IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: Ford (Re), 2009 NSSC 124

Date: April 16, 2009
Docket: 32631
Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. B-32631
Estate No. 51-810205

In the Matter of the Bankruptcy of Joanne Marie Ford

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: February 6, 2009

Counsel: Tim Hill representing the bankrupt, Joanne Marie Ford

D. Bruce Clarke representing the Trustee,
Salyzyn & Associates

Introduction

[1] This is an application to determine whether caregiver amounts allowed as non-refundable tax credits under the *Income Tax Act*, R. S.C. 1985, c.1 (5th Supp.) (*ITA*) and corresponding provincial legislation with respect to years prior to discharge from bankruptcy, but received after discharge, should be treated as property under Section 67 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, (*BIA*) or as part of total income under Section 68.

[2] Joanne Marie Ford made an assignment in bankruptcy on August 5, 2005 and was discharged on May 11, 2006. She had for many years lived with and cared for her ageing mother. In 2007 she became aware of the non refundable tax credit called the " caregiver amount" under the *ITA*. She refiled her income tax returns for the years 1998 to 2005 claiming this credit for each year. Reassessments for each of these years reflecting this credit were made resulting in a cheque for $4,798.58 being the total of the credits for those years and a further cheque for $60.95 representing interest on these amounts being sent to her Trustee. The Trustee's position is that these credits having accrued prior to her discharge, they are property of her estate under s. 67 of the *BIA*. Ms. Ford's position is that they are income which

must be dealt with according to s. 68.

Legislative History of Section 68

[3] Prior to 1966 the income of a bankrupt over and above that which was exempted by provincial legislation vested in the trustee. In 1966 the *BIA* was amended to include the forerunner of the present s. 68. I quote the relevant part then designated as s. 39A:

> "**39** A. (1) Notwithstanding section 39, where a bankrupt is in receipt of, or is entitled to receive, any salary, wages or other remuneration from any person employing, or using the services of, the bankrupt, hereinafter in this section referred to as the "employer", the trustee, if directed by the inspectors or the creditors, shall apply to the court for an order directing the payment to the trustee of such part of the salary, wages or other remuneration as the court may determine having regard to the family responsibilities and personal situation of the bankrupt.
>
> [S.C. 1966-67, c. 32, s. 10]

[4] S. 68 was amended in 1997 and remains in effect. I quote the relevant portions of it.

> 68. (1) - The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the portion of the total income of an individual bankrupt that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living.
>
> (2) - For the purposes of this section,
> (a) "total income" referred to in subsection (1) includes, notwithstanding

> paragraphs 67(1) (b) and (b.1), all revenues of a bankrupt of whatever nature or source; . . . .
>
> [S.C. 1997, c. 12, s. 60(1)]

[5] This section has been further amended. However, this amendment has not been proclaimed. I nevertheless quote parts of it here. My reason for doing so will become apparent later.

> (1) The Superintendent shall, by directive, establish in respect of the provinces or one or more bankruptcy districts or parts of bankruptcy districts, the standards for determining the surplus income of an individual bankrupt and the amount that a bankrupt who has surplus income is required to pay to the estate of the bankrupt.
>
> (2) **Definitions** - The following definitions apply in this section.
>
> "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 un subsection (1).
>
> "total income"
>
> (a) includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt's revenues of whatever nature or from whatever source <u>that are earned or received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge</u>, including those received as damages for wrongful dismissal, received as a pay equity settlement or received under an Act of Parliament, or of the legislature of a province, that relates to workers' compensation; but
>
> (b) does not include any amounts received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, as a gift, a legacy or an inheritance or as any other windfall.

[S.C. 2005, c.47, s.58(1), amended
S.C. 2007, c.36, s.33(1), (2)]

(underlining added)

Caregiver Amount

[6] A caregiver amount is allowed both with respect to federal and Nova Scotia income tax to a tax payer who maintains a dwelling where the taxpayer lives with a dependant. The dependant may be the taxpayer's parent, provided the parent's income is limited to a specific amount and the dependence is due to an impairment in mental or physical function or the parent is over a certain age.

