SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Frost (Re)*, 2021 NSSC 296

Date: 20211018
Docket: No. 43236
Registry: Halifax
Estate Number: 51-2276280

In the Matter of: The bankruptcy of Andrew David Frost

Judge: Raffi A. Balmanoukian, Registrar

Heard: June 25, 2021, in Halifax, Nova Scotia

Counsel: Stanley W. Hopkins, for the Trustee, S.W. Hopkins & Associates Inc.
Andrew David Frost, not appearing

Balmanoukian, Registrar:

[1] Andrew David Frost, now 53, made his assignment in bankruptcy on July 26, 2017. Some time thereafter (in mid-2018, according to the Trustee) he emigrated from Canada leaving in his wake unpaid tax bills[1] and undischarged duties under the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA"). In doing so, he left his Trustee and other stakeholders to twist in the wind, explicitly telling the Trustee that he was not going to complete those duties and had no intention of doing so.

[2] This is despite Mr. Frost having written to the Trustee on October 9, 2018 looking for an update on his bankruptcy status as he had "applied for a job here in the UK that requires a background check, and this is one of the areas that is covered." Mr. Hopkins promptly replied, setting out the balance of duties required, namely filing of income and expense information (and remittance of any surplus income), 2017 tax filing, second counselling (available by video) and provision of the bankrupt's current address. He did none of those things.

[1] Approximately $99,000 out of a total of $170,000 in proven unsecured debts. Most of the balance are shortfalls on a mortgage ($38,647.54, now owing to CMHC) and an automobile ($13,066.44)

[3] On that footing, the matter first came before me on June 14, 2019. The Trustee requested an adjournment *sine die*. I declined to put the file in what would effectively be eternal purgatory. I considered that to be an inadequate response to a bankrupt who availed himself of the BIA's protections while in Canada as was his right, but then then quite explicitly flipped the bird to stakeholders, including this Court.

[4] I directed the Trustee to make inquiry as to what if any reciprocal insolvency arrangements are in place between Canada and the United Kingdom. The Trustee made those inquiries, and for current purposes it is adequate to say that the cost-benefit analysis and funds available in the estate make pursuit of such matters impracticable by the estate.

[5] Follow ups by the Trustee with Mr. Frost did not result in compliance by the bankrupt.

[6] When the matter returned to Court on December 11, 2020, I refused the bankrupt's application for discharge, with leave to re-apply upon compliance with all BIA duties. I also directed the Trustee, if those matters were not completed within three months (or arrangements in place to do so within a prescribed time), to seek its discharge under s. 41(2) of the BIA. That section reads:

> The court may discharge a trustee with respect to any estate on full administration thereof or, for sufficient cause, before full administration. (emphasis added)

[7] Mr. Frost did not do anything further to complete his duties. The matter was originally set for May 7, 2021 but was adjourned when the Court re-entered its COVID-19 essential services model. It returned on June 25, 2021; at that time, I indicated that I would discharge the Trustee, with these reasons and written directions to follow.

[8] Why would the Court be interested in the Trustee's status in these circumstances and direct it to seek its discharge from the Court, rather than leave the Trustee to proceed in due course through the Superintendent (which it may do under BIA General Rules 62-65 in summary administration estates, absent creditor or Superintendent objection)?

[9] As these reasons will develop, I accept that it is "sufficient cause" under s. 41(2) BIA to discharge a Trustee when a bankrupt has, without reasonable context or rational excuse or justification, defaulted egregiously in compliance with obligations under the BIA. The knock-on effects of that Trustee's discharge should thereupon be explicit to stakeholders.

[10] Section 69.3 of the BIA pertains to the stay of proceedings against a bankrupt, and reads in part:

> **69.3 (1)** Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.
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> **(1.1)** Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged. (emphasis added)

[11] With great respect to any who may still hold a different view, my reading of this plain language is that once the Trustee has been discharged – whether through the BIA General Rules or by the Court – the stay is lifted and creditors may pursue their remedies if the bankrupt has not been the subject of an absolute, suspended, or possibly conditional discharge[2]. The purpose of my direction in these proceedings is to ensure not only that the bankrupt does not have the benefits and protections of the BIA when he has cavalierly and overtly flouted his corresponding obligations, but that the Trustee is not unduly burdened. Further, I believe that creditors, insofar as they are willing and able, should know that they may pursue their remedies at law without having to seek independent orders to "lift" the stay under s. 69.4.

[12] I presume to say that the weight of authority, with the possible exception of certain decisions from Manitoba, support this reading of the effect of a Trustee's

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[2] I say "possibly" as there is both caselaw and policy grounds for the proposition that a bankrupt who has flouted a conditional order should not be entitled to the protection of the BIA after the Trustee has been discharged, such as in *Thiessen v. Antifaev, infra*. Presumably, there will be few if any cases in which a conditional order that is in the process of being performed will have the Trustee discharged, and presumably if there is reactivated performance a Trustee can be reappointed under s. 41(11) BIA, reinstating the stay. However, as I caution at the conclusion of these reasons, I leave that decision to a proper case.

discharge, when the bankrupt has not received an absolute, suspended, or possibly conditional order of discharge. To recent cases, I now turn roughly in chronological order.

[13] In *Canada (Attorney General) v. Ramjag*, 1995 CanLII 9107 (ABQB), Registrar Breitkreuz dealt with a prior iteration of s. 69.3(1), which then read:

> 69.3(1) Subject to subsection (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy, until the trustee has been discharged. [emphasis added]

[14] In *Ramjag*, as here, the bankrupt did not comply with his duties, and was undischarged at the time of hearing; the trustee was discharged. The Crown sought determination whether the stay remained in place and Court leave was required to pursue its remedies. The learned Registrar set out s. 69.3 as it then read, and observed that the prior version of the legislation (before amended to read as set out above) required "leave of the court and on such terms as the court may impose." Those words were removed in 1992. The Registrar concluded that once the Trustee had been discharged and the bankrupt was undischarged, no further leave was required, and the creditor, if successful in collection, did so on its own account. He stated at para. 18 *et seq*:

> [18] With respect to the line of cases that follow the decision of Mr. Justice Collins in *Kott v. Waxman* and *Markis v. Soccio* with all due respect to these judgments,

> it does not seem just or equitable that the bankruptcy should be able to file for bankruptcy and be allowed to sit in bankruptcy without complying with his duties under the *Bankruptcy and Insolvency Act*. A bankruptcy should be entitled to the stay provisions under this Act until he shows that he is unwilling to perform his duties under this Act. Trustees usually obtain their discharges because they cannot obtain any co-operation from the bankrupt.
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> [19] The stay provided