CANADA
PROVINCE OF NOVA SCOTIA
COURT NO: 23659
ESTATE NO: 51-087332

IN THE SUPREME COURT OF NOVA SCOTIA

IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF

ELIZABETH MARIE COLE

D E C I S I O N

Cite as Cole (Re), 2006 NSSC 203

HEARD BEFORE:	Tim Hill, Registrar in Bankruptcy
DATE HEARD:	March 26, 2001
DECISION:	April 2, 2001
WRITTEN REASONS:	April 9, 2001
COUNSEL:	D. Bruce Clarke representing the Trustee, Goodman Associates Incorporated Paul Walter, Q.C. and Siobhan Doyle representing the Bankrupt, Elizabeth Marie Cole

The Trustee applies for directions pursuant to s. 34(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "*BIA*"). The application is stated to be made *ex parte.*

In his application the Trustee asks for directions regarding the procedures to be followed by the Trustee where the Trustee on behalf of the estate seeks, at least in part, the proceeds of a personal injury claim being pursued by the Bankrupt. In particular, the Trustee anticipates that the personal injury claim will include an amount for loss of income which the Trustee intends to seek under section 68 of the *BIA*. The Trustee is uncertain as to the appropriate procedure to follow to "protect such proceeds when they become available until such time as the estate is able to proceed for a determination under s. 68 of the Act."

Notwithstanding that the application was made *ex parte*, the Trustee did give notice to the Bankrupt. She appeared on the application and was represented by counsel.

<u>THE FACTS</u>

The only evidence before the Court is that to be found in the affidavit of the Trustee filed on the application. The facts are not complicated.

The Bankrupt is a medical doctor;

The Bankrupt was involved in a motor vehicle accident on December 6, 1998, in which she was quite severely injured. As a result of the accident, she is pursuing a claim for lost income. That lost income claim will involve both past and future lost income.

The Bankrupt made an assignment in Bankruptcy on August 1, 2000. She is a first time bankrupt and will be eligible for an automatic discharge on May 1, 2001.

The Bankrupt has only worked for a period of some four months since the accident, and then only on a part-time basis. It does appear that she will have a substantial claim for lost income. According to the Bankrupt, the bulk of the monies sought in the law suit she is now pursuing relate to loss of income, and in particular loss of future income.

At the time of her assignment, the Bankrupt owed a substantial amount of

money with respect to income tax not paid for the years 1997 through 2000.

A number of people were injured in the accident. The Bankrupt may only recover a part of her loss in the ongoing litigation, as it appears that the total claims of the injured parties may exceed the available insurance funds. Thus, she may only receive a pro rata proportion of her claim against the tortfeaser.

In any event, her claim appears to be some time away from resolution, and the actual amount she will receive, and how much of that amount should be attributed to lost income, is yet to be determined.

ISSUES

1. Do I, as Registrar, have jurisdiction to make an order giving directions where, as here, the Bankrupt objects to my jurisdiction and does not consent to me dealing with the issue?

2. What is the appropriate procedure for the Trustee to follow under the *BIA* where, as here, the amount of available "income" will be undetermined at the date of discharge?

DECISION

1. Do I, as Registrar, have jurisdiction to make an order giving directions where, as here, the Bankrupt objects to my jurisdiction and does not consent to my dealing with the issue?

Section 34(1) of the BIA states:

> A trustee may apply to the court for directions in relation to any matter affecting the administration of the estate of a bankrupt and the court shall give in writing such directions, if any, as to it appear proper in the circumstances.

While there is some authority for the proposition that s. 34(1) of the BIA is not intended to make the Court a "solicitor" for a trustee, giving advice to the trustee when the trustee is in doubt (*Re Canadian Steering Wheel Co.* (1921), 2 C.B.R. 27 (S.C.C.)), in my view it is entirely appropriate for a trustee to make an application for directions in circumstances where the trustee is in real doubt as to the proper procedure to be followed in administering an estate. Indeed, where, as here, novel issues arise with respect to a recently amended section of the BIA, it is my view that a trustee might well be considered to be negligent if he or she did not resort to an application such as this. Here a prudent trustee has made proper use of s. 34(1).

