SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *Gavel (Re)*, 2021 NSSC 5

Date: 20210111
Docket: No. 51-1950178
Registry: Halifax
Estate Number: 40773

In the Matter of: The bankruptcy of Trevor James Gavel (deceased)

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	November 26, 2020, in Halifax, Nova Scotia
Final Written Submissions:	December 15, 2020
Counsel:	Tim Hill, QC, for the estate of Trevor James Gavel Francyne Myers, for the Trustee, Allan Marshall & Associates Inc.

Balmanoukian, Registrar:

[1] "The evil that men do lives after them; the good is oft interred with their bones." In this case, much the reverse is true.

[2] Trevor James Gavel's case raises the nuanced questions of the interplay of life insurance, bankruptcy exemptions, trustee actions, issue estoppel, and the Court's autonomy over issues that come before it.

[3] Mr. Gavel is a deceased drywaller. The Trustee opposes his discharge, under circumstances that will become clear. His personal estate is unopened – it was suggested that he is intestate although this was not proven one way or the other.

[4] At the time of his bankruptcy, he was a joint owner of real property which in turn was subject to a mortgage. It had partial mortgage life insurance, for more than half the value of the property but less than the amount of the mortgage.

[5] Several matters of fact and law are either agreed or uncontroverted. The effect of those matters, and what the Court should do about them, is what I must decide.

[6] A timeline is useful at the outset, as certain elements of "what happened when" will factor into different aspects of my reasons, and ultimate conclusion.

- April 1996 – Mr. Gavel files for his first bankruptcy, when he was just under 25 years old. [1]

- April 1997 – Mr. Gavel receives his discharge[2]

- 2009 – Mr. and Ms. Gavel purchase their lot at Goffs, Nova Scotia[3]

- April – November 2010 – Mr. and Ms. Gavel build, obtain their mortgage through Home Trust Company, and obtain mortgage life insurance on the same through Manulife[4]. This life insurance was paid for by the Gavels and in the event of insured loss would have proceeds paid directly to the lender. It stated "you cannot choose a beneficiary."[5]

[1] Affidavit of Shirley Jenine Gavel, sworn November 17, 2020 (hereinafter the "Gavel Affidavit"), Exhibit B, Page 6 (Mr. Gavel's Form 79 Statement of Affairs)
[2] Ibid
[3] Gavel affidavit, para. 4
[4] Mr. Gavel's pre-hearing brief, paragraph 3 refers to "illness or death" and coverage for "mortgage payments." It appears that the insurance was for life only, not disability or illness, and for a lump sum rather than periodic installment payments. It makes no difference to the disposition of this case.
[5] Gavel affidavit, Exhibit A, page 4; Mr. Gavel's pre-hearing brief, paragraph 43.

- September 2014 – the Gavels make a joint consumer proposal. The major unsecured creditors appear to have been Canada Revenue Agency ("CRA") and Royal Bank of Canada.[6]

- January 12, 2015 – the consumer proposal is rejected by creditors.[7]

- January 15, 2015 – the Gavels make separate but simultaneous assignments in bankruptcy[8]. This was not a joint assignment, a factoid that will take its proper place. Both cited tax liabilities as the reason for filing. Ms. Gavel lists only a notional ($1.00) amount to CRA. Mr. Gavel's filing cites approximately $65,000 for two CRA accounts, plus a notice amount for a third. Most but not all other debts were in common. Ms. Gavel noted in para. 8 of her affidavit that "the trustee provided us with a document entitled 'bankruptcy made easy for a 1st time filer'." (my emphasis) That would have been incorrect for Mr. Gavel, who was on his second filing; Exhibit "E" to the Gavel affidavit (a copy of that information handout) provides only for an acknowledgement by her, not by Mr. Gavel. I have no reason to think that Mr. Gavel was *not* provided with the appropriate "second time filing"

[6] Affidavit of Francyne Louise Marcelle Hunter sworn May 23, 2019 (hereinafter the "Hunter affidavit"), para. 1 and Exhibit A
[7] Gavel affidavit, Exhibit B
[8] Gavel affidavit, Exhibit C and D

material, as his Form 69 Notice of Bankruptcy reflects that his is a second filing. Again, I mention these points as they will take their proper place in this decision. For now, it is sufficient to say that unlike many simultaneous assignments by spouses or couples in which I consider a joint assignment to be appropriate and desirable (and have sanctioned Trustees for failure to do so)[9], I consider separate assignments to be warranted and perhaps even required in this instance. The two Gavels had meaningfully different debts and, as a result of Mr. Gavel's former filing, different default bankruptcy timelines (s. 168.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3 as amended [the "BIA"]).

- March 12, 2015 – Mr. Gavel (alone) files a second consumer proposal; it provided for $36,000 paid over 60 months, in addition to maintaining secured creditors' payments and rights on default.[10] It did not receive a warm reception from the creditors who voiced their opinions (CRA and Royal Bank of Canada), and was withdrawn on May 4, 2015. [11]

[9] See, e.g., *Re Donaldson*, 2019 NSSC 33 at para. 33 *et seq*. I have repeated this comment and sanction in numerous unreported and oral decisions.
[10] Hunter affidavit, para. 3 and Exhibit B
[11] Hunter affidavit, para. 5.

- April 2015 – Mr. Gavel is diagnosed with cancer; shortly after, he ceased work permanently and begins medical treatment.[12]

- July 2015 – The Gavels' friends hold a benefit. It was not in evidence how much was raised, except that it was adequate to pay off what Ms. Gavel said was at least one party's calculated interest in the real property.[13] The Gavels chose to pay off Ms. Gavel's obligation. Mr. Gavel's remained outstanding. No reason was advanced to me as to how this decision was reached.

- September 25, 2015 – the Trustee writes to the Gavels calculating equity at $13,195.57 ($6,597.78 each). I will discuss that calculation in due course.

- October 9, 2015 – the Trustee writes to the Gavels recalculating equity at $11,874.57 ($5,937.28 each), to reflect what would be the mortgage penalty, if the property was sold. Again, I will discuss that calculation later.

  There is no indication of what, if any, reaction the bankrupts had to this. It will be noted that this was some months after the fundraiser above. It

[12] Gavel affidavit, paras. 10, 11; Paragraph 12 of the Gavel affidavit and paragraph 9 of Mr. Gavel's pre-hearing brief both refer to surgery on Mr. Gavel's "bladder and prostrate." I assume this refers to "bladder and prostate."
[13] Gavel affidavit, para. 16. It is notable that Ms. Gavel says it raised enough to pay "at least" her equity; it does not say whether additional funds were raised. It will also be noted that this was not paid until some time between October 2015 and February 2016.

appears nothing or little from this benefit was allocated towards this obligation at the time.

- October 15, 2015 – The Trustee files its notice of opposition to the discharge of both bankrupts, based on outstanding equity in the real property.

- At some point thereafter, Ms. Gavel pays her calculated balance to the Trustee. Exhibit "I" is an undated letter from the trustee enclosing her discharge order. She says it was "in 2015."[14] The actual absolute discharge was issued by Registrar Cregan by order dated February 26, 2016.[15] The Trustee appears to have filed its application in January 2016.[16] From this, I hypothesize that Ms. Gavel did not pay in her calculated equity as at that January date; however, I need not make a finding in that regard. It is adequate to say that she did not rush to do so after the July 2015 benefit, and Mr. Gavel did not do so at all.[17]

- November 16, 2015 – the Trustee records the assignments in the judgment roll for Halifax County[18]; at that point they were not reflected in the parcel

[14] Gavel affidavit, para. 17.
[15] Estate number 51-1950179, Court no. 39474.
[16] Ibid.
[17] With the possible exception of $500, discussed herein.
[18] Hunter affidavit, Exhibit F

register. However, from November 2015 onward they were properly viewable by a searcher of the public record.

