SUPREME COURT OF NOVA SCOTIA IN BANKRUPTCY AND INSOLVENCY

Citation: *Durdle (Re)*, 2020 NSSC 67

Date: 20200219
Docket: B-13-443970 (Crt No. 39442)
Registry: Halifax

BDO Canada Limited

Appellant

v.

Michael Joseph Durdle

Respondent

Judge:	The Honourable Justice Ann E. Smith
Heard:	November 18, 2019, in Halifax, Nova Scotia
Counsel:	Tim Hill, QC, Counsel for Appellant Michael Joseph Durdle, Respondent (not present)

By the Court:

Introduction

[1] This is an appeal by BDO Canada Limited ("the Trustee") pursuant to subsection 192(4) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended ("*BIA*"). The appeal was heard on November 18, 2019. The appeal is from a decision of the Honourable Registrar, Raffi A. Balmanoukian ("the Registrar") dated August 31, 2018, concerning the Trustee's application for an order of discharge for Michael Joseph Durdle, (the "Bankrupt" or "Mr. Durdle" or "Master Corporal Durdle").

[2] Mr. Durdle did not appear for the hearing of the appeal. The Court notes that Mr. Durdle wrote to the Court by letter dated November 8, 2019 (received on that date) advising that he had attempted to, but had been unsuccessful in obtaining legal counsel to represent him on the appeal. Mr. Durdle did not request an adjournment in this letter. However, he attached a letter from psychiatrist Dr. Luke Napier dated November 5, 2019 which states, in part:

> It is my strong recommendation that he not be obliged to attend the court hearing on November 18th as he is in no shape to represent himself and he has been unable to find legal counsel to help him on this issue.

[3] There were two previous adjournments of this appeal, at Mr. Durdle's request. Jamieson J. of this Court granted an adjournment on June 25, 2019, and a previous adjournment was granted in January 2019.

[4] Justice Jamieson sent correspondence to Mr. Durdle dated June 28, 2019, in which she stated that if Mr. Durdle wished to seek an adjournment in the future, it must be brought according to the *Civil Procedure Rules*, i.e. with a notice of motion and evidence. Justice Jamieson had granted Mr. Durdle's adjournment request based on an email from him and a note from Dr. Luke Napier. The Court Clerk, at my request, called Mr. Durdle after Court was opened on November 18, 2019. She reached Mr. Durdle and advised that the Court was in session. Mr. Durdle advised that he did not intend to be present for the hearing of the appeal.

[5] On that basis, with no request or motion for an adjournment before the Court, the appeal was heard.

[6] In his decision of August 31, 2018, the Registrar interpreted s. 68 of the *BIA* and concluded that the following payments made to Mr. Durdle did not constitute income:

(a) $16,778 received under a wage loss replacement program;

(b) $28,107 received as a “rehiring allowance”, which included $19,765 in severance pay;

(c) $49,289 received as disability income.

Issues

1. What is the appropriate standard of review when considering an appeal of a decision of a Registrar of Bankruptcy?

2. Did the Registrar err in concluding that the payments received by the Bankrupt under a wage loss replacement program, as a “rehiring allowance” and as disability income to be “income” pursuant to section 68 of the *BIA*?

Issue 1: What is the appropriate standard of review when considering an appeal of a decision of a Registrar in Bankruptcy?

[7] Section 192 of the *BIA* sets out the powers of a Registrar. Subsection (4) of s. 192 provides an avenue of appeal from a decision of a Registrar:

> 192(4) A person dissatisfied with an order or decision of a registrar may appeal therefrom to a judge.

[8] Under subsection 183(1) of the *BIA*, the Nova Scotia Supreme Court has jurisdiction to deal with bankruptcy matters arising in this province.

[9] In the case of *Re Achilles* (1993), 23 C.B.R. (3d) 20, it was stated that:

> An appeal under s. 192(4) of the Act is a true appeal and the decision of Master Bolton sitting as a Registrar in Bankruptcy should not be disturbed unless it is clearly wrong.