As noted in s. 34(1), the right to apply for directions is given to the trustee. The right is not given, generally speaking, to any third party, although third parties may apply for directions where a trustee fails to do so in a situation where he or she should make such an application: *Re Atlantic Felt Co.* (1961), 3 C.B.R.(N.S.) 18 (Que.S.C.).

On occasion applications for directions involve substantive matters. On other occasions such applications simply involve the provision of the court's view as to procedure rather than substance. An application for directions may be appropriate in either circumstance.

In my opinion, a Trustee may apply *ex parte* for directions where the directions sought involve matters other than matters of substance affecting the rights of third parties. However, where the rights of third parties are involved it seems to me that the third party should be given notice of the application and should be a participant in the

proceeding.

The Bankrupt argues that I have no jurisdiction to deal with this application. The jurisdiction of the Registrar is set out in s. 192(1) of the BIA, and the following parts of that section are germane:

> The Registrars of the Courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules;
>
> (e) to make interim orders in case of urgency;
>
> (f) to hear and determine any unopposed or *ex parte* application;
>
> (k) to hear and determine any matter relating to practice and procedure in the Courts.

In my view I have jurisdiction to hear and determine the application now made by the Trustee on the following bases.

Firstly, as I have indicated, where the substantive rights of a third party are not involved it is appropriate for a trustee to make his or her application for directions *ex parte*. Consequently, under s. 192(1)(f) of the BIA, I have jurisdiction to hear the matter. The simple setting of a procedure whereby the Trustee may pursue a claim against the Bankrupt under s. 68 does not give rise to matters of substance.

In the case at bar I am also satisfied that I have jurisdiction to deal with the matter under s. 192(1)(e), which provides that the Registrar may make interim orders

in a case of urgency. The Trustee is seeking directions at this point in time because of the impending automatic discharge of the Bankrupt. The Trustee is concerned that, should the Bankrupt be automatically discharged, the right of the estate to have access to any potential recovery on the part of the Bankrupt for lost income may be prejudiced. As noted in *539618 Ontario Limited* v. *Olympic Foods (Thunder Bay) Limited* (1987), 65 C.B.R.(N.S.) 143, 22 C.P.C. (2d) 195 (Ont.S.C.); affirmed (1987), 65 C.B.R.(N.S.) 285 (Ont.S.C.), a matter may be considered urgent if, as a result of the passage of time, the applicant's position will be serious threatened with irreparable harm. At least the potential for this exists, and on that basis it is my view that I should, at least in part, deal with the issues brought before me by the Trustee on this application.

Finally, in my view, this matter relates to practice and procedure in the Courts, i.e. the practice and procedure to be adopted under s. 68 of the BIA, and I may hear and determine the matter on that basis: Section 192(1)(k).

2. What is the appropriate procedure for the Trustee to follow under the *BIA* where, as here, the amount of available "income" will be undetermined at the date of discharge?

The loss of income claim being pursued by the Bankrupt in her action against the tortfeaser involves lost income arising before the date of her assignment in bankruptcy, during the period in which she is a bankrupt, and potentially for that time after she is discharged.

In *Re Hynes* (2000), 20 C.B.R. (4th) 98 (N.S.S.C.) I had occasion to review and consider the present section 68 of the BIA. In that case I concluded that the words "total income" to be found in s. 68 of the BIA refer to all the revenue of a bankrupt from whatever nature or source. Thus, total income was said to include not only income accruing during the period of the bankruptcy, but income accruing prior to the date of bankruptcy.

My decision in *Hynes* was rendered on September 18, 2000. Five days before, the Ontario Court of Appeal rendered its decision in *Re Landry* (2000), 50 O.R. (3d) 1. I was not aware of the Ontario decision at the time of rendering my own decision.

The decision of the Ontario Court of Appeal in *Landry* confirms and comforts me in the decision I reached in *Hynes*.