- February 26, 2016 – Ms. Gavel receives her absolute discharge.[19]

- December 2, 2017 – Mr. Gavel dies, age 46.[20] Nothing had been paid into the estate except for a post-bankruptcy tax refund.[21]

- January 2018 – Manulife pays Home Trust $172,951.00[22] – more than half of the value of the property, but not enough to completely discharge the mortgage (as of renewal in 2018, the balance was $35,908.87)[23]

- March 27, 2018 – The Trustee writes to Mr. Gavel asking for his consent to a conditional order for $5,937.28. It states, "if you agree with the recommendation by the Licensed Insolvency Trustee and do not wish to attend the Court we request you sign this consent and return it….so we may present it to the Court."[24] It goes on to say "failure to sign the consent form

[19] Estate number 51-1950179, Court no. 39474, supra.
[20] Gavel affidavit, exhibit J.
[21] Gavel affidavit, Exhibit G (Form 170 report); Gavel affidavit, para. 20 and Exhibit L refer to the same amount to be realized, namely $5,937.28. From this I infer no further payments had been made into the estate for this asset. As will be seen below, there is a discrepancy in the Gavel affidavit showing that the Trustee was seeking payment of $5,**4**37.28 and this report, seeking $5,**9**37.28. I will return to this in my disposition.
[22] Gavel affidavit, Exhibit K.
[23] Gavel affidavit, Exhibit M
[24] As the Trustee is aware, I actively encourage – and sometimes require – debtor attendance, either in person as safety protocols permit or by phone during the current environment. As I have occasion to discuss in this decision, the Court is not bound by what the Trustee has told the bankrupt or what the bankrupt understands from the Trustee

or attend the hearing or file the appropriate evidence shall result in an order being issued by the Court, as required by the Licensed Insolvency Trustee or such other order the Court feels appropriate, without further notice to you."[25] Ms. Gavel, upon receipt, asked the Trustee if she could pay Mr. Gavel's $5,437.28 plus Court costs. She was told no.[26]

- May 4, 2018 – the Trustee writes to the Court on Mr. Gavel's file indicating "new information has come to light on the file and the office needs more time to look into the matter."[27]

- May 18, 2018 – Mr. Gavel's matter is adjourned without day.[28]

- August 10, 2018 – a lawyer at Mr. Hill's firm files a Form 21 at the Land Registration Office removing Mr. Gavel from the parcel register as a deceased Joint Tenant.[29] It is unclear how that lawyer reached this conclusion (notwithstanding that Form 21 does not contain a certificate of

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or other sources. This Trustee, to my approval, has since changed its pre-hearing standard letter to reflect that the Court's disposition may differ and that the Bankrupt must or should attend should they wish to be heard. For the current case, this clarification does not matter as the Trustee went on to say that failure to sign/present evidence would result in the Court making its own disposition; Mr. Gavel was by then deceased but Ms. Gavel arranged for his estate to have counsel and, obviously, evidence and representations were presented on his behalf.

[25] Gavel affidavit, Exhibit L.

[26] Gavel affidavit, para. 22. As noted above, the letter sought $5,937.28. As will appear, I conclude that neither figure is correct; however, Mr. Gavel's estate is entitled to credit for anything that ultimately was paid towards this obligation, and I will return to that in my conclusion.

[27] Email in Court file.

[28] Order in file.

[29] Hunter affidavit, Exhibit H

legal effect), given that the assignments were recorded to evidence the bankruptcy. As I will note below, it is common ground that the effect of the assignment is to sever the joint tenancy and to vest the bankrupt's property in the Trustee, subject only to potential issue estoppel situations to be discussed.

- November 9, 2018 – the Registrar General of Land Titles places a stop order on the parcel.[30]

- April 11, 2019 – the Trustee files an application for a conditional order for Mr. Gavel, returnable on May 24, 2019.[31]

- May 23, 2019 – the Trustee writes to the Court attaching an affidavit[32]. The matter was adjourned by consent, as Ms. Gavel had just engaged counsel (ultimately, on behalf of the estate of Mr. Gavel; the Hunter affidavit indicated that Ms. Gavel had obtained separate counsel; neither that counsel nor - aside from swearing the Gavel affidavit – did Ms. Gavel participate further in these proceedings). I gave effect to that adjournment by order issued June 19, 2019.

[30] Ibid
[31] Application in Court file.
[32] The Hunter affidavit.

- June 19, 2019 – the assignments are registered in the parcel register (the stop order having previously been removed)[33]; it is common ground that this is in error insofar as Ms. Gavel is concerned, and that this should be remedied.

- November 8, 2019 – the Trustee files a subsequent application returnable on December 19, 2019; this was withdrawn.

- November 29, 2019 – Mr. Hill writes to Ms. Myers indicating that he had been "retained by Jenine Gavel in respect of this estate….I understand this is scheduled for December 13th [sic] before the Registrar."[34] He requested that it be adjourned as "there is a reserved decision before the Supreme Court that has many of the same issues as this file." I believe he spoke in reference to *Re Ross*, 2020 NSSC 36.

- June 26, 2020 – the matter returns to Court, following resumption of COVID-19 "safe services" hearings after the "essential services" restrictions in place from late March to mid-June 2020. At that time, the Trustee indicated that CRA had sought extra time to evaluate its position[35]. I so adjourned.

[33] Gavel affidavit, Exhibit P
[34] Email in Court file.
[35] Log notes in Court file.

- October 15, 2020 – the Trustee writes to Mr. Hill indicating that "the trustee was not intending to submit a position on this matter." Indeed, it did not file a brief.

- October 16, 2020 – the matter returns to Court and is scheduled for a special hearing.

  No further s. 170 reports were filed.

- November 26, 2020 – hearing. The Trustee and Mr. Hill, who clarified in his brief that he acts for the estate of Mr. Gavel (whose estate has not been opened for probate or administration, a matter I am prepared to disregard for current purposes)[36] appeared. CRA did not appear, nor did it make submissions.

[7] Before setting out the position of the parties and the issues, it is worthwhile to set out many matters on which the parties, and the Court, are agreed.

[8] First, it is common ground as I have said above that the effect of the assignment in bankruptcy is to sever the joint tenancy, and to vest the interest of the bankrupt in the Trustee: BIA s. 71. It is also agreed that this is by operation of

[36] Oral representations of counsel.

law and is not affected by any registration (or lack of registration) at the relevant Land Registration Office, subject to any issues of an intervening transfer to a *bona fide* purchaser for value without notice, or of issue estoppel.

[9] Counsel also agreed, as do I, that as Ms. Gavel has received her absolute order, the subsequent removal of her from the parcel register was in error (except perhaps insofar as to register the assignment to provide a chain of title for a reconveyance from the Trustee back to her as a tenant in common). It is not now open for the Trustee or the Court to "re-calculate" her obligations after such an order (and any relevant appeal period has expired). This removal is to be remediated; the Trustee is to provide the required consent to rectification, or deed, as the case may be. It is not to charge for this.

[10] Further, it is agreed by the Trustee and counsel that the insurance proceeds do not constitute "after acquired property" for the purposes of s. 67 BIA. Much of Mr. Gavel's brief concentrates on this issue; in fairness to Mr. Hill, it appears that the Trustee had at one point taken this position at least for discussion purposes, but it was not pursued in argument, and explicitly abandoned by the Trustee.

[11] Finally, the Trustee submits, to Mr. Hill's agreement, that the excess in value resulting from the insurance proceeds' payment towards the mortgage (that

is, exceeding half the value of the real property) is for the account of Ms. Gavel and should not be counted in Mr. Gavel's balance sheet. Due to the conclusions I reach in this specific case, I do not need to address this issue, but I do not want to be taken as agreeing with it in all situations. In my view, it does not take into account the fact that other creditors may have a stake, or that it may factor into what a Court might do when exercising its discretion under s. 172 of the BIA. I leave those factors to an appropriate case.

[12] As I see it, the issues are:

1. What is the proper date for valuing the equity in the bankrupt's former interest in the real property?
2. Is the Trustee estopped from asserting a different value from that communicated to the bankrupt?
3. Is the Court bound by that calculation?
4. If not, and without consideration of the insurance issue, what is that equity?
5. Is the Trustee estopped from claiming its title to Mr. Gavel's former interest?

6. Is the bankrupt's payment obligation (or amount of equity) changed by the insurance proceeds for which the mortgagee was the beneficiary?

7. If the insurance proceeds would otherwise have been exempt or not part of the bankrupt's estate, does this change on these facts when those proceeds are transformed into a non-exempt asset (that is, increased equity in the real property)?

8. How, if at all, does the Court's discretion under s. 172 of the BIA to impose conditions of discharge affect the bankrupt's obligations in this case and in these circumstances?

9. What is the proper disposition as to costs?

[13] I have intentionally emphasized the scope of the issues as I do not want to be perceived as deciding either more or less than I actually am.

Issue 1: The date of valuation

[14] It is common ground, and I agree, that the last date for valuation of the bankrupt's interest in real property (or for that matter, any other asset) is the date of the hearing of the final discharge application. Once there is a discharge order in

place – absolute or conditional[37] – that value is 'frozen' (assuming no appeal) and if the bankrupt is repurchasing that asset, any subsequent increase or decrease in value is for the account of the bankrupt and not the estate.[38]

[15] This does not mean the discharge hearing date is the only potential V-day. It may be equitable in the circumstances of a particular case to select another antecedent date or dates – for example, where the debtor has had the extended benefit of an asset (especially a depreciating asset) with no or minimal cost; where the debtor has incurred significant risk or expended substantial money or money's worth subsequent to the bankruptcy; where market forces completely *dehors* the efforts of the parties have been at play (for instance, publicly-traded stocks held in a non-exempt fund); or where the debtor has substantially enhanced or wasted an asset between the date of bankruptcy and the date of the final discharge hearing. I leave the equities of "other dates" to another time as they do not arise on any of the facts in evidence before me.