[10] In *Re G.W. Holmes Trucking (1990) Ltd.*, 2005 NSSC 290, Robertson J. of this Court, quoting from the case of *Olympia & York Developments Ltd., Re.* (1998), 30 O.TC. 369 (Ont. Bktcy), wrote:

> 12. … An appeal from the Registrar in Bankruptcy is a true appeal and not a hearing *de novo*. The appellant must satisfy this Court that the Registrar arrived at an incorrect result in law. Rosenberg J. summarized this standard of review in the following fashion, in *Re Kenny* (1997), 149 D.L.R. (4th) 508 (Ont. Gen. Div.), at pp. 514-515:
>
> > An appeal under s. 192(4) of the *BIA* from an "order" of a Registrar is a true appeal and not a hearing *de novo*. Accordingly, the appellant must satisfy the court that the Registrar erred in principle or in law in the way he has applied or exercised his discretion or that he omitted the consideration of, or misconstrued some fact (citations omitted).

[11] Robertson J. continued:

> 13. and quotations from Holden & Morawetz:
>
> > Unless there is demonstrated on the part of the Registrar some error of principle, some failure to take into account a proper factor or some taking into account of an improper factor which demonstrably led to a wrong conclusion, or some error of law, the Bankruptcy Judge should not on appeal interfere with a decision of the Registrar.
>
> 14. I will not take the time now to read quotations from each of these cases. Simply put all these cases stand for the principle that unless it is demonstrated on the part of the Registrar that he committed some error of principle, some failure to take into account the proper factors or taking in account of improper factors which demonstratively lead to a wrong conclusion or some error of law the Bankruptcy Judge should not on appeal interfere with the decision of the Registrar. So accordingly, the cases are pretty clear on this point. It is a true appeal. It is not a hearing *de novo* and the Registrar saving and accepting an [sic] some overriding and palpable error his view should stand.
>
> 15. So, accordingly the Registrar's findings are to be treated with considerable deference.

[12] In *Barrington and Vokey Limited (Re)*, [1996] N.S.J. No. 532, Saunders J. when he was a member of this Court adopted the following from a decision of Anderson J., in *Re Barukory Investments Limited (Ont)* (1979), 32 C.B.R. (NS) 185:

> . . . Save in extraordinary circumstances, I do not think the differing opinion of a judge, if he entertains one, should be substituted for that of the registrar. Putting it in a slightly different fashion, unless there is demonstrated on the part of the registrar some error in principle, some failure to take into account a proper factor or some taking into account of an improper factor, which demonstrably led to a wrong conclusion. …

[13] The Nova Scotia Court of Appeal in *Flynn v. Halifax (Regional Municipality)*, 2005 NSCA 81, considered the concept of "palpable and overriding error" in the context of a ground of appeal. Bateman J.A. stated:

> [13] An appeal is not a re-trial. The powers of an appellate court are strictly limited. A trial judge's factual findings and inferences from facts are insulated from review unless demonstrating palpable and overriding error. On questions of law the trial judge must be correct. A question of mixed fact and law involves the application of a legal standard to a set of facts and is subject to a standard of palpable and overriding error unless it is clear that the trial judge made some extricable error in principle with respect to the characterization of the standard or its application, in which case the error may amount to an error of law and, therefore, be subject to a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 S.C.R. 235).
>
> [14] Palpable error was clearly and simply described recently by the Ontario Court of Appeal in *Waxman v. Waxman* (2004), 186 O.A.C. 201 (Ont. C.A.):
>
> > [296] The "palpable and overriding" standard addresses both the nature of the factual error and its impact on the result. A "palpable" error is one that is obvious, plain to see or clear: *Housen* at 246 [S.C.R.]. Examples of "palpable" factual errors include findings made in the complete absence of evidence, findings made in conflict with accepted evidence, findings based on a misapprehension of evidence and findings of fact drawn from primary facts that are the result of speculation rather than inference.
> >
> > [297] An "overriding" error is an error that is sufficiently significant to vitiate the challenged finding of fact. Where the challenged finding of fact