In *Landry* the Bankrupt had made an assignment on June 4, 1997 and had been discharged on October 15, 1998. The Trustee remained undischarged. Ms. Landry had been pursuing a claim for unjust dismissal against her former employer. The Trustee had made application before the court seeking a declaration that any amount awarded to Landry in relation to lost wages should vest in the Trustee for the benefit of the creditors of the estate. The Trustee was unsuccessful in the court of first instance. However, on appeal the Trustee enjoyed considerable success.

The Ontario Court of Appeal recognized that the judgments of the Supreme Court of Canada in *Marzetti* v. *Marzetti*, [1994] 7 W.W.R. 623 and *Wallace* v. *United Grain Growers Limited* (1997), 152 D.L.R. (4th) 1, which reviewed s. 68 of the BIA

as that section read prior to being amended in 1997:

> ... authoritatively determined that s. 68 supersedes the provisions of s. 67 insofar as 'salary, wages or other remuneration' from employment are concerned. It follows that, if this provision is applicable to this case, the Ontario Wages Act does not apply and neither does any part of s. 67. There is no automatic vesting of Landry's claim against First Air or of any part of the arbitrator's award. The trustee, and the court, must look exclusively to s. 68 to determine what part, if any, of the award will form of the bankrupt's estate for distribution to the creditors. The question becomes, does the same interpretation apply to the current s. 68 under the *BIA*? (at p. 10)

Marzetti and *Wallace* both dealt with the former provisions of s. 68 of the *BIA*. In *Landry* the Ontario Court of Appeal went on to consider the present provisions of s. 68, those being the provisions considered by this Court in *Hynes*.

The Ontario Court of Appeal concluded that "total income" in the present s. 68 provided an even wider compass than the earlier reference to "salary, wages and other remuneration". While the court did not specifically make reference to s. 68 applying to pre-bankruptcy earnings, the court did note:

> Second, the motions judge erred in his interpretation of the scope of the section. Although, from a practical standpoint, s. 68 may apply more commonly to periodic wages received during the period of time between the assignment and the discharge, I see nothing in the language of the provision that restricts its application to this time frame. It is clear from *Wallace* and *Marzetti* that s. 68 applies because of the nature of the property in question, regardless

> of the timing of the acquisition of the property or of the fact that the payment is made in a lump sum. (at p. 13).

The decision of the Ontario Court of Appeal in *Landry* both implicitly and explicitly confirms the view taken by this court that s. 68 has application to both pre-bankruptcy income and income earned during the period of bankruptcy.

At this point I digress to note that the source of the "income" in *Landry* was a potential claim for unjust dismissal which would, of course, involve a payment of monies in lieu of wages. I see nothing to distinguish that situation from this situation where the monies that the Trustee seeks to obtain under s. 68 would be monies paid to the Bankrupt in compensation for lost income.

Can the Trustee make an application under s. 68 after the discharge of the Bankrupt? The Ontario Court of Appeal in *Landry* found that the Trustee could.

The Court reviewed the definition of a "bankrupt" and concluded that the definition not only referred to the legal status of the person during the period of bankruptcy, but was also descriptive of an individual who had made an assignment. Thus, after discharge, a person might still be described as a "bankrupt", although one who had been discharged.

The Court further noted that there was nothing in the language of s. 68 which would restrict its application to the time frame between the date of Bankruptcy and the date of the Bankrupt's discharge. What is important, in the view of the Ontario Court of Appeal, is the nature of the property in question, not the period of time in which it

is acquired or received.

Finally, the Court in *Landry* could find no policy reason which would dictate that resort to s. 68 be proscribed after the date of discharge. As a practical matter, as was the case in *Landry*, it might be impossible to resort to the provisions of s. 68 prior to the discharge. That being the case, should a trustee object to the discharge of the bankrupt, leaving the bankrupt in a state of bankruptcy longer than is necessary, simply to hold open the ability under s. 68 to access "income" either not determined or available at the scheduled date of discharge? A temporal restriction on the ability of the Trustee to make an application under s. 68 would not be in accord with one of the major purposes of the *Act*, that being the economic rehabilitation of the bankrupt. In addition, given that the trustee's obligation to realize and distribute the bankrupt's estate survives the date of the bankrupt's discharge and lasts at least until the trustee's discharge, there exists no reason to so limit the trustee's ability to realize upon the bankrupt's assets.