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[37] Or a final order with a suspension. As I rarely issue stand-alone suspensions, for ease of readability I will refer to final discharge orders as "absolute or conditional."

[38] I reiterate my comments in *Re MacFarlane,* 2019 NSSC 201, that I consider it inappropriate to issue an absolute order when there are outstanding asset repurchase obligations; on appeal, the Supreme Court agreed: see *MacFarlane v. BDO Canada Inc*., 2020 NSSC 45, at para. 57: "(57) As the Registrar put it in his decision, this matter was exacerbated and in some ways even triggered by the choice of the trustee to seek an Absolute Discharge Order rather than a Conditional Discharge Order. In his view, it was an error by the trustee to seek an absolute discharge when there were duties outstanding under the CSC. That is a view shared by this court. " [emphasis added]

[16] Returning to the "final discharge hearing date as the last date" issue: Justice Gabriel recently surveyed the law in a decision cited and much relied upon by Mr. Gavel's estate, namely *Re Ross*, 2020 NSSC 36. In that case, Mr. Ross had received a conditional order for payment of a sum certain into his estate, representing the equity in his real property (the trustee had also previously issued a written disclaimer of interest). Mr. Ross subsequently died with mortgage life insurance. I will later discuss the differences between that case and this. However, the "last date" analysis in *Ross* remains germane. At para. 31 *et. seq.*, Justice Gabriel said:

> [31] An arguably closer (although still obviously not exact) analogy exists in *Wadden (re)*, 2018 NSSC 217. This was a case in which Mr. Wadden had been granted an order for conditional discharge in the amount of $12,071.00. Little equity existed in the home, which had been subject to a mortgage of approximately $51,000.00. When the home later burned down, the Trustee was notified that there was a resulting insurance payment, and it applied for a variation of the discharge order under section 187(5) of the *BIA*.
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> [32] McDougall, J. dismissed the application:
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> 30. In exercising my discretion, I am guided by the decision of Mr. Justice John J. Gill of the Court of Queen's Bench of Alberta where, at paras. 27 to 30, of *Hazin (Re)*, 2011 ABQB 197, he stated:
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> 27. Firstly, the issue of when is the time to address the issue of non-exempt equity. The comments of Master Funduk in the *Re MacKay* case are applicable here. At paragraphs 100 and 101 he stated:
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> 100. Regardless whether a bankrupt has gotten an absolute, suspended or conditional discharge nobody can <u>later</u> raise an issue about surplus equity in a house. The discharge is the latest time that issue is to be dealt with, if anyone wants to make that an issue.

> 101. If a conditional order is given requiring the bankrupt to pay for the surplus equity nobody can later ride the market, up or down, to revisit that. If the house value later goes up the Trustee and creditors cannot ask that the bankrupt now pay more. If the house value later goes down the bankrupt cannot ask that he now pay less.
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> 28. The latest time to raise an issue about surplus equity in a house is at the time of discharge. In this case it was in September, 2002 at the time of the discharge pursuant to the order of Registrar Breitkreuz .

[17] Justice McDougall went on to discuss issue estoppel, as later will I.

[18] For now, it is adequate to observe that Ms. Gavel did what the Trustee told her to do before (but apparently just before) the Court hearing; her discharge is absolute. It is clear law that insofar as Ms. Gavel is concerned, once the appeal period expired her financial obligation with respect to assets is "frozen" and whether the asset (or equity in that asset) goes up or down is immaterial as between that bankrupt and trustee.[39] Whether that affects the rights and obligations as between the trustee and the late Mr. Gavel is a topic for later on.

[19] In this case, Mr. Gavel did not have a discharge hearing until now. He remains undischarged. The Trustee's objection was filed during his lifetime, setting out two separate calculations of equity. As noted above, there is no indication Mr. Gavel (or anyone on his behalf) acted on it or indeed even responded to it *inter vivos*. Neither he nor anyone on his behalf appears to have

[39] At least in the absence of fraud, reckless misrepresentation, or other impropriety.

taken any active steps to have the discharge heard on its merits during his lifetime. As noted above, the proceeds of the benefit by friends eventually went at least in part to pay Ms. Gavel's (calculated) equity; not that of Mr. Gavel. While I will discuss issue estoppel below, it is adequate for current purposes to say that there is no evidence of any reliance or steps taken by Mr. Gavel to "solidify" his obligations to his bankruptcy estate, or to have his affairs arranged and in order for the time of his passing. There is no juridical reason not to value his equity as at the time of this discharge hearing.

[20] Mr. Hill submits at para. 31 of his brief that the "only meaningful difference" between the case at bar and *Ross* is that Mr. Ross had a conditional order in place at the time of his death.

[21] First, and with respect, that makes all the difference in the world.

[22] Second, that statement is not wholly correct. The Trustee's actions in *Ross* were considerably different from the case at bar. In *Ross*, the Trustee had disclaimed its interest in writing and had not recorded or registered the assignment in the judgment roll or parcel register. Neither of those facts are the case here. This is front-and-centre to the equitable doctrine of estoppel.

[23] It will be also noted that Justice McDougall, in *Wadden* (cited in *Ross*) said "in exercising my discretion" he was guided by caselaw in setting the date of the discharge hearing as the date of valuation. To the extent that these matters are within my discretion, and matters of discretion, I adopt the same V-date here, insofar as the evidence allows.

Issue 2: Is the Trustee estopped from asserting a different value?

[24] The largest issue here, in dollar terms, is not how the Trustee valued the equity in the property but whether the Trustee is now estopped from claiming that the equity is different by reason of the insurance proceeds. While these two considerations yield significantly different equity figures, I believe it is important to keep them analytically distinct.

[25] Ultimately, I conclude that the Trustee is not estopped on these facts, at any time prior to the issuance of a conditional or absolute order, from re-visiting the equity calculation as it pertains to Mr. Gavel (I have already discussed Ms. Gavel).

[26] Given my conclusions respecting insurance, I do not need to consider whether the Trustee will always be estopped from "adding" post-bankruptcy, pre-

discharge insurance proceeds[40]. I reach a different conclusion, however, with respect to the Trustee's "pro-forma" equity calculations in this case (that is, the value of the property less encumbrances and costs of disposition).

[27] I recently had occasion to consider this issue in *Re McInnis*, 2020 NSSC 64, a case in which Mr. Hill appeared for the successful Trustee. In that case, the Trustee had calculated equity based on a market value opinion, less reasonable notional disposition costs. It turned out that the property sold, prior to the bankrupt's discharge hearing, for considerably more. The issue was whether the McInnis' obligations were based on the actual sale price (ie actual market value) or the considerably lower notional calculation posited by the Trustee.

[28] I had no difficulty concluding the former. First, as noted, there was no conditional or absolute order in place, so the issue of "date of valuation" was not a *fait accompli*.

[29] Second, if anything the facts in the *McInnis* case cut substantially more in favour of the McInnises than the facts at bar cut in favour of Mr. Gavel. The Trustee had not registered its claim on title; the McInnises said (sensibly) that they

[40] Although as will appear in my discussion of s. 198 of the *Insurance Act*, it is difficult to envisage a situation in which life insurance paid directly from insurer to a lender would be captured by the BIA, except in formulating an appropriate remedy under s. 172.

would not have sold but for the mistaken belief that they would only have to pay the Trustee's calculated amount into the estate (although they do not appear to have consulted with the Trustee on the decision to sell). Neither of those is the case here – the Trustee has registered its claim on title (first in the judgment roll and later in the parcel register), and there isn't a sale by the Gavels that yielded a nil benefit to them; Ms. Gavel repurchased her (calculated) equity and Mr. Gavel's obligations remain to be determined and satisfied.

[30] I followed both *Wadden* and *Ross* in deciding that the McInnis' Trustee could (and indeed must) calculate the balance payable to the estate based on the pre-discharge actual value, not that previously and mistakenly calculated. The issue then became whether the Trustee was otherwise estopped from asserting to the contrary.

[31] In discussing this point, I doubted – as I have before[41] – the decision of Registrar Cregan in *Re Johnson*, 2006 NSSC 384. I reiterate those doubts.

[32] In *Wadden, supra*, Justice McDougall discussed issue estoppel as follows, at para. 29-32:

[41] *Re MacRury*, 2019 NSSC 146 at paras. 34-35; *Re McInnis*, 2020 NSSC 64 at para. 26.