> is based on a constellation of findings, the conclusion that one or more of those findings is founded on a "palpable" error does not automatically mean that the error is also "overriding". The appellant must demonstrate that the error goes to the root of the challenged finding of fact such that the fact cannot safely stand in the face of that error: *Minister of National Revenue v. Schwartz*, [1996] 1 S.C.R. 254; 193 N.R. 241 at 281 [S.C.R.].
>
> …
>
> [300] . . . the "palpable and overriding" standard applies to all factual findings whether based on credibility assessments, the weighing of competing evidence, expert evidence, or the drawing of inference from primary facts. ...
>
> [emphasis added]

[14] Accordingly, unless the Trustee can establish that the Registrar erred in law or committed palpable factual errors and inferences made from those factual errors, the Registrar's decision should not be overturned.

Issue 2: Did the Registrar err in concluding that the payments received by the Bankrupt under a wage loss replacement program, as a "rehiring allowance" and as disability income to be "income" pursuant to section 68 of the *BIA*?

The Registrar's Decision

[15] The Registrar reviewed Mr. Durdle's background circumstances and outlined his task in disposing of the discharge application before him:

> [3] Master Corporal Durdle served his country for over 24 years. He is a career soldier. He is now 49 years old, and was 45 at the time of his military discharge. He jointed the forces as a young man. He continues to suffer from severe service-related PTSD. He is under professional care.
>
> …
>
> [5] I, as Registrar, have no medical role and profess no medical expertise; but I do have a function and corresponding duty in finding a just and appropriate disposition of this discharge application, given the income streams I refer to below.

> [6] Two days after Remembrance Day 2013, MCpl Durdle made an assignment in bankruptcy, his second (his 1998 assignment resulted in an automatic discharge late the same year). A 2012 proposal, presumably for most of the same debts at issue at present, was unsuccessful.
>
> [7] There is a significant list of creditors. That is not to be taken lightly, particularly in a second bankruptcy. As of the 2015 report pursuant to Section 170 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended ("*BIA*"), there are $73,476 in proven unsecured creditors against only minor non-exempt assets.
>
> …
>
> [9] In 2014 – that is, during the bankruptcy period – MCpl Durdle received significant taxable receipts. As summarized in the Trustee's affidavit, these included:
>
> 1. $16,778 from a wage loss replacement plan;
> 2. $28,107.04 from a rehiring allowance, including $19,675 in severance pay;
> 3. $23,594.10 in pension income;
> 4. $49,289 in disability income; and
> 5. $3,624 in employment income.
>
> [10] In these circumstances, how much if any of this should be considered "surplus income" for the purposes of Section 68 of the *BIA*, and the Superintendent's Standards on that subject pursuant to Directive 11R2, as it stood in 2015?

[16] Section 68(2) of the *BIA* provides a definition of "total income." Total income is the basis for determining what bankrupts are expected to pay into their estates during their bankruptcy:

> "total income"
>
> (a) Includes, despite paragraphs 67(1)(b) and (b.3), a bankrupt's revenues of whatever nature or from whatever source that are earned or received by the bankrupt between the date of bankruptcy and the date of the bankrupt's discharge, including those received as damages for wrongful dismissal, received as a pay equity settlement or received under an Act of Parliament, or of the legislature of a province, that relates to workers' compensation; but
>
> (b) Does not include any amounts received by the bankrupt between the date of the bankruptcy and the date of the bankrupt's discharge, as a gift, a legacy or an inheritance or as any other windfall.

