during the bankruptcy process, but did not pursue the issue pending discharge, that could well be a distinguishing factor or one which the Court could take into account in setting terms of discharge. There is no such evidence in this case; indeed, all evidence based on the timeline noted above, and the bankrupt's prior rejection for CPP disability benefits, suggest to the contrary.

[30] Second, and more broadly, nothing in these reasons preclude the range of remedies available to the Court under ss. 172 or 172.1, as the case may be, should a discharge application come before the Court[2]

[31] Third, I make no finding with respect to amounts that accrued or were claimable <u>during</u> the bankruptcy period – in this case, between March 13, 2014 and March 14, 2016, and what if any role the Trustee has in pursuing those. Those are not before me.

[2] It will be recalled that Ms. Rafter, a second-time summary administration bankrupt, received an automatic discharge under s. 168.1(1)(b) BIA.

[32] Fourth, I make no finding with respect to situations in which a discharge may be opposed, suspended, delayed, or otherwise administered to allow for credits or refunds to vest in the Trustee for the benefit of the estate, or which has that as a consequent effect.

Conclusion, and erratum

[33] The sum of $390.36, representing the refund and interest for the 2014 pre-bankruptcy period, shall remain vested in the Trustee for the benefit of the estate. The balance shall be delivered to Ms. Rafter.

[34] On a final administrative note, the Section 41(11) Order of November 20, 2018 appointing the trustee on file herein mistakenly provided that "it is further ordered that the costs of this application be paid out of the property to be distributed." Pursuant to Section 187(5) of the BIA, I delete this paragraph from that order. The costs of a summary administration estate are governed by Rule 128 and the Court does not have authority, no matter how laudatory the efforts of the Trustee or how extensive the challenges in the estate, to go beyond that Rule: *Re Thompson*, 1991 CanLII 4468 (NSSC); *Re Crawford*, 1998 CanLII 1544 (NSSC).

Balmanoukian, R.