I agree with the reasoning of the Ontario Court of Appeal and adopt it in this case.

In my opinion, the purpose of s. 68 is to allow a trustee access to a bankrupt's income for the benefit of the bankrupt's creditors. Where monies to be received by the bankrupt can properly be characterized as "income", I see no reason to artificially deny access merely because the income will be received after discharge. The important point to consider is "when was the income earned" and not "when was it received". Accountants have understood the "accrual method" of accounting for

centuries. The same principals apply here. "Income" earned prior to bankruptcy is income earned at a time when the bankrupt owed a contractual obligation to the creditors to pay the debts owed them. "Income" earned during bankruptcy is income earned during a period where a statutory duty under s. 68 may exist to contribute some of that income towards the estate for the benefit of the creditors. It would simply be wrong to allow a bankrupt to escape his or her obligations where by design or circumstance receipt of the income is delayed until after discharge. Section 68 as it now reads avoids that result.

Section 68 does not spell out the procedure to be followed where income is expected to be received by a bankrupt after discharge. What procedure should the Trustee follow?

It is not necessary for the Trustee to object to the discharge of the Bankrupt. The Trustee's ability to access funds under s. 68 of the *BIA* survives the discharge of the bankrupt.

In my opinion, the Trustee should:

1. Fix the amount to be paid to the Trustee for the benefit of the estate pursuant to s. 68(3) once he is satisfied as to the amounts to be received by the Bankrupt as "income"

2. Request mediation where the Bankrupt disagrees with the amount set by the Trustee : Section 68(6).

3. Should mediation not succeed or should the Bankrupt fail to comply with the amount to be paid as determined under s. 68, the Trustee may apply to the Court to establish the amount to be paid: Section 68(10).

4. If, prior to the amount of "income" to be received by the Bankrupt being determined, the Trustee becomes concerned that his ability to obtain any funds subject to a s.68 order may be prejudiced for some reason, the Trustee may apply for an order such as that granted in *Landry*. In *Landry* the court ordered that any monies to be paid by the employer to the bankrupt as compensation for lost wages be paid into court pending resolution of the amount to be paid under s. 68.

With respect to the last noted point, that is an application to preserve the property, it is in my view unnecessary for me on this application to determine in what circumstances and upon what basis such an order should issue.

The issuance of such an order would, in my opinion, involve more than a determination of practice or procedure, and be more than is appropriate on an application for directions such as the one made here. The granting of such an order would involve matters of substance affecting the Bankrupt. That being the case, accepting the argument put forward by counsel for the Bankrupt that I do not have jurisdiction to make a substantive order affecting the rights of the Bankrupt where she objects to my jurisdiction, I cannot deal with the Trustee's request that I make a *Landry* style order.

In any event, it is ordered and directed that:

1. The Trustee's right to make an application to the Court under s. 68 in respect to the income of the Bankrupt shall not be prejudiced by the discharge of the Bankrupt;

2. The Trustee is at liberty to follow the directions contained herein in pursuing an order under s. 68;

3. The Trustee shall further be at liberty to make an application to the court for the purpose of securing payment of any order which may be subsequently be made under s. 68.

It should be noted that any application whereby the Trustee seeks to secure payment should be made to a Justice of this Court rather than myself in the absence of the Bankrupt consenting to my jurisdiction.

I find that this was an appropriate case for the Trustee to make an application for directions. I am most indebted to both counsel for the Trustee and for the Bankrupt for their helpful comments, which were of great assistance to the Court.

I direct the Trustee have his costs of this application, to be paid by the estate, on a solicitor and client basis.

Dated at Halifax, Nova Scotia this day of April, 2001.

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Registrar in Bankruptcy