[17] The Registrar continued:

> [11] I begin with the general principle that Section 68 is a complete code for determining what is, and is not, payable to the estate for income purposes: *Marzetti v. Marzetti*, [1994] SCR 765. It is to be given a large and liberal interpretation: *Wallace v. United Grain Growers Ltd.*, [1997] SCR 701, and *Re Ford*, 2009 NSSC 124. An illustration of the scope of case flows that can come within Section 68 is illustrated in Houlden, Morawetz and Sarra's *Annotated Bankruptcy and Insolvency Act* at Section F111(3).
>
> [emphasis added]

[18] Accordingly, the large and liberal interpretation of Section 68 means that it includes all income, unless there is a good reason why it does not, including any statutory or common law exclusions.

[19] In terms of the common law, the case law establishes that creditors should not benefit from the pain and suffering of the bankrupt individual. These cases will be reviewed later in this decision.

Disability Income under the Canada Pension Plan

[20] Mr. Durdle was paid $49,289 as disability income under the Canada Pension Plan. This payment is noted on Mr. Durdle's 2014 T4(P), Statement of Canada Pension Plan Benefits. The Registrar addressed the payment of disability income. He prefaced his analysis by noting that a payment which is considered to be taxable income under the *Income Tax Act*, is not determinative as to whether the payment is "income" for the purpose of the *BIA*:

> [17] As I have said above, s. 68 is a complete code for that purpose. To use an easy example, some non-taxable periodic private disability insurance payments may not be taxable for income tax purposes, but I find it difficult to envisage a situation in which they would not be "income" for the purposes of Section 68. What I face here is the opposite – payment streams or lump sums which are taxable for Revenue Canada's purposes, but which for the reasons I will now discuss, I exclude for the purposes of Section 68 of the *BIA*.
>
> [emphasis added]

[21] The case law shows that a disability amount is *prima facie* included in total income, subject to an applicable statutory or common law exception, as the Registrar acknowledges (para. 11-13 of his decision).

[22] However, a review of the Registrar's decision does not show an evidentiary link between the Bankrupt's condition and the CPP disability payments.

[23] The Registrar referred, with agreement, to the decision of Registrar Bray in *Re Duffney*, 2007 NBQB 142. At issue in that case was whether risk allowance, sometimes known as "danger pay" for members of the Armed Forces should be included in Section 68 income. Registrar Bray determined that risk allowances should not be included, stating:

> Those who in the course of their rehabilitation, however, render exemplary service to their nation should be allowed to keep the stipend offered in recognition of such efforts [risk allowances]. This is completely congruent with public expectations of fairness and balance in insolvency practice.

[24] The Registrar in the within proceeding reasoned:

> [20] I would add the paraphrase, "those who render exemplary service and who suffer service-related illness or injury as a consequence should also be allowed to keep the stipend offered in recognition of such efforts".
>
> [21] *A fortiori*, if periodic payments for danger pay in a theatre of service are excluded for the purposes of s. 68 of the *BIA*, a lump sum paid or payable as a consequence of illness suffered as consequence of service is as well, whether or not it is income for Income Tax purposes.
>
> [emphasis that of the Registrar]

[25] The Registrar also referred to the decision of his predecessor, Registrar Cregan, in *Re Smith*, 2009 NSSC 261, stating that that decision was even more on point to Master Corporal Durdle's circumstances as the "income stream in that case was a pension arising from illnesses arising from her military service." Registrar Cregan in *Re Smith* stated:

> It is well established law that any cause of action arising from bodily injury, mental suffering, or injury to reputation or character or the proceeds therefor is personal and does not vest in the trustee.
>
> I quote Houlden and Morawetz: *Bankruptcy and Insolvency Law of Canada*, Fourth Edition, F 241, Page 4-176:
>
> > Where a cause of action arises from bodily or mental suffering or from injury to reputation or character, the cause of action belongs to the bankrupt and does not vest in the trustee.
> >
> > It is not the policy of the law to convert into money for creditors the mental or physical anguish of the bankrupt.
>
> Put another way the creditors are not entitled to benefit from that which a bankrupt receives to make whole her injured body, mind or reputation.