[29] And, while this court has authority under Section 187, s-s (5) of the *Act* to "review, rescind or vary any order" previously made, I do not see this as occasioning such an outcome.

In the British Columbia Supreme Court case of *Gwizd (Re),* [2017] B.C.J. No. 2209, Master Taylor wrote at paras. 23 and 24, the following:

> [23] As per the Supreme Court of Canada in *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, the purpose of bankruptcy is twofold; first, the equitable and efficient distribution of a bankrupt's assets to the bankrupt's creditors; and second, the financial rehabilitation of the debtor through a discharge of debts.
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> [24] It is well established, as *per Nelson (Re),* [1995] S.J. No. 384 (Q.B.), subject to the constraints of s.172 of the *BIA*, that the order created by the court at a discharge hearing is a matter of discretion. In exercising that discretion, the court must look at the whole matter before it in "the light of reason, common sense and humanity" and must seek to balance three things:
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> a) The interest of the rehabilitation of the bankrupt;
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> b) The interest of the creditors in being paid; and
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> c) The integrity of the bankruptcy process and the public's perception of it.

[30] In exercising my discretion, I am guided by the decision of Mr. Justice John J. Gill of the Court of Queen's Bench of Alberta where, at paras. 27 to 30, of *Hazin (Re),* 2011 ABQB 197, he stated:

> [27] Firstly, the issue of when is the time to address the issue of non-exempt equity. The comments of Master Funduk in the *Re MacKay* case are applicable here. At paragraphs 100 and 100 he stated:
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> 100 Regardless whether a bankrupt has gotten an absolute, suspended or conditional discharge nobody can later raise an issue about surplus equity in a house. The discharge is the latest time that issue is to be dealt with, if anyone wants to make that an issue.
>
> 101 If a conditional order is given requiring the bankrupt to pay for the surplus equity nobody can later ride the market, up or down, to revisit that. If the house value later goes up the trustee and creditors cannot ask that the bankrupt now pay more. If the house value later goes down the bankrupt cannot ask that he now pay less.
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> [28] The latest time to raise an issue about surplus equity in a house is at the time of discharge. In this case it was in September, 2002 at the time of the discharge pursuant to the order of Registrar Breickreuz.

> [29] Secondly, the issue of doctrine of issue estoppel. The Court of Appeal in *Ernst & Young Inc., supra*, outlined the doctrine at paragraphs 29 and 30:
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> 29 The doctrine of *res judicata* has two branches: issue estoppel and cause of action estoppel. Issue estoppel precludes the litigation of an issue previously decided in another court proceeding, and cause of action estoppel precludes the litigation of a cause of action which was adjudged in a previous court proceeding: Donald J. Lange, *The Doctrine of Res Judicata in Canada*, 2d ed. (Ontario: LexisNexis Canada Inc. 2004) at 1 [*Res Judicata*]. We need not consider the applicability of cause of action estoppel because issue estoppel precludes Central Guaranty from attacking the validity of the trusts in this litigation.
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> 30 For issue estoppel to be successfully invoked, the issue must be the same as the one decided in the prior judicial decision, the prior judicial decision must have been final, and the parties to both proceedings must be the same, or their privies: *Toronto (City) v. Canadian Union of Public Employees, Local 79*, 2003 SCC 63 (CanLII), [2003] 3 S.C.R. 77 (CanLII) at para. 23 [Toronto].
>
> [30] I find that the three requisite elements of issue estoppel are present in this case.
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> [31] Like Justice Gill and as skillfully and persuasively argued by Mr. Gillis, I, too, conclude that the requisite elements of issue estoppel are present in the case that is now before me.
>
> [32] The Trustee, rightfully I might add, made the proper determination that there was no appreciable equity in the Bankrupt's house and property at the time the assignment in bankruptcy was made. The intervening event resulting in the complete destruction of the home did nothing to change that. [emphases added]

[33] In this case, there is no prior judicial proceeding, or determination, involving Mr. Gavel; even to the extent that Ms. Gavel's separate file can be said to be in parallel, it did not involve a judicial determination – she paid her calculated equity to the Trustee prior to the hearing and was issued an absolute order. There was no determination on the merits. I say this in *obiter* as it would not affect the rights (and indeed obligation) of the Court with respect to the calculation of Mr. Gavel's equity. These were – properly – separate filings and indeed Mr. Gavel attempted

(to his credit) to un-do his second bankruptcy with a second consumer proposal. It is sufficient, for current purposes, to find that issue estoppel does not apply to Mr. Gavel as there was *no prior final judicial determination of the issue of equity with respect to him*.

[34] I also reiterate my doubts that issue estoppel has a broad scope in proceedings such as this as there is an entire class of stakeholders – that is, creditors – who are left out of the analysis. I need not pursue that inquiry today.

[35] The Trustee is therefore not estopped from re-calculating *Mr. Gavel's* equity on these facts at any time prior to the discharge hearing. Indeed, it will be recalled that the Trustee calculated the equity twice – the second time to deduct the notional mortgage penalty, of which I approve.

[36] I would point out as a matter of course that it is not only permissible, but common, for the Trustee to embark on this recalculation exercise quite aside from intervening issues such as insurance. New information on value may come to light (as indeed was the case in *McInnis*); a non-exempt asset either unknown or contingent at the time of filing may become choate (such as an inheritance or other non-exempt lump sum); or other rights or obligations may accrue during the bankruptcy that were unknown, misconstrued, or poorly valued at the time of

filing. Simply saying "the Trustee told me such-and-so" or "I thought such-and-so from what the Trustee told me" does not, *alone and in itself*, give rise to issue estoppel. While again I doubt *Johnson, supra*, I reiterate that that case went much further – there was action, over a period of years, by the bankrupt in reliance on the assertions of the Trustee that it would take no steps to realize on the property. There is no such evidence here. Similarly, there is no assertion that the Trustee disclaimed or otherwise recused itself from its claim to Mr. Gavel's obligations, as was the case with *Ross* (a disclaimer coupled with a judicial conditional order).

[37] Mr. Hill, in his brief, asserts:

> Here, the Trustee agreed to surrender its interest upon the payment of approximately $10,000. The fact there was mortgage insurance does not vitiate that agreement. Estoppel applies.

[38] No, it doesn't.

[39] Mr. Gavel did not indicate his agreement; there is no indication he even responded to the Trustee's overtures. Certainly nothing from the benefit was applied and then only with respect to the interest being re-acquired by Ms. Gavel. Most importantly, there is no judicial proceeding resulting in an absolute or conditional order – unlike in *Ross* or *Wadden*. And, as I will now discuss, even if there was an agreement as between bankrupt and Trustee (as opposed to a

unilateral communication from the Trustee), it does not fetter the Court. If it ever did – which I doubt - it doesn't now.

Issue 3: Is the Court bound by the calculations of the Trustee?

[40] Short answer: No.

[41] In oral argument, Mr. Hill asserted that I am so bound; and that the Trustee having (re)calculated Mr. Gavel's pre-insurance equity at $5,937.28, my function is limited – and bound – to sign where I am told, without complaint or inquiry.

[42] Following the hearing, I invited the Trustee and Mr. Hill to submit authority, if any, for such a proposition.

[43] From the Trustee, answer came there none.

[44] Mr. Hill indicated that he

> …had in mind Directive 12…which was in fact revoked in August of 2009. The Directive was referred to by Registrar Cregan in Re McCurdy [2006 NSSC 125, addendum at 2006 NSSC 312[42]]….
>
> The point I was attempting to make was that when a trustee comes to a "number", and agrees with the bankrupt that upon payment of same the trustee will issue a certificate of discharge, the trustee ought to be bound, and the court should exercise its discretion by issuing an order in conformation with the trustee's agreement with the bankrupt. This should be particularly true where, as here, there are joint bankrupts and one makes

[42] Mr. Hill provided a copy of the case, but not the addendum.

> payment based upon that agreement, while the other does not at the time because of exigent circumstances.[43] [emphases added]

[45] Let's de-pack that.

[46] There are a full dozen reasons why this is a spurious argument, one which I hope experienced counsel does not again choose to present in this Court, either in the broad form presented in oral argument, or the more limited "fetter your discretion" iteration cited in the email above.

[47] First, as noted by Mr. Hill, Directive 12 was repealed over 11 years ago.

[48] Second, it pertained to BIA Section 170.1(2) as it read at the time; it included a provision directing the Trustee to make a recommendation based, among other things, "the total amount paid to the estate by the bankrupt, having regard to the bankrupt's indebtedness and financial resources." That provision has since been repealed.