[7] In substance both the federal and the Nova Scotia government have decided as a matter of social policy that tax payers who in their home look after their disabled or aged parents of limited income should be helped with this tax credit which reduces their annual income tax assessments. It is something they are entitled to annually.

[8] The amount is a non-refundable tax credit. A percentage of this credit is deducted from the tax payable. Presently in the calculation of federal tax the

amount allowed is 15%. The taxpayer can only use the credit to reduce taxes otherwise payable. Any portion of the credit not needed for this purpose is lost. The credit may result in the taxpayer receiving a refund, his or her payroll deductions or quarterly payments being, with the credit, more than needed to pay the taxes assessed. There is clear law, as will be noted later, as to how such refunds will be treated year by year. However, in the present case the refunds arise from later reassessments. What was received is the total of what would have been received had the amount been claimed each year.

Case Law

[9] This matter does not appear to have been settled by the existing case law. Thus I must review in some detail the cases touching on the interaction between ss. 67 and 68. I begin with the Supreme Court of Canada decision: *Marzetti* v *Marzetti*, [1994] 2 S.C.R. 765, 26 C.B.R. (3d) 161.

[10] In issue was an income tax refund received after discharge flowing from income earned in the bankruptcy period, the income tax return for which had been filed after discharge.

[11] The question was whether this refund should be considered as property under s. 67 of the *BIA* or as "salary, wages or other remuneration from any person employing, or using the service of, the bankrupt" under the then wording of s. 68.

[12] The court first addressed whether the return could be said to be property of the bankrupt's under s. 67, notwithstanding it was not received until after discharge. It held that property is widely enough defined so that it includes that to which during the period of bankruptcy the bankrupt has at least a future and contingent interest. This is what the bankrupt has once funds are deducted from the bankrupt's pay.

[13] Given that the refund is property under s. 67, the court asked whether its treatment as property is overridden by s. 68. The court established that s. 68 must be taken as a complete code with respect to what happens to "any salary, wages or other remuneration" bankrupts receive or are entitled to receive and must be dealt with in accordance with the scheme laid out in that section and not treated as property would otherwise be treated under s. 67, namely as divisible among the creditors.

[14] It concluded that the refund should be considered as "wages". It is money which the bankrupt earned as wages. It was not paid to the bankrupt but rather to the bankrupt's credit with the income tax authorities. It is the surplus remaining after taxes are assessed. This surplus is still wages, but is only received once it is no longer needed to pay outstanding taxes.

[15] Let me quote Major J.A. of the Court of Appeal, [(1992) 14 C.B.R. (3d) 127], at paragraph 18:

> I do not conclude that all tax refunds are wages. It depends on the nature of the refund. In this case the refund was the result of taxes deducted directly from wages. Tax refunds may arise in other ways and can be determined when that case arises.

and Iacobucci J.'s decision in the Supreme Court of Canada at paragraph 80:

> Furthermore, like Major J.A., I note that there is no doubt in this case that the post-bankruptcy income tax refund derived from Marzetti's wages. Of course, tax refunds can be generated by other sources of income. In the words of Major J.A., therefore, the wages-characterization "depends on the nature of the refund".

and paragraph 88:

> To summarize briefly, s. 68 governs in this case as a complete code. Marzetti's post-bankruptcy income tax refund retained its character as wages for the purposes of s. 68. The Trustee could access that refund only through a s. 68 application. None was made.

[16] The amendment to s. 68 in 1997 results that instead of speaking of "salary, wages or other remuneration" from employment, the section now speaks in

subs. (2)(a) of "total income" which is defined to include "all revenues of a bankrupt of whatever nature or source". This would appear to widen the scope of s. 68, certainly not to narrow it. This is what I take from the following case.

