

**IN THE SUPREME COURT OF NOVA SCOTIA**  
**IN BANKRUPTCY AND INSOLVENCY**  
*Citation: Schnare (Re), 2015 NSSC 219*

**Date:** August 6, 2015  
**Registry:** Halifax

District of Nova Scotia  
Division No. 1  
Court No. 38931  
Estate No. 51-1975262

In the Matter of the Bankruptcy of Jane Moffat Schnare

DECISION

**Registrar:** Richard W. Cregan, Q.C.

**Heard:** June 12, 2015, in Halifax, Nova Scotia

**Counsel:** D. Bruce Clarke, Q.C. representing Jane Moffat Schnare  
Gregory MacIntosh, representing the Canada Revenue  
Agency  
Jason Breeze, CIRP, representing the Trustee, BDO Canada  
Limited

**By the Court:**

[1] This is an application by BDO Canada Limited as Trustee in Bankruptcy for Jane Moffat Schnare, who made an assignment in bankruptcy on February 10, 2015, for an order setting the monthly payments to be made by her pursuant to Section 68 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c B-3 (*BIA*).

[2] Ms. Schnare is in her late 50's. She is by profession a Clinical Therapist and Registered Social Worker, with a concentration in working with children and adolescents. She has two children, a daughter age 23 and a son age 21. She separated from her husband in 2002. This was followed by divorce which she described as "lengthy, complex, acrimonious and expensive". She continues to have obligations to her children and ex-husband.

[3] She has been working since 2010 with the Indian Reservation Mental Health Support Program. This is in conjunction with the Truth and Reconciliation Commission. The employer is the Nova Scotia Health Addiction Services, Bridgewater.

[4] Ms. Schnare found herself in financial difficulty in 2013. This was the result of a number of factors. She had gone through a lengthy divorce, which began in 2003. It left her with significant financial difficulties. She has been unable to sell her home which is fully encumbered and an adjacent lot. She has been responsible

for her mother's care. She had an automobile accident. She had difficulties with her insurer. She fell behind in paying her income tax.

[5] She consulted Mr. Robert McCuaig, a trustee whose practice is now part of BDO Canada Limited. A Consumer Proposal under Section 66.13 of the *BIA* dated November 2013 was presented to her creditors. Her unsecured debt totalled \$144,322, of which \$37,000 was owed to the Canada Revenue Agency (CRA). Amendments were made to the proposal resulting in the potential payment to the creditors of 100 cents on the dollar.

[6] The proposal provided that she would pay \$250 per month for 60 months and contribute the proceeds of an insurance settlement, the sale of her property and the liquidation of her LIF holdings.

[7] CRA had reservations regarding the analysis presented by Mr. McCuaig and took particular exception to the monthly payment being only \$250. Its analysis of her surplus income under Section 68 of the *BIA* called for a substantially greater amount.

[8] CRA's position frustrated the Consumer Proposal. As a result Ms. Schnare withdrew it and made an assignment in bankruptcy on February 10, 2015.

[9] Ms. Schnare has been paying \$250. monthly to her estate.

[10] The Trustee's analysis is that the proper amount for her to pay monthly is \$856. The following are the Trustee's calculations:

Total Monthly Income	\$4,354.00
Less: Non-Discretionary Expenses	<u>\$ 326.00</u>
Available Monthly Income	\$4,028.00
Less: Superintendents' Standard (Family of 1.5)	<u>\$2,315.00</u>
Surplus Income	<u>\$1,713.00</u>
Required Payment (50% of surplus income)	\$ 856.00

[11] They are based on the information provided at the time of Ms. Schnare's assignment and assume that her household consists of 1.5 persons in recognition that her children are home part time.

[12] CRA's analysis is that the monthly payment should be \$1,368.95.

The following are the CRA's calculations:

Primary Income (as reported)	\$4,466.15
Secondary Income (as reported)	<u>\$ 659.75</u>
Monthly Net Income	\$5,125.90
Less: Non-Discretionary Expenses	<u>\$ 326.00</u>
Total Monthly Net Income	\$4,799.90
Less: Superintendent's Directive Amount	<u>\$2,062.00</u>
Surplus Income	<u>\$2,737.90</u>
Payment Required (50% of surplus income)	\$1,368.95

They are based on the information in the 2014 income tax return. They do not recognize allowances for children being part of the household.

[13] Ms. Schnare's counsel submits that the following is an appropriate calculation for surplus income:

Net Income	\$4,000.00
Less: Non discretionary expenses	<u>\$ 900.00</u>

	\$3,100.00
Less: Standard for 2.5 persons	<u>\$2,867.00</u>
	\$ 233.00
	x 50 % = \$ <u>117.00</u>

Allowing for 2.5 persons recognizes her responsibilities to her children and mother.