[49] Third, Directives are not binding on the Court.[44]

[50] Fourth, the Directive provided that, *as between trustee and bankrupt*, a recommended conditional discharge could not exceed twelve months. That was,

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[43] Email to the Court, December 15, 2020.
[44] *Re Ross*, supra, para. 20.

first, a recommendation and, second, between bankrupt and trustee – not a compact between either of them and the Court.

[51] Fifth, the directive related to the Trustee's *recommendations* to the Court, not obligations of the Court to agree with them or not. It says nothing about what the Court should do when there was no or untimely compliance by the Bankrupt. Neither does the *McCurdy* case.

[52] Sixth, the directive only applied to *mediated agreements* under s. 170.1 as it then read, referencing agreements with the debtor pertaining to acts under s. 173(1)(m) or (n) – namely surplus income requirements or whether a viable proposal had been an option; and also whether the Trustee considered the "total amount paid to the estate by the bankrupt [to be] disproportionate to the bankrupt's indebtedness and financial resources"[45] Except in respect to that "disproportionality," the directive had naught to do with outstanding property obligations. Here, there was no agreement with Mr. Gavel – mediated or otherwise.

[53] Seventh, *McCurdy* dealt with a situation in which the bankrupt had not complied with the conditions within the 12 month window. Registrar Cregan did

[45] Directive, paragraph 4(b)

not say that this constrained the Court or what it could or should do. What he said was that when it was apparent that such an agreement would not be fulfilled within the Directive's time (a maximum of 21 months, including the 12 months of 'conditions' set out in the Directive), the matter "should promptly be brought before the Court for review and, if found appropriate, new manageable conditions imposed or an absolute discharge given." (para. 14). He did not say that the Court was bound by the agreement between bankrupt and trustee; quite the opposite.

[54] Eighth, there is no indication of any agreement between Mr. Gavel and the Trustee on the amount, if any, of real property equity. It will be recalled that the Trustee specifically said in its letter of March 27, 2018 that absent agreement, the Court could proceed differently[46]. The Court may do so with or without the bankrupt's imprimatur. While it is true that Mr. Gavel had by then passed from this life, both he and Ms. Gavel previously knew the number the Trustee had in mind. There is no indication that Mr. Gavel either agreed or relied on this, or took any action to have the matter "solidified" by a conditional order.

[55] Ninth, this was *not* a joint filing. The Gavels are not "joint bankrupts." They are separate but (at first) contemporaneous filings by Mr. and Ms. Gavel. As

[46] Again, as discussed in this decision, the Court can and sometimes indeed must proceed differently even if there is such an agreement. As noted, the Trustee has since amended this standard form of notice; the Court approves of this aspect of its rewrite.

I have said above, I encourage joint filings where appropriate, often to resistance from trustees. In this case, for the reasons outlined above, I think it is not only appropriate but practically inevitable for these to be separate filings – the debts were significantly disparate in nature and tenor (ie heavy CRA debt in the case of Mr. Gavel) and it was Mr. Gavel's second filing while Ms. Gavel's first. To say that Mr. Gavel has the benefit of Ms. Gavel's calculated equity is to have the bankruptcy process as a kind of fiscal diode – when it is beneficial, the matters flow in one direction; when inimical, they do not flow in reverse.

[56] Tenth, and to reiterate, there was no order with respect to Ms. Gavel's payment; there was only an absolute discharge.

[57] Eleventh, Mr. Hill's assertion that I should "exercise my discretion" to effect parallel results when one spouse has obtained a discharge by performing obligations before a Court order, would be to hamstring and fetter that self-same discretion. All that would be required for a Court to be hogtied would be for two spouses to file; one spouse to do what the Trustee said, whether the Court would have agreed with that course or not; obtain their discharge; and then for the other spouse to come to Court and tell me that "I'll have what she's having." It would bind the Court to the sometimes substantially different practices and methodologies employed by different Trustees.

[58] Twelfth, to say "I am bound by what the Trustee has calculated" would in effect overrule the result in *McInnis, supra,* in which the Trustee had made calculations – and indeed set the matter for Court – only to discover that they were incorrect and substantially below the actual amounts at hand. It would allow notional to triumph over reality.

[59] Trustees recalculate obligations all the time. So does the Court. I have repeatedly said this is not a rubber stamp forum[47], or one which is bound by the practices of Firm X or Firm Y. Indeed, Justice Gabriel and I both have noted that while a Court may be guided by OSB guidelines, it is not bound by those either.[48] If it is not bound by formal directives from the OSB, it is impossible to see how the Court can be bound by – sometimes wildly different – Trustee policies and practices. In this Court, calculations are applied consistently regardless of the Trustee or its practices; I am not so naïve as to believe that "trustee shopping" does not occur[49]. I can't do anything about that until it gets to my Court. Once it does, I can.

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[47] See: *Re Crummey and Wojtyniac*, 2020 NSSC 377 (taxation of accounts); *Re Little*, 2020 NSSC 366 (second consumer proposals); *Re McInnis, supra* (calculation of equity); *Re Handspiker*, 2018 NSSC 333 ("court of rote" with respect to student loans*); Re Scotian Distribution Services Ltd*, 2020 NSSC 158 (s. 64.2 BIA, in *obiter*). See also *Re Great North Data Ltd.* 2020 NLSC 149 (SC) at paras. 27-8 ("rubber stamping" a Trustee-approved account).

[48] See *Ross, supra,* at para. 20.

[49] To be clear, there is no indication that the Gavels did this. I am making the point that the way firm X calculates equity or other obligations may well be different from firm Y. I had occasion to discuss this in *McInnis, supra*, at para. 35 as well as *Re Huphman*, 2019 NSSC 280 (in the context of practices in reviewing validity and priority of security)

[60] In the alternative, it could have been open for me to "equalize" the payment by adding what – as will appear – is Ms. Gavel's underpayment to the obligation on Mr. Gavel's estate. I have a wide jurisdiction under s. 172 BIA and it would not be unjust for me to say "now that you have the whole property, you are to pay its whole value." However, to do so would in my opinion circumvent the absolute nature of the order now in effect for Ms. Gavel by doing indirectly what I should not do directly. Again, I will not engage in "diode justice" by having matters in two separate files flow in whichever direction I think it should and not the other, especially when the Court is *functus* on one of them.[50]

Issue 4: What is Mr. Gavel's equity (but for mortgage life insurance)?

[61] I laid out the default matrix for "notional equity" calculation in *Re McInnis*, *supra*. I start with the evidence of value at the applicable time. Here, I have only the realtor's opinion from some years ago and although I can take judicial notice of a robust real estate market of late, I have no evidence of any other higher value; it was not suggested that I commission another valuation and although I have that jurisdiction, I do not do so.

[50] Subject to such post-discharge provisions such as ss. 180 and 187(5) BIA.

[62] From that $259,000 valuation, I deduct commission at 5% plus HST, legal fees of $1,000 (or as in evidence and reasonable), mortgage, and penalty (3 months' at prevailing rates or as in evidence). I do not allow carrying costs, insurance, interest, or utilities where the bankrupt has had use or benefit of the asset.

[63] I apply that methodology here, noting where I differ from the Trustee.

[64] Realtor's opinion: $259,000.00.[51]

[65] Real estate commission (5% plus HST – the Trustee used 7%, a figure unacceptable to the Court; I use 5% as a recognition that most estate agent driven sales run between 5 and 6% plus HST, but many sales may be private or through discount agencies, on-line services, tiered-commission structures, *etc.*): $14,892.50.

[66] Allowance for legal fees: $1,000 *including* HST (the Trustee used $2,000 *plus* HST, a figure I consider unreasonable for a notional regular residential sale of a Land Registered parcel).

[51] Trustee's figures are from Gavel affidavit, exhibit F

[67] Mortgage: $223,057.53 (the Trustee used $2**3**3,057.53 in the initial calculation, but this appears to be a typographical error as the net figure reflects $223,057.53),

[68] Penalty: $1,321.00

[69] HST is included where noted; the Trustee used a figure of $2,616.90 on commission and legal, whose calculation is not apparent to me.

[70] Net (Court's calculation): $18,728.97.

[71] Mr. Gavel's portion: $9,364.48 (rounded).

[72] There was some suggestion that Mr. Gavel may have paid $500 towards this[52]; if so, he is to be credited for this or such other amount as may have been paid on *this* obligation.

[73] It will be seen that this differs from the Trustee's second calculation of $5,937.28. For the reasons discussed above, the Court is not bound by this.

[52] Ms. Gavel's s. 170 report reflects a $500 payment. It is unclear whether $500 had been paid into each estate, or whether this is a typographical 'carry over' from Ms. Gavel's report to her affidavit in which she says she offered to pay the Trustee the identical $5,**4**37.28. His s. 170 report shows no payment having been made, although in oral argument the Trustee so suggested.

Issue 5: Is the Trustee estopped from asserting its claim to Mr. Gavel's former equity?