[26] In *Re Smith*, Registrar Cregan concluded that a tax-free Veteran's Affairs Canada disability pension should not be used in calculating income under s. 68. The Registrar based this finding on his characterization of the pension as being akin to a payment for general damages in a personal injury action.

[27] In a 2000 decision of Registrar Herauf, *Re Bird* (2000), 187 Sask R. 156, CPP disability payments were held to not form part of the bankrupt's property. It is noted that in that case the bankrupt did not dispute the trustee's contention that CPP disability payments should not be considered as income for the purposes of s. 68.

[28] In *Re Bird*, the Registrar stated:

> 16 I have carefully considered the authorities referred to and cannot come to the same conclusion as the courts in *Halldorsson* and *Burton* that C.P.P. disability benefits are assets of the bankrupt estate, save for the child benefit portion. I have no difficulty with the child benefit portion not being considered assets of the bankrupt's estate.
>
> 17 However, upon the ordinary meaning of the statutory provisions referred to by the bankrupt I am unable to distinguish C.P.P. disability benefits from other pension benefits that are not subject to execution, seizure or attachment and accordingly, do not form part of the property of the bankrupt.
>
> 18 As well, I can find no reason to distinguish C.P.P. disability payments from the other benefits paid out under the plan. The *Canada Pension Plan Act* does not distinguish between a "retirement pension," disability pension," or a "survivor's pension" with regards to the *Bankruptcy and Insolvency Act*.
>
> 19 Therefore, I find that Canada Pension Plan disability benefits are pension benefits that are not subject to execution, seizure or attachment. By virtue of s. 67(1)(b) these benefits do not form part of the property of the bankrupt.
>
> 20 I turn to the bankrupt's third argument that disability benefits are analogous to personal injury damage awards and thus are not property of the estate. In *Re Ali* (1987), 62 C.B.R (N.S.) 64 (Ont. S.C.) it was held that disability payments are not compensating the bankrupt, but rather they are partially replacing income he would have otherwise received. I accept this proposition and do not find disability benefits to be analogous to injury damages.
>
> 21 In dealing with the final issue I have no hesitation in concluding that the C.P.P. disability benefit should be considered as income for the purpose of s. 68.
>
> [emphasis added]

[29] Finally, the Registrar referred to another decision of Registrar Cregan, *Re Rose*, 2014 NSSC 202, where the Registrar found that awards made to members of

the Armed forces for injuries received in service, are to be distinguished between workers' compensation awards, which are specifically included in the Section 68 definition of "total income."

[30] This Court notes that Houlden, Morawetz and Sarra's 2019 *Annotated Bankruptcy and Insolvency Act* provides at Section F111(3):

> The following have been held to come within s. 68: (citations omitted)
>
> (1) Damages for wrongful dismissal in so far is it relates to lost wages…Where an employer agrees to pay a sum to an employee to end a relationship but the payment is not related to wage loss, the payment does not constitute "wages"
>
> (2) Disability payments.
>
> (3) Severance pay.
>
> (4) Income tax refunds.
>
> (5) Pay equity payments made by the federal Crown, even though the civil servant no longer works for the federal government.
>
> (6) Support payments to farmers under the AIDA program.
>
> (7) Payment in excess of income tax limits from a pension plan on termination of employment.
>
> [emphasis added]

[31] This Court finds that the case law supports a finding that CPP disability benefits are exigible under section 68, as they are not analogous to general damages for injury, but are for income replacement. CPP benefits are to be contrasted with danger pay, a tax-free Veterans' Affairs Canada disability pension and a lump sum disability award granted to the bankrupt pursuant to the *Canadian Forces Members*

and Veterans Re-establishment Act, each of which, being analogous to general damages is not exigible under section 68.