[14] Ms. Schnare has provided a current monthly Income and Expense Statement. In summary it shows:

<u>Monthly Income</u> (from employment)	\$3,528.38	
(from private practice)	<u>350.00</u>	
		<u>\$3,878.38</u>
<u>Household Expenses</u>		
Mortgage	\$1,797.40	
Heat	50.00	
Cell	70.00	
Home phone	98.00	
Electricity	375.00	
Maintenance	<u>50.00</u>	
	<u>2,440.40</u>	
<u>Personal Expenses</u>	<u>250.00</u>	
<u>Non-Discretionary Expenses</u>		
Child support	\$600.00	
Medical	100.00	
Employment Expenses	100.00	
Mother's Indebtedness	1,000.00	
Mother's Comfort Fund	<u>100.00</u>	
	<u>\$1,900.00</u>	
<u>Living Expenses</u>	<u>\$ 830.00</u>	
<u>Transportation Expenses</u>		
Car Payment	825.00	
Repair and gas	400.00	

Parking	<u>26.00</u>
	<u>\$1,251.00</u>
<u>Insurance</u> (House & Car)	<u>\$200.00</u>
<u>Payments</u> Surplus Income to Trustee	\$ 250.00
Secured Creditor	<u>105.00</u>
	<u>\$ 355.00</u>
Total Expenses	<u>\$7,226.40</u>
Deficiency	\$(3,348.02)

[15] A request for mediation under Section 68(6) of the *BIA* was made. However the mediation did not proceed because CRA indicated it had no intention of agreeing to anything less than the full amount as calculated under the Superintendent's Directive on Surplus Income.

[16] The monthly income reflects her evidence that the project for which she is employed is beginning to wind down, as is her private practice.

[17] The expenses of her house are quite reasonable. There is no equity in it. She has been trying to sell it, but not with success. In any event she needs it for her private practice.

[18] Ms. Schnare requires an automobile as a condition of employment. She receives some contribution from her employer in this regard, but it is not sufficient to be relevant for present consideration.

[19] The other expenses are perfectly proper and reasonable.

[20] She is obligated to pay \$600 for the maintenance of her children.

[21] She is responsible for the care of her mother who is ninety years old and lives in the Veterans' Unit of the Fisherman's Memorial Hospital in Lunenburg. Her mother's income is sufficient to cover her living expenses. However, her mother is indebted for past care in the amount of approximately \$20,000. This resulted from an error in filing a late tax return. It would appear that this is her mother's debt and not Ms. Schnare's. However, Ms. Schnare is named on the account. She recognizes some responsibility respecting it. Whether she has a legal obligation respecting it may not be relevant, as even without it, her expenses exceed her income.

[22] I quote from her affidavit:

I work 6-7 days a week. I cannot work any harder; I should be working less. I have an intense travel schedule and, between my regular work and dealing with family abuse issues as part of my practice. I have little time to rest and care for my own needs. I have been in counselling therapy myself for the past several years. I am also dealing with some physical health issues which are related to the mental stress I have been under.

[23] Section 68 of the *BIA* provides that the Superintendent shall by direction establish the standards for determining the surplus income which an individual bankrupt should be required to pay during bankruptcy. It as well gives guidance as to how the standards are to be applied. It is helpful to quote portions of this section.

[24] Subsection (2) defines "surplus income"

“surplus income” means the portion of a bankrupt individual’s total income that exceeds that which is necessary to enable the bankrupt individual to maintain a reasonable standard of living, having regard to the applicable standards established under subsection (I). (Underlining added)

[25] Direction is given to the trustee in Subsection (3) part of which I quote:

The trustee shall, having regard to the applicable standards and to the personal and family situation of the bankrupt, determine whether the bankrupt has surplus income. (Underlining added)

[26] The Superintendent’s standards are found in Directive No. 11 R2 -2015 –

Surplus Income, relevant portion of which I quote:

3. Family Unit – In determining the bankrupt’s personal and family situation for the purpose of subsection 68(3) of the Act, it is necessary to establish the earnings and expenses of both the bankrupt and the bankrupt’s family unit. The bankrupt must disclose the earnings and expenses of each member of the family unit by providing the trustee with income and expense statement for the entire period of bankruptcy. Trustees must use their professional judgment in exercising their duty to apply due diligence when determining the bankrupt’s average monthly income. The trustee’s file should clearly document the method by which he/she calculated the amount, if any, the bankrupt is required to pay to the estate. As well, the trustee may question each member of the family unit as to their earnings and expenses.  
(Underlining Added)

4. For the purpose of this Directive, the bankrupt’s family unit includes, in addition to the bankrupt, any person who does not reside in the same household and who benefits from either the expenses incurred or income earned by the bankrupt, or who contributes to such expenses or earnings. A person who does not reside in the same household shall be considered as a member of the family if the person benefits from or contributes to the expenses incurred or income earned by the bankrupt.

[27] Section 68 and the Directive are quite specific in how surplus income is to be calculated. There is a clear duty imposed on trustees to very carefully examine and document the income, and expenses of bankrupts. However, they are also very clear in directing trustees to use professional judgement so that bankrupts are able



to maintain a reasonable standard of living “considering their personal and family situation”.