[74] Again, the short answer is "no."

[75] Mr. Hill relies heavily upon *Ross*, in which I reiterate the assignment was *not* recorded in the judgment roll, nor registered in the parcel register. The Trustee had also disclaimed its interest in writing.

[76] Here – to say it again - it is common ground that the assignments vested the property in the Trustee (s. 71 BIA) by operation of law, and that the assignments severed the joint tenancy. One major difference from *Ross* is that here, the Trustee recorded its interest in the judgment roll and, eventually, the parcel register. Another difference, and at least as important, is there was no conditional or absolute order in place for Mr. Gavel. The equities surrounding issue estoppel that were of concern to the Court in *Ross* do not apply here.

[77] In *Ross*, Justice Gabriel said:

> [53] Consider that there was a clear representation to the deceased and Mrs. Ross (albeit, via the copy of the letter to the third party lender TD) that the Trustee would not be seeking an interest in the property. No steps were taken to transfer or amend the records at the Registry of Deeds to reflect any ownership interest by the Trustee in the property. Both the TD Bank (when it allowed the Rosses to renew the mortgage in 2016) and the Rosses themselves, acted upon, and relied upon PWC's word. [emphasis added]

[78] All of those factors are different here.

[79] I add that it would have been desirable for the Trustee to have registered its interest in the parcel register at an earlier time. I am aware of various situations in which the assignment is, properly, in the judgment roll, and missed by a searcher. That does not affect the fact that it is notice and the potential defeat of the Trustee's interest by Equity's Darling[53], of concern to me in *McInnis,* does not arise. However, it can lead to inconvenient – perhaps actionable – moments and from a practice perspective, registration in the parcel register is desirable when the Trustee knows of a specific land registration parcel. With that said, the failure to do so (when the assignment is in the relevant judgment roll) does not affect the equities at hand here. The Trustee put the world on notice; it did not disclaim; it did not obtain (and Mr. Gavel did not take steps to obtain) a conditional (or other dispositive) order. The title remains vested in the Trustee, insofar as Mr. Gavel's estate is concerned.

[80] As I have outlined above, the registration of the assignment by Ms. Gavel is in admitted error and it is agreed that this is to be remediated, by conveyance of

[53] That is, a *bona fide* purchaser for value without notice, by virtue of lack of public filing in the relevant Registry, and a lack of actual knowledge of the bankruptcy by the grantee.

that interest to Ms. Gavel, or the filing of a Form 6A rectification, as the case may be. That is only with respect to Ms. Gavel.

Issue 6: Is the bankrupt's payment obligation (or amount of equity) changed by the insurance proceeds for which the mortgagee was the beneficiary?

[81] And now we come to the matter of most interest to the parties.

[82] The insurer, Manulife, paid $172,951.00 to the mortgagee on or about January 30, 2018[54]. I will note again that this is more than half the value of the real property, but less than the balance of the mortgage. On renewal in August 2018, the balance was $35,908.87[55]

[83] The Trustee, while ostensibly taking no position, urges me to the view that this is a development that increases the equity in an existing non-exempt asset; that since the bankrupt was not "fixed" with a conditional or absolute order at the time of payment, the net equity in the underlying asset has increased accordingly; and the net balance is the property of the Trustee to realize upon, whether to be purchased by Ms. Gavel or otherwise.

[54] Gavel affidavit, Exhibit K
[55] Gavel affidavit, Exhibit M

[84] As noted, the Trustee did not pursue the argument that either the insurance or the additional equity was "after-acquired property" within the meaning of s. 67 of the BIA.

[85] The answer to the issue of entitlement to the additional value resulting from the life insurance involves three components: First, are the insurance proceeds either an estate asset or the enhancement in the value of an encumbered estate asset; second, if they are exempt and used to acquire (or pay off) a non-exempt asset, does that change the nature of the proceeds; and third, does it affect what the Court should do in exercising its discretion under s. 172 of the BIA?

[86] I address only the first question in this section.

[87] Section 198 of the *Insurance Act*, RSNS 1989, c. 231 reads:

> Exemption from execution and seizure 198
>
> (1) Where a beneficiary is designated, the insurance money, from the time of the happening of the event upon which the insurance money becomes payable, is not part of the estate of the insured and is not subject to the claims of the creditors of the insured.
>
> (2) While a designation in favour of a spouse or common-law partner, child, grandchild or parent of a person whose life is insured, or any of them, is in effect, the rights and interests of the insured in the insurance money and in the contract are exempt from execution or seizure. R.S., c. 231, s. 198; 2000, c. 29, s. 24. [emphases added]

[88] Mr. Hill argues that s. 198(1) means that if there is a beneficiary – any beneficiary[56] – designated in the insurance policy, the proceeds are not part of the estate of the insured and not attachable. 198(2) goes on to provide for preferred beneficiaries not at issue here. He goes on to say that since Home Trust is a beneficiary under the life insurance policy, s. 198(1) exempts the proceeds from the claims of creditors.

[89] I agree.

[90] Equivalents to s. 198 exist in most if not all jurisdictions in Canada. In Nova Scotia, its forebear appears to have been enacted in 1962 (SNS 1962, c. 9, s. 156). It became s. 158 of RSNS 1967, c. 148. It later took on its current wording. Identical or similar provisions exist, for example, in Ontario (RSO 1990, c. I.8, s. 196); Alberta (RSA 2000, c. I-3, s. 666), and Manitoba (CCSM c. I40, s. 173). It may fairly be said that this is a general policy choice amongst legislators around Canada, and thus hardly a "quirk" exemption found in one jurisdiction but rarely if ever elsewhere.[57]

[91] That said, s. 198 does not appear to have had frequent consideration in Nova Scotia. In *Re Mullen*, 2016 NSSC 203, Justice Moir made a fleeting reference to s.

[56] Other than the estate of the deceased.
[57] See e.g. certain exemptions in the *Judicature Act*, RSNS 1989 c. 240, c. 45(1).

198(2) in stating that "RRSPs with a designated life beneficiary are exempt"[58] He expressed a similar sentiment in *Re Trask*, 2003 NSSC 160.

[92] *Re Crane*, 2016 ONSC 291, provides guidance. The issue in that case was whether the spousal property claim in an intestate's real property was calculated before or after the application of mortgage life insurance. Justice Broad concluded that the entitlement was "pre-insurance," as the mortgage life insurance was not part of the deceased's estate, under the Ontario equivalent of Nova Scotia's s. 198.

[93] Under Ontario law at the time, the spouse of an intestate had a preferred claim for $200,000; the house was worth $294,500 and had a mortgage of $100,339.26, which was paid out after the owner's death by virtue of mortgage life insurance. The issue was whether the value for the purposes of the preference was approximately $195,000 (the equity in the home immediately prior to the owner's death), or the post-insurance equity of $295,000. The Court, having found that the mortgage life insurance was not part of the estate, valued the home for preference purposes at approximately $195,000.

[58] Para. 40; Justice Moir was discussing the 2008 BIA amendments which made RRSPs exempt under the BIA except for contributions in the 12 months preceding bankruptcy.

[94] By extension, in the case at bar if the mortgage life insurance was not "part of the estate" of Mr. Gavel, his estate's property obligation to the trustee must disregard that payment as well.

[95] In *Re MacArthur*, 2013 NSSC 157, Registrar Cregan dealt with a situation in which one exempt insurance beneficiary was switched in favour of a creditor. He found that there was no preference, and therefore the change was not impugned, as creditors (except the new beneficiary creditor) would not have been able to obtain the insurance proceeds with or without that change. It was an instance of "you're no further behind than you were before."

[96] In the present case, it is clear there is a beneficiary (a mandatory one, as I will discuss next). The fact it is a creditor is of no import. Indeed, as may be seen from *MacArthur*, it would not even have mattered if there was a change in beneficiary *to* that creditor, if the change was from a beneficiary who would have been out of reach of Mr. Gavel's (other) creditors. The clear wording – not unique to Nova Scotia – is that the proceeds are "not part of the estate of the insured" – in this case, Mr. Gavel – and not "subject to the claims of creditors of the insured."[59]

[59] See also *Re McCallum*, 2001 ABQB 156, and *Re Martino* (2007), 35 CBR (4th) 134 (Ont. SC) (cash surrender value of exempt policies also exempt in bankruptcy)

[97] Before leaving the issue of creditor insurance, I wish to address one argument in *Ross* that Justice Gabriel considered in *obiter*. At para. 55 he said:

> [55] There is some force to the submission of counsel for Mrs. Ross that:
>
> > ... With this in mind, Glenn and Carol mortgaged the property [in 2016] post assignment, and Glenn took out and paid for mortgage insurance to benefit his wife in the event of his death. Would Glenn have done so if he believed for a minute that he was simply providing for the Trustee? The answer is too obvious to need expression...