[32] There was no evidence before the Registrar with respect to the reasons for Mr. Durdle's receipt of the CPP disability payments, which the case law shows are usually considered as income for the purposes of section 68. There was a letter from Dr. Luke Napier dated Jaune 28, 2018 addressed to Ms. Burke which states:

> Please be advised that Mike is a patient of mine with severe PTSD from Canadian Forces service.
>
> I strongly advised he not attend any court/insolvency hearing for medical reasons.
>
> Please call me as needed.

[33] This letter does not say when Mr. Durdle was diagnosed with PTSD nor tie his illness to the receipt of CPP disability benefits.

[34] In finding that the CPP disability benefits were not income for the purpose of section 68, the Registrar's decision was incorrect on the question of law (whether a CPP pension was exigible under section 68 of the *BIA*), and contained a palpable and overriding error (to find that the CPP pension was related to the Bankrupt's Armed Forces service, in the absence of evidence to support such a finding).

Wage Loss Replacement Plan - $16,778

[35] The Registrar then considered whether monies received by Mr. Durdle pursuant to a wage loss replacement plan were to be included as "total income" within the meaning of Section 68. The Registrar stated:

> [25] The wage loss replacement plan – although as noted above, wrongful dismissal awards (at least for pecuniary loss) would generally be included in "total income, " as would continued salary during a period of pay in lieu of notice, I believe for the same policy reasons as noted above that in the service illness context this stands on a different footing. It is pith and substance compensation for the fact that he is unable to continue to serve, not for wrongful termination or the like. Its direct nexus is to his service-related illness. It is not part of s. 68 *BIA* total income.
>
> [emphasis added]

[36] The evidence before the Registrar concerning the wage loss replacement plan was contained in the Trustee's application for an order of discharge dated July 31, 2018. The Affidavit of Kimberley A. Burke, Vice-President of BDO Canada Limited was filed in support of the application. Ms. Burke stated in her affidavit that Mr. Durdle provided his income tax information for 2014. This information consisted of Mr. Durdle's 2014 income tax return. Ms. Burke states in her affidavit that Mr. Durdle's 2014 tax return shows that his net income for 2014 tax year was $121,198 and that amount includes $16,778 as payments from a wage loss replacement plan, of which $3,355.70 was deducted for taxes. The T4A statement of pension, retirement, annuity and other income shows that these wage-loss replacement plan amounts were received from The Manufacturers Life Insurance Company.

[37] The evidence before the Registrar included a letter from Dr. Luke Napier, psychiatrist, dated June 28, 2018, which is addressed to Ms. Burke and states:

> Please be advised that Mike is a patient of mine with severe PTSD from Canadian Forces service.
>
> I strongly advise he not attend any court/insolvency hearing for medical reasons.
>
> Please call me as need.

[38] The Registrar did not refer to this letter in support of his finding that the wage loss replacement payments in support of his decision that the payments were not part of section 68 total income.

[39] As noted previously in this decision, the letter does not say when Mr. Durdle was diagnosed with PTSD. It is therefore unknown why the wage loss replacement benefits were paid by Manufacturers Life in 2014. Further, wage loss replacement payments replace income. These payments are not analogous to the payment of general damages for pain and suffering.

[40] This Court finds that the Registrar erred in law when he exempted wage replacement payments from the total income of the Mr. Durdle.

"Re-Hiring" Allowance - $28,107

[41] The Registrar then considered payments made to Mr. Durdle as Canadian Forces Severance Pay. He called these payments a "rehiring allowance" amounting

to $28,107, which included $19,765 in severance pay. Clearly these amounts were not a "rehiring allowance" but a "retiring allowance." The monies were paid when Mr. Durdle left the Armed Forces, not when he was "re-hired" by the Forces. The Registrar stated:

> [26] The rehiring allowance – I apply the same logic. The compensation directly arises from MCpl. Durdle's inability to continue in service. It is only fit and proper that he be provided with all appropriate assistance in moving forward in remunerative civilian employment. He is still a comparatively young man.
>
> [emphasis added]

[42] The difficulty with the Registrar's statement that "the compensation directly arises from MCpl. Durdle's inability to continue in service" is that there was no evidence before him to support that conclusion. This is to be contrasted with the situation before the Registrar in *Re Rose* where there was evidence that monies were paid to Mr. Rose as a lump sum under the *Canadian Forces Members and Veteran Re-establishment Act*.