[17] *Landry, Re* (2000), 21 C.B.R. (4th) 58 (Ont., C.A.), concerned an arbitrator's award for unjust dismissal from employment, part of which would be for lost wages. The bankrupt had been dismissed in 1993. She made her assignment in 1997. The arbitration had not been completed at the time of the her discharge in 1998 and was still outstanding at the time of this appeal. I quote from it:

> 30 In my view, the reasoning in ***Marzetti*** and ***Wallace*** that led to the conclusion that s. 68 was a complete code with respect to wages applies equally to this new section. The current provision applies to the "total income" of the bankrupt and, as such, is even wider than the earlier reference to "salary, wages and other remuneration"; the provision expressly excludes the application of s. 67(1)(b) [FN3]; its purpose is no different than that described in ***Marzetti*** (except that applications to the court now appear to be limited to those cases where the issue cannot be otherwise resolved); and the jurisprudential principles reviewed by the Supreme Court in ***Marzetti*** are equally relevant.
>
> 31 I therefore conclude that s. 67 is superseded by the provisions of the current s.68 in so far as the "total income" of the bankrupt is concerned. It follows that, as in *Wallace*, Landry's claim against her former employer and any consequent award relating to lost wages do not automatically vest in the trustee under ss. 67 and 71.

> Resort can only be had to s. 68 for payment of any portion thereof to the estate of the bankrupt.

[18] This case is then authority that an award prosecuted after discharge but relating to loss of wages incurred prior to bankruptcy is part of "total income" subject to s. 68. To express the point more generally one may say that s. 68 applies to income which accrued prior to assignment but was not received by the time of discharge.

[19] These two cases remain the primary authorities in this area. However, counsel for the Trustee referred me to a number of other cases which I shall briefly review.

[20] Justice Roscoe, then of this court, in *Peat Marwick Thorne Inc.* v. *Crowe et al* (1990), 97 N.S.R. (2d) 199, dealing with post-bankruptcy refunds, some of which were income tax refunds relating to overpayment and others were refunds relating to child tax credits, said at paragraph 13:

> In the absence of a specific assignment, any tax credit portion of the refund is part of the estate, but those amounts deducted from wages must be returned to the bankrupt unless an application has been made pursuant to s.68.

[21] This case was decided under the old s. 68. It does not address whether tax

credits such as received by Ms. Ford are covered by the wider descriptive language in the present version of s. 68.

[22] *Re Bolz* (2004), 7 C.B.R. (5th) 49 (B.C., Romilly J.), also considered the distinction between post-bankruptcy tax refunds, the kind dealt with in *Marzetti*, and disability tax credit refunds.

[23] The bankrupt, prior to his assignment in 2004 applied to Canada Customs and Revenue Agency for a disability tax credit. It was denied, but he reapplied subsequent to his bankruptcy, the conditions for granting such credits having changed. He was successful in obtaining a reassessment for the years 1997 to 2003 inclusive which resulted in credit being given for each year. These are thus reassessments applicable to both pre and post-bankruptcy returns.

[24] The source of the refund, the tax credit, was distinguished from the income tax refund in *Marzetti*. It is not derived from an overpayment of wages earned after bankruptcy, rather from a disability tax credit. I quote from paragraph 31:

> I see this as an important distinction as this credit is considered by the CCRA to be a non-refundable, fixed credit to aid those living with a disability or caring for individuals with a disability . A credit such as this cannot therefore be considered wages or income for the purposes of s. 68 of the *Act* and must therefore vest in the trustee.

[25] The difficulty I have with the analysis in this case is that the bankruptcy occurring in 2004 is subject to the revised version of s. 68, but the language of the decision seems to be based on the old version, particularly with reference to the word "wages". I do not think this properly considers that the connotations of "income" and "revenue" are wider than that of "wages".

[26] *Sobieski* v *Sobieski* (Trustee of) (1997), 2 C.B.R. (4th) 70 (Man.Q.B.) considers disability tax credits which were received following bankruptcy, but could have been applied for before bankruptcy.