[28] These are words which recognize that there must be flexibility and judgement particularly in determining expenses and the needs which “a reasonable standard of living” dictates. Yet, it is clear from the case law that the flexibility which can be allowed to trustees is limited. Some measure of consistency must be imposed on trustees. Mediation may allow some more flexibility but it, even with the best efforts, may not result in the proper resolution. Thus, there is resort to the court.

[29] The court is to balance the right of the creditors to a proper share of the bankrupt’s income against the right of the bankrupt to maintain a reasonable standard of living and meet current responsibilities. The courts have recognized that trustees have limited flexibility in applying the Standards, but that they are not similarly bound. They do not have to apply the Standards so as to deny a bankrupt a reasonable standard of living.

[30] I was reminded by Ms. Schnare’s counsel of three cases: Feindel (Re), 2009 NSCA 118, Gagnon (Re), 2013 NSSC 234, Sampson (Re), 2014 NSSC 303. They all concerned how much surplus would have to be paid as the condition of discharge.

[31] In the first, surplus according to the Standard would not leave money available to cover medical treatment available only in the United States. In the second, the bankrupt incurred significant expenses in attending to his father who was dying in another province. In the third, the bankrupt had a family situation much like Ms. Schnare's. In all three cases the surplus income to be paid as a condition of discharge was either eliminated or reduced to take into consideration the circumstances of each bankrupt.

[32] This matter has recently been extensively reviewed by Deputy Registrar John Dempster in *Wilson (Re)*, 2012 ONSC 2034.

[33] Holden, Morawetz and Sarra: *The 2015 Annotated Bankruptcy and Insolvency Act*, at page 446, F111(4), has a good summary of this case. I take the liberty of quoting it:

The registrar held that a trustee, in determining the bankrupt's obligation to pay surplus income, is not required to apply the amount as determined by the mathematical formula established by the Office of the Superintendent of Bankruptcy. The trustee is required to also consider the personal and family situation of the bankrupt. The trustee, in determining the bankrupts' obligation to pay surplus income under s. 68 of the *BIA*, had strictly applied the amount as determined by the mathematical formula established by OSB Directive No. 11R2. The trustee admitted that it did not have regard to the personal and family situation of the bankrupts in determining their surplus income, believing it had no discretion. The trustee's evidence was that if it had any discretion, it would have exercised that discretion to fix the bankrupt's surplus income obligations at the amount that they had already paid to the estate, as the OSB standards created unfairness in the circumstances. The registrar observed that pursuant to s. 68(3) of the *BIA*, the onus is placed on the trustee to determine whether or not, having regard to both the OSB standards and the personal and family situation of the bankrupt, the bankrupt has surplus income in excess of what the bankrupt requires to maintain a

reasonable standard of living. The registrar held that the trustee is not required to unquestioningly follow the OSB mathematical calculations; and that it is clear from the wording of the relevant sections of the *BIA* and the applicable case law that the trustee has discretion that must be properly exercised and that can be reviewed by the court at the bankrupt's discharge hearing. In this case, the registrar agreed that the surplus income should be fixed at the amounts already paid and that the bankrupts should be given an absolute discharge: *Re Wilson*, 2012 Carswell Ont 4883, 89 C.B.R. (5<sup>th</sup>) 67, 2012 ONSC 2034 (Ont. S.C.J.)

[34] CRA's analysis presupposes continuation of past income. Ms. Schnare's evidence is that such will not be the case. Furthermore it makes no allowances for the complexities of her life, e.g. being unable to sell her property, the needs for her work, being available to her children and supporting her mother.

[35] The Trustee's analysis is basic. However it considers her family as being 1.5 persons for this purpose.

[36] Her counsel's calculation presupposes that her family consists of 2.5 persons, herself for 1 and her children and mother for 1.5 persons. This is a creative interpretation of paragraph 3 of the Directive.

[37] There is no simple mathematical way of settling this matter. The discussion above makes it clear judgement has to be involved in determining what is the proper amount. The submissions made vary from \$1,368.95 to less than \$200 per month which under paragraph 4(6) of the Directive is not payable.

[38] Ms. Schnare had sought the advice of Mr. McCuaig, a senior member of his profession. He helped her prepare a proposal which was presented to her creditors.

It called for payment of \$250 per month along with capital payments. Mr. McCuaig would have used his best judgement in this regard. He had to consider whether it was fair to Ms. Schnare and could be managed by her and as well would be fair to the creditors so that she could expect the necessary majority of them would approve it.

[39] I am satisfied that considering all the factors Ms. Schnare does have surplus income. I must balance her needs and responsibilities against the reasonable expectation of her creditors that she make some contribution to her estate. As implied above, the analysis of CRA and of the Trustee is based on certain assumptions which most likely will not stand. As well the analysis is simply mathematical and without flexibility considering the complexities of Ms. Schnare's situation.

[40] \$250 per month was the amount included in her proposal. It was the result of careful consideration by her and Mr. McCuaig. I think it is a fair amount.

[41] I set the amount of surplus income required to be paid by Ms. Schnare at \$250 per month for the 21 month period.