[43] The evidence before the Registrar included a letter dated February 20, 2018 addressed to Mr. Durdle from C.J. Fewer, Master Warrant Officer, Release, Benefits & Administration, Director Pension and Social Programs which provides:

> MCpl. (Ret'd) Durdle,
>
> The purpose of this letter is to advise that your Canadian Forces Severance Pay (CFSP) was paid in the amount of $19,675.42 on End Pay run 2014. The payment was for 24.16 years at Cpl IPC (4) pay rate $4,986.00. Federal Taxes were deducted in the amount of $8,432.32.

> In addition, for the same period you were approved for 3 days of Leave Cash-Out. The payment was processed as follows:
>
> - A Direct Deposit for $715.63 less, $35.43CPP, $158.62 Federal Tax and $13.45 EI.
>
> Should you require further information, pleas contact the Release Personnel Pay Office….

[44] This Court finds that it is clear that Mr. Durdle was paid severance pay calculated on the basis of his years of service and pay rate. There was no evidence before the Registrar that these amounts were paid to compensate Mr. Durdle for injuries received during service. To the contrary, the evidence was that Mr. Durdle was paid severance pay upon his release from the Armed Forces. The summary of Mr. Durdle's T4 statement lists $14,000.00 as an "eligible retiring allowance" and $14,107.74 as "not-eligible retiring allowance." Income tax deducted on those amounts was $8,432.32. That figure matches the amount withheld as federal taxes on the $19,675.42 severance pay payment to Mr. Durdle referenced in Master Warrant Officer Fewer's letter set forth above.

[45] Counsel for the Trustee provide this Court with excerpts from Chapter 204 of the National Defence Policies and Standards – Pay of Officers & Non-Commissioned Members. Section 4 deals with Severance Pay. It provides that eligible service for Canadian Forces Severance Pay (CFSP) "means a member's number of years of service after the member's most recent date of enrolment", but does not include any years where various factors were at play. This Court notes that

Master Warrant Officer Fewer's letter also refers to CFSP. There is nothing in his letter which suggests that Mr. Durdle received anything other than severance pay which he was entitled to receive by virtue of his years of service.

[46] This Court concludes that the Registrar committed palpable and overriding error when he accepted the severance payment amounts paid to Mr. Durdle were to compensate him for injuries received in service. There was no evidence before the Registrar that that was the case.

Conclusions

[47] With respect, the Registrar erred in law and/or committed palpable and overriding errors when he concluded that the CPP disability payments, the retiring allowance and the wage loss replacement monies were not income under s. 68 of the *BIA*.

[48] Accordingly, the appeal is allowed, and the Registrar's decision set aside.

[49] Given this decision, I invite counsel for the Trustee to advise whether the matter should be remitted back to the Registrar, given the Registrar's comments in para. 36 of his decision.

[50] Finally, the Trustee sought an extension for the time to file the within appeal and for service of same. This Court exercised its discretion pursuant to s. 187(11) of the *BIA* to grant that extension. Section 187(11) provides:

> Where by this Act the time for doing any act or thing is limited, the court may extend the time either before or after the expiration thereof on such terms, if any, as it thinks fit to impose.

[51] Section 30 of the *Bankruptcy and Insolvency General Rules* provides:

> A notice of motion or a motion, as the case may be, must be filed at the office of the registrar and served on the other party within 10 days after the day of the order of decision appealed from, or within such further time as the judge stipulates.

[52] The Registrar's written decision was released on August 31, 2018.