[27] I quote paragraph 9:

> The Act clearly contemplates that the monies that are within the control of the bankrupt at the time of the bankruptcy are available for the creditors.

The court was solely concerned with whether the credits were property available to the creditors. No mention was made of s. 68 and the timing is unclear being in 1997 as to which version of s. 68 would apply. That the

credit should be found to be property under s. 67 is not relevant to the present case. What is relevant is whether considering the nature of the credits s. 67 is overridden by s. 68. This case does not address this question.

[28] *Nixon Re* (2001), 25 C.B.R. (4th) 74 (Alberta, Registrar Herauf) dealt in paragraph 1 with the question:

> Does the Disability Income Tax Credit for a child who is legally blind vest in the trustee or is it personal to the disabled child.

The bankrupt had a potential claim for a child's disability income tax credit for the years 1993 to 1998. She had become aware of her entitlement only after she had become bankrupt. She did not disclose this to her trustee. Registrar Herauf, finding in favour of the trustee, relied on two decisions. First is *Neufeld*, *Re* (1993), 22 C.B.R. (3d) 275 (Alberta, Registrar Albertstat) and *Sobriski* mentioned above.

[29] In *Neufeld* the Registrar found that such credits did not vest with the trustee of the person entitled to receive it, in this case the parent, under s. 67, but rather were held in trust for the disabled person, the child. The decision has been criticized and the trust analysis is generally not accepted.

[30] The concern of *Blotz, Sobieski, Nixon and Neufeld* is to determine whether the credits are property of the bankrupts as against someone else, namely the disabled person. This is not the problem in the present case. Rather it is the contest between whether they are property of the bankrupt's available for the creditors or part of the bankrupt's "revenue" or "total income" which, if so, must be processed not under s. 67 as property, but under s. 68.

[31] A different approach is taken in *Re Bowerbank - Buckley*, (2007) (Ont. Registrar Diamond) Estate No. 32-149001. This dealt with disability tax credits received by parents respecting disabled children. The Registrar considered himself bound by *Re Landry* and found that the credits were revenue and thus governed by s. 68.

[32] I have written two decisions which have some bearing on this problem. In the interest of maintaining consistency, I must refer to them.

[33] First is the *Bankruptcy of Daniel Albert Ruelland,* 2005 NSSC 207, where I was asked pursuant to subs. 34 (1) of the *BIA* to determine how surplus pension monies were to be treated. Mr. Ruelland was receiving a pension

from the Cape Breton Development Corporation. In 2000 pensioners were advised that there were surplus monies in the fund. In April 2005 Mr. Ruelland received notice of the amount of the surplus he would be entitled to receive. He had made his assignment in February of 2004 and had received his automatic discharge in November of that year. The entitlement was known before his bankruptcy, but not finally calculated nor disbursed until after his discharge. Following *Marzetti*, without the input of any counsel, I said in paragraph [9] and [10]

> [9] The surplus payment comes from the bankrupt's pension fund. He receives regularly payments from it. They are clearly income. The surplus payment is just another payment to which as a beneficiary of the Plan he has become entitled. Its provenance is in remuneration for past labour. "Income" must be given a wide and generous meaning. I think it must include this surplus payment.
>
> [10] My answer to the Trustee's question then is that the payment is income subject to the provisions of section 68 of the *Act*.

[34] In the course of my decision I made reference to *Re Byrne* (2003), 41 C.B.R. (4th) 6 (Alberta, Registrar Funduk). It concerned a bankrupt who on her assignment reported that she was entitled to a pension of $125,000.00 and "a severance pay out" of $45,000.00 The pension was paid to a registered plan

and the severance pay out. The severance actually reflected the amount in her pension arrangement which could not be transferred under the rules to a registered plan and was paid directly to her. She neglected to advise her trustee of her receipt of this money and soon spent it. Registrar Funduk saw this money as income to be treated according to s. 68.