[98] Respectfully, it's not quite "too obvious to need expression." There are any number of reasons a bankrupt may take out, maintain, or renew life insurance during their bankruptcy for the benefit of someone other than a s. 198(2) exempt beneficiary. They likely expect to survive the bankruptcy process and continue on paying the secured (and insured) creditor. They may no longer qualify for insurance or replacement insurance on reasonable terms.[60] If they don't survive – as unfortunately was the case with Mr. Gavel – they may not have a sophisticated understanding of the consequences, but that does not affect the consequences in law. They may not even necessarily know they *have* life insurance – I have more than once in practice encountered situations in which the reality differed (in both directions) from what the borrower/deceased thought was the case. Insurance may be mandatory (such as with certain loans, or through employment, or under the

[60] As was probably the case with Mr. Gavel, post-diagnosis.

terms of a separation agreement, minutes of settlement, or Court order). They may have been given incorrect or poor advice by a banker or third party.[61] In short, it is a *non-sequitur* to say "nobody would buy life insurance to benefit their bankruptcy estate, therefore it cannot be an asset of the bankrupt estate or enhance the value of an asset within the bankruptcy estate." However, as appears below, it makes no difference to the Gavels. The insurance proceeds, in first instance, are not part of his estate and not subject to distribution amongst creditors other than the beneficiary, Home Trust. His equity remains unchanged at $9,364.48 subject to my discussion below.

Issue 7: Does the fact the insurance proceeds changed the equity in a non-exempt asset make that equity a more valuable asset of the bankruptcy estate?

[99] To rephrase this issue – if an exempt asset is used to purchase, pay off, or acquire a non-exempt asset (in this case, equity in real property), does the underlying exemption disappear?

[61] I posited in argument that, had Mr. Gavel simply purchased a policy naming his spouse as beneficiary, with a lump sum from which she could discharge the mortgage or otherwise use the proceeds as she saw fit, we wouldn't be having a conversation around the insurance proceeds. Mr. Hill agreed. Nonetheless, thousands if not millions of Canadians life insure their mortgages annually, usually with declining coverages and an inflexible destination of funds. Ours not to reason why, in light of the outcome of this case.

[100] Mr. Hill says it does not. In argument, I presented the scenario of a person selling their $6,000 car (exempt) and turning it into cash, or acquiring non-exempt property prior to their discharge (or a conditional order). He said that does not change things – the proceeds (or replacements) stand in the same shoes as the prior exemption.

[101] With respect, I disagree. It is common for bankrupts – by design or inadvertence – to lose exemptions. The most frequent, perhaps, is withdrawal of exempt RRSPs for living expenses (which then becomes income, subject to the Court's discretion under s. 68(10) BIA; see also *Re Lewer*, 2010 NSSC 98).

[102] In the property context, if an exempt asset is used to acquire another exempt asset, both are exempt. That makes sense. See Houlden, Morawetz, and Sarra, *2020-2021 Annotated Bankruptcy and Insolvency Act*, s. F36(5).

[103] It is when – as is potentially the case here –an exempt asset is sold, or is used to acquire (or pay down debt secured by) a *non-exempt* asset that an issue arises. Houlden, Morawetz, and Sarra, *supra*, at s. F36(6) and F36(8).

[104] The weight of authority discussed by the learned editors is that if an exempt asset is transformed – by sale, or by way of acquisition or increase in realizable value of a non-exempt asset, the exemption is lost. Some of those cases refer to

dispositions prior to bankruptcy and need not be discussed here. Others refer to situations in which an exempt asset is voluntarily sold and the exemption lost (e.g. *Regal Distributors Ltd. v. Freele*, [1931] 1 DLR 943 (Alta. CA)).[62]

[105] In *Poulin v. Serge Morency et Associes Inc.* [1999] 3 SCR 351, the Supreme Court of Canada was faced with the interface of property exemptions under Quebec civil law (and thus exempt in bankruptcy pursuant to s. 67(1)(b) BIA) and their subsequent disposition. The bankrupt transferred his government pension (which was exempt under Quebec law) into his RRSP (which at the time was not exempt). Although that case deals with exemptions under the civil law, the principles – as they apply to federal legislation – are equally applicable here: that is, the BIA exempts property that is exempt from seizure under provincial law; there is no distinction whether that province operates under a civilian or common law regime.

[106] Justice Gonthier, for the Court, said in holding that the RRSP (as the law then stood) was not exempt stated, at para. 31:

> 31 The second reason why I cannot accept the appellant's argument is that I am of the opinion that s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* does not protect the sums once they have been taken out of the Retirement Plan. If we were to interpret the

[62] This was an "exemption from execution" case. The Court, in a short decision, emphasized repeatedly the voluntary nature of the sale.

expression "sums paid or reimbursed" in such a way as to cover the sums once they have been taken out of the Retirement Plan, the result would be absurd. If we read s. 222, we see that not only has the Quebec legislature declared sums paid or reimbursed to be unseizable, but it has also declared them to be inalienable ("*incessible*" in the French version). Of what use might inalienable or unassignable sums of money be? Such sums could not be alienated in order to be applied to a payment and would quite simply be useless. Consequently, if we consider the nature of a sum of money, saying that a certain sum is inalienable or unassignable is nonsense, and produces an absurd result. As Dickson J. wrote in *Morgentaler v. The Queen*, 1975 CanLII 8 (SCC), [1976] 1 S.C.R. 616, at p. 676:

> We must give the sections a reasonable construction and try to make sense and not nonsense, of the words. We should pay Parliament the respect of not assuming readily that it has enacted legislative inconsistencies or absurdities.

Concerning this rule of interpretation, see also *Dubois v. The Queen*, 1985 CanLII 10 (SCC), [1985] 2 S.C.R. 350, at pp. 363-64, and P.-A. Côté, *The Interpretation of Legislation in Canada* (2nd ed. 1991), at pp. 373 *et seq*. The only way not to produce an absurdity and to give some meaning to the words "inalienable" and "*incessible*" in s. 222 of the *Act respecting the Government and Public Employees Retirement Plan* is to interpret the expression "sums paid or reimbursed" to mean "the right to payment or to reimbursement of sums". Moreover, the concept of *incessibilité* to which the French version of s. 222 refers usually applies only to rights. It is defined in the *Dictionnaire de droit privé et Lexiques bilingues* (2nd ed. 1991), at p. 301, as follows: [TRANSLATION] "Attribute of a right not susceptible of assignment." (Emphasis added.) The definition of the term "*cession*" ("assignment") is found at p. 81: [TRANSLATION] "*Inter vivos* transfer of a right, by onerous or gratuitous contract, in particular in relation to a claim." (Emphasis added.) Once the right to payment or to reimbursement has been extinguished, that is, once the sums have in fact been paid or reimbursed, their inalienable and unseizable nature has been permanently lost. It goes without saying, however, that sums paid or reimbursed that are transferred into another unseizable "vehicle" acquire the unseizable nature of their new "vehicle". Consequently sums reimbursed that are directly transferred into an unseizable "vehicle" remain sheltered from any seizure. Moreover, the appellant could have asked that the sums reimbursed be transferred into an unseizable plan, both at the time of reimbursement and later before his assignment into bankruptcy, but he did not do so, choosing instead a seizable RRSP. [emphases added]

[107] He continued, at para. 35:

> 35 The appellant further submits that an RRSP may become unseizable if the funds that were paid into it were themselves unseizable under a specific statute. I cannot accept that argument. That would amount to arbitrarily extending the meaning of the expression "sums paid or reimbursed" and creating a new category of unseizable property. It would also go against the rule that exemptions from seizure should be narrowly construed, since, it must be recalled, they are exceptions. [emphases added]

[108] *MacKinnon v. Deloitte & Touche*, 2007 SKQB 39, is to similar effect. In that case, the bankrupt took exempt child tax benefits and deposited them into a non-exempt RESP; the Court found that the RESP was not exempt in bankruptcy, despite the source of funds.

[109] Academic analysis adds slightly to this view. In *the Enforcement of Civil Judgments Final Report*, the Law Reform Commission of Nova Scotia (August 2014) stated at p. 97:

> ….the general view is that the funds lose their protected character once paid. Though Canadian authority is scarce, the tendency is against extending the exemption once the unseizable funds are converted to some other asset [citing *Poulin* and *Lewer*]

[110] I am therefore of the view, without finally deciding the matter at present, that when an exempt asset is volitionally changed to a non-exempt asset (by sale, conversion, or paydown of debt), the exemption ceases and the non-exempt asset (or increase in equity in the non-exempt asset) becomes distributable among creditors.