[53] Counsel for the Trustee advised this Court that the Trustee was not represented by counsel at the discharge hearing. Mr. Hill, QC was retained to pursue the within appeal and filed the Notice of Motion (Notice of Appeal) with the Court on September 10, 2018. That was within the time limited by the Rule.

[54] Mr. Durdle lives in Cape Breton. The Notice of Appeal was served on him on September 24, 2018, outside the time stipulated by s. 30 of the *Bankruptcy and Insolvency General Rule*.

[55] I find the following sections of Mr. Hill's brief to be an accurate representation of the relevant case law:

It is submitted that the starting point to consider an extension of time to serve a Notice of Appeal was highlighted in *Howard v. Martin*, 2014 ONCA 309

> 26 The test on a motion to extend time for filing a notice of appeal is well-settled. The overarching principle is whether the "justice of the case" requires that an extension be given. Each case depends on its own circumstances, but the court is to take into account all relevant considerations, including:
>
> 1. whether the moving party formed a *bona fide* intention to appeal within the relevant period;
>
> 2. the length of, and explanation for, the delay in filing;
>
> 3. any prejudice to the responding party that is caused, perpetuated or exacerbated by the delay; and,
>
> 4. the merit of the proposed appeal.

In *Leighton v. Best*, 2014 ONCA 667 the court allowed an extension of time to file a notice of appeal. The court considered the four factors outlined in *Howard v. Martin* and noted that potential prejudice to the other party is not determinative:

> 1. The issue on this motion is whether Leighton's time to serve and file a notice of appeal should be extended. The test on such a motion is well-settled: *Howard v. Martin*, 2014 ONCA 309, 42 R.F.L. (7th) 47 (Ont. C.A.), at para. 26. It is whether the justice of the case requires that the extension be granted having regard to the circumstances of the particular case and all relevant considerations including: 1) whether the moving party formed a *bona fide* intention to appeal during the time permitted for an appeal; 2) the length of the delay and the explanation for the delay; 3) the merits of the proposed appeal; and 4)any prejudice to the responding party. (The order in which the third and fourth factors are considered is sometimes reversed.)
>
> …
>
> 18. I agree that the prejudice to Best from being unable to obtain an earlier complete discharge should not prevent an extension from being granted. Overall, I am of the opinion that it is in the interest of justice to extend the time to file a notice of appeal. The motion is allowed. Leighton shall have five days from the release of these reasons to file a notice of appeal.

In *Hanley v. Coopers & Lybrand Ltd.*, the court allowed an extension to appeal because the lawyer thought he had 30 days, not 10, to file the Notice of Appeal:

> 4. There is a further principle that recognizes that counsel may be misled by a different time limit under a federal statute and that his client should not be prejudiced or have his right of appeal denied by the failure of counsel to be aware of that shortened time limit.

> In *J. C. Kerkhoff & Sons Contracting Ltd. v. Royal Bank* (1984), 57 BCLR 41 the court allowed an extension where the applicant had a *bona fida* intention to appeal, the appeal had merit, and there was no prejudice to the respondent. In addition, the court held that not telling the respondent their intention to appeal was not determinative:
>
> > 14 I turn to the second factor. I do not think it established that the bank's intention to appeal was communicated expressly or impliedly, to the respondent or its solicitors within the ten-day period. I am not prepared to give any weight adverse to the appellant because of his failure to inform. That failure was not prejudicial to the respondent in any way that I can detect. The time limit period was very brief.

[56] The Trustee satisfied the four factors outlined in *Howard v. Martin* (*supra*): intention to appeal, length and reason for the delay, lack of prejudice to the Bankrupt and merits of the appeal.

[57] Although the Trustee did not inform the Bankrupt of the appeal within ten days after the Registrar's decision was released, that is not determinative. The appeal was filed in time. Service of the appeal on Mr. Durdle took longer given his location in Cape Breton. Further, no prejudice resulted to Mr. Durdle in the circumstances. He had ample time to retain counsel to represent him on the appeal. Obviously, the appeal was meritorious.

Smith, J.