[35] The second case is *Devooght* (Re), 2008 NSSC 291, which concerned $15,000.00 in a bank account being the residue of a disability claim which has been resolved and the money paid long before bankruptcy. I determined it was property under s. 67 and did not see any basis for it being brought under s. 68. The claim related to events long before the assignment. The settlement had been made and the proceeds received long before the assignment. Some of them had been used; the remainder were in a bank account and had become part of her assets, assets which she wrongfully neglected to report to her trustee.

[36] These two cases are relevant to the present discussion. One recognizes that when money is received from a pension it has the status of income, whereas

money received in the other case as disability payments which at the time of receipt might well have been treated as income, with time loose the character of income as they become incorporated into one's asset base. Income can only be traced back so far. Most of what people have is derived from what was once income or revenue.

[37] I think it is clear from the cases mentioned that, if the funds in question are "salary, wages or other remuneration" under the old wording of s. 68 or are part of "total income" including "all revenue of a bankrupt of whatever nature or source" under the present wording of s. 68 earned or in some other way crystalized during the bankruptcy period and received during the bankruptcy or after discharge, they are to be distributed under s. 68. This follows clearly from *Marzetti*. It further follows from *Landry* that this applies also to such funds earned or crystalized before assignment, but not received until after assignment into bankruptcy.

Analysis

[38] There are two questions which must be answered in the affirmative before

Ms. Ford's tax credits can be brought under s. 68.

[39] The first is whether the caregiver amount fits within the scope of "all revenue of a bankrupt of whatever nature or source" and thus is part of "total income" under s. 68.

[40] The second is whether *Landry* should be followed in saying that s. 68 applied to funds earned, accrued or otherwise crystalized before assignment.

[41] To answer the first question one must first look at the context in which "revenue" is used in s. 68. As mentioned this tax credit is a way the federal and provincial governments have been helping those who look after their relatives who are in need of care. Their need is recognized so each year that they meet the qualifications, they receive money through being given a tax credit. There is a periodicity and currency to it. It is an annual entitlement. It is intended to help them with the expenses of living day to day, particularly with the additional burden of looking after their disabled relatives.

[42] The purpose of s. 68 is to assure that bankrupts have from their income

sufficient funds to provide a reasonable standard of living for themselves and those dependent on them. It provides a method for determining what portion of their income should be available to them and what portion should be available to their creditors.

[43] The cases reviewed are not very helpful to me in answering this question. I have resorted to dictionaries for help in giving meaning to "revenue". I quote:

> The Oxford English Dictionary, Second Edition 1989:
>
> *revenue . . .*
> *5 a. An income, an amount of money regularly accruing to one; a stipend, salary*
>
> *b. A separate source or item of (private or public) income.*

and the Oxford Canadian Dictionary, second edition:

> ***revenue*** *n.* ***1 a*** *income from any source.* ***b*** *(in pl.) items constituting this.* ***2*** *a government's annual income from which public expenses are met.* ***3*** *the department of the civil service collecting this.*

The relevant portions of these dictionary definitions of "revenue" simply refer to "income" in its widest sense. There is a certain circularity in this. These are hard words to define. I think a practical approach must be taken. The dominant concern of s. 68 is that bankrupts and their dependents have a reasonable amount of money to cover the everyday expenses of living, before

they should have to make contributions from what they currently receive for the benefit of their creditors.

[44] It follows that a wide and generous meaning should be given to what constitutes revenue and thus the income subject to this section. It clearly covers what one might call the bankrupt's pay, the bankrupt's wages, commission, benefits in lieu thereof and what other modest periodic receipts they have and are expected to use for the expenses of daily life.