[111] But here's the twist. In this case, the deceased had no choice in the beneficiary. I recounted above the terms of the policy that the beneficiary was, and

always was to be, the mortgagee – nobody else. The terms were clear – "you cannot choose the beneficiary."[63] In this instance, had Ms. Gavel been the beneficiary (exempt) and used it to pay down the mortgage (including Mr. Gavel's bankrupt estate interest) she may well have been out of luck (subject to any equities that may arise which would give the Court reason to chose a non-discharge-hearing-date for valuation, or to adjust the obligation pursuant to s. 172 BIA). That is not the case here.

[112] All of the "loss of exemption" cases I have found refer to situations in which the bankrupt elected – advisedly or otherwise – prior to receipt of a conditional or absolute order – to lift the cloak of exemption from an asset or source of income and apply it towards a non-exempt asset. In this instance, the only choice made by Mr. Gavel was to have mortgage life insurance at all; having done so in the form in which he did, his demise triggered a payment directly from insurer to an inviolate payee.

[113] To reiterate, the only election he made to "pay down a non-exempt asset" was the election to have the insurance in the first place. After that, it was out of his hands. It is not the same situation as in *Re MacRury*, 2019 NSSC 146, (in which a

[63] Gavel affidavit, exhibit A, p. 3; Gavel's pre-hearing brief, para. 43.

life insurance policy was payable to the estate of deceased during his bankruptcy, although not paid until after his posthumous automatic discharge), or the cases cited above - in which M. Poulin "could have asked that the sums reimbursed be transferred into an unseizable plan, both at the time of reimbursement and later before his assignment into bankruptcy, but he did not do so, choosing instead a seizable RRSP;" or in which an asset is voluntarily sold (as in *Freele*).

[114] I am bolstered in that – aside from the Gavels' having paid insurance premiums, presumably leaving corresponding indebtedness upon their filing – the other creditors are in no worse position by virtue of this insurance having been in place. In this way, the Gavels are more akin to *MacArthur* than the "voluntarily loss of exemption" cases.

[115] I am therefore compelled – I admit with a grudging reluctance, on these facts - to the conclusion that Mr. Gavel's equity interest remains at $9,364.48 and is unimpacted by the direct insurance payment from insurer to a s. 198 *Insurance Act* beneficiary who was not within the post-application discretion of the deceased, namely his mortgage lender.

Issue 8: Section 172 BIA

[116] As noted, this was Mr. Gavel's second bankruptcy. He had substantial public debt. There was approximately 17 years between his first discharge and his second filing. His compliance with his duties were minimal; in saying so, I have not disregarded his illness which was diagnosed shortly after his second consumer proposal was withdrawn. Nonetheless, he took few to no steps to "get his affairs in order," either for the benefit of his personal estate, or his bankruptcy estate. He did not pass suddenly. He appears to have knowingly been ill for over two years; there is no evidence he responded to the 2015 correspondence from the Trustee as to his payment obligations; no proceeds from the 'benefit' were used to defray the payment obligation of either of the Gavels until the Trustee filed its objection, and then the payments were applied to Ms. Gavel's repurchase.

[117] CRA, at one point, appears to have taken an interest in these proceedings. This was adjourned in mid-2020 as their offices worked under COVID protocols; they did not appear or make submissions at the hearing.

[118] In argument, I posited – and Mr. Hill agreed – that regardless of my findings as to equity obligations or entitlement, I had a discretion to diverge under s. 172 of the BIA. Indeed, I am obliged not to grant an absolute discharge even if I wanted to, by reason of s. 173(1)(j) [Mr. Gavel's prior bankruptcy] and s. 172(2).

[119] Section 172(2) reads:

> **(2)** The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,
>
> **(a)** refuse the discharge of a bankrupt;
>
> **(b)** suspend the discharge for such period as the court thinks proper; or
>
> **(c)** require the bankrupt, as a condition of his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[120] It is common ground that my discretion, particularly under s. 172(2)(c), is a wide one.

[121] I have opined in other cases that I should rarely if ever deviate from the property obligations on a bankrupt by way of s. 172(1) or 172(2). To do so would, in my view, generally impose an obligation or create an exemption where one does not exist. That is a function for the legislature or the parliament, as the case may be (Parliament has, under s. 68(10), given me a wider discretion with respect to income obligations, which I exercise on rare but appropriate occasions; this in turn bolsters my view that having been given explicit movement over one obligation but not another, I should be reluctant to read in that latitude *vis a vis* property rights and obligations).

[122] The reverse, though, is also true. I have authority under s. 172(1) to make an order "with respect to any earnings or income….or with respect to the bankrupt's

after-acquired property." 172(2) allows me to make an order requiring the bankrupt to "pay such moneys…..or comply with such other terms as the Court may direct." I may order post-bankruptcy payments that are not captured under ss. 67, 68, or 158. But, there must be a just reason to do so.

[123] Is there such a reason here?

[124] There may well be. I would have welcomed the submissions of the CRA in particular. They chose not to appear or make submissions. I am befuddled as to why, given the comparatively novel nature of certain issues in this proceeding and the amount of public money at issue. I do not have the benefit of that advocacy. It is not for the Court to be their, or anyone's, surrogate and to surmise how these debts arose or whether the deceased's estate should be subject to conditions as a consequence.

[125] Had Mr. Gavel been alive, I would likely have ordered him to file, be assessed for, and pay all relevant tax returns for a period of time in order to ensure that the relevant obligations were inculcated in him on his way out of his second discharge[64]. That is obviously not germane here. I may have also ordered payments appropriate to his capital and income resources and prospects.

[64] See, e.g. *Re Yeo*, 2020 NSSC 135, for a much more egregious situation.

[126] In the absence of such submissions, and again with a certain grudging reluctance, I am not prepared to exercise my discretion to impose s. 172 obligations that are over and above those contained in the property and income regimes in the BIA itself. That is, the obligations as to abandonment or repurchase of non-exempt property (as calculated in accordance with this decision), filing of relevant income and expense information and tax returns, counselling (during Mr. Gavel's lifetime), payment of any s. 68 surplus income, *etc.*

Issue 9: Costs

[127] I have a different opinion, however, as to costs. It was necessary for the Trustee to bring these issues to Court, quite aside from the need to obtain an appropriate order for Mr. Gavel. That said, the Trustee did not file a brief, or provide written submissions aside from the application itself and the Hunter affidavit.

[128] Conversely, I did not find all of the submissions on behalf of Mr. Gavel to be on point (although again in fairness, part of this may have been due to the issue of "after acquired property," which the Trustee did not pursue and indeed abandoned); Ms. Gavel appears to have engaged counsel on behalf of Mr. Gavel's estate comparatively late in the day; she herself discharged her bankruptcy

obligations (as seen by the Trustee) only after the application was made in her file. Although I have critiqued CRA for its interest in and then apparent abandonment of the file, that does not change the fact that there was substantial public debt owed by Mr. Gavel.

[129] Ms. Gavel paid less than what this Court would have ordered; as I have said above, I could have used my discretion to "add it on" to Mr. Gavel's conditions in order for the two estates to net out of the property what it should have (namely $18,728.97). I have done so not lest, again, it constitute "doing indirectly what should not be done directly" and have the net effect of re-evaluating Ms. Gavel's absolute order, however imprudently the calculations upon which it was obtained were derived.

[130] The result is that she has a house that is almost paid off, after a series of actions and inactions by both of the Gavels which are short of exemplary. Again, I do not disregard Mr. Gavel's final illness in making these comments; but given the timeline above, he had the opportunity to address – both in practical and juridical terms – the various items that present themselves now over five years after the initial bankruptcy events.

[131] It will readily be seen that this is not a “widows and orphans” decision prompted by considerations outside of the application of the law.

[132] I have decided that the appropriate disposition, in my discretion, is that all parties bear their own costs. No doubt this was a pricey exercise for one or both Gavels. I do not think any of it should come out of the pockets of creditors, in these circumstances.

[133] Mr. Gavel’s undivided half-interest as of bankruptcy remains vested in the Trustee, and the Trustee is to remain on title as to that interest. Ms. Gavel’s interest is to be re-conveyed or rectified as a tenant in common, and the Trustee is to do so at no cost to the estate or to Ms. Gavel; registration shall be for her account. Upon payment to the Trustee of $9,364.48 (less any amount previously paid towards the repurchase of Mr. Gavel’s real property equity), the Trustee is to convey the interest previously held by Mr. Gavel to Ms. Gavel, or as she or Mr. Gavel’s personal representative (if any) directs. The parties shall bear their own costs; and, for greater certainty, the Trustee’s costs and fees shall be governed by Rule 128.

[134] The Trustee shall prepare the draft order.

Balmanoukian, R.