[45] Does a reasonable meaning of "income" or "revenue" considered in the context of s. 68 include these caregiver amounts? I think it does. They arise from the personal circumstances of the bankrupt. They are accruing payments, available yearly, in recognition of certain social goals adopted in the *ITA*. They recognize extra efforts the taxpayer makes. They come in annually, are modest in amount, intended to help a family in its current needs. I appreciate that to receive the credit one must in fact be assessed income tax against which the credit is set off; otherwise the credit is lost, being non-refundable. However, I do not see this conditional entitlement detracts from its nature as income or revenue. The language of s. 68, particularly the

words “total”, “all”, and “whatever nature or source”, I think direct that the benefit of any doubt must be given in favour of including these credits as part of “total income”.

[46] If Ms. Ford had been receiving the allowance each year as each accrued, the benefit would have been reflected in the amount of tax she would have had to pay. It would be less. She would then receive a greater refund.

[47] The tax credit would thereby have been converted into an extra refund which following *Marzetti* is income under s. 68. However, Ms. Ford did not receive the credits this way but rather they came as one lump sum for the years 1998 to 2005. I do not think that it makes any difference because I am satisfied following the discussion above that the caregiver amount is revenue caught by s. 68, whatever way it is delivered. I should note that the amendment to paragraph 67(1)(c) passed in 2007 and proclaimed in 2008 provides that “any refund owing to the bankrupt under the *Income Tax Act* in respect of the calendar year . . . in which the bankrupt became a bankrupt” shall be included as property under that section. This will limit the application of this analysis in the future.

[48] Accordingly, I can answer the first question in the affirmative.

[49] I must now consider the second question, whether the credit accruing prior to bankruptcy may be brought under s. 68.

[50] If the unproclaimed amendment to s. 68 were in effect, the task would be quite easy. It speaks of "surplus income" as being "the portion of a bankrupt individual's total income", and then says that "total income" includes "a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt <u>between the date of the bankruptcy and the date of the bankrupt's discharge</u>". . . . (underlining added)

[51] That which accrued or was earned before bankruptcy but not received between the date of bankruptcy and the date of discharge would apparently not be covered by s. 68. I understand this amendment is intended to clarify the confused state of affairs with which I am now addressing.

[52] If I am to follow *Landry*, I think the answer is very clear. Income accrued before bankruptcy is subject to s. 68 and is not property in the hands of the

trustee under s. 67.

[53] I am not aware of this matter being considered by the Court of Appeal of Nova Scotia nor by any judges of this court. *Landry* is a decision of the Ontario Court of Appeal. Although it may have led to some uncertainty which is addressed in the unproclaimed amendment, it has not been seriously criticized.

[54] L.W. Houlden, G. B. Morawetz and Janis Sarra: Bankruptcy and Insolvency Law of Canada, 3rd edition, comments in paragraph F§ 52(2):

> (2) *Generally*
> There are a number of cases which held that s. 68 only applies to earnings of a bankrupt after the date of bankruptcy, not to pre-bankruptcy earnings. In *Re Landry*, . . . the Ontario Court of Appeal, without referring to the point, applied s. 68 to a claim for damages for wrongful dismissal where the dismissal occurred four years before the date of bankruptcy. The court held that a claim for wrongful dismissal in so far as it relates to lost wages, can be equated to actual wages. Section 68 applies, therefore, to earnings before and after the date of bankruptcy.
>
> Section 68 applies to total income of the bankrupt even though the bankrupt has been discharged: *Re Landry, supra*. It is immaterial that pre-bankruptcy and income earned during bankruptcy are received after the bankrupt has obtained his discharge.
>
> (underlining added)

[55] I think the principle in *Landry* is well established. Its faults have been noted

and pending proclamation of the amendments to s. 68, it nevertheless stands. I think that it is for me to follow it. I do so and give an affirmative answer to the second question.

Conclusion

[56] Accordingly, Ms. Ford's caregiver amounts received by the Trustee are to be considered as part of her total income under s. 68. I shall be available, if the parties need help in making the necessary calculations.

[57] If costs are sought, I shall hear the parties.

R.

Halifax, Nova Scotia
April 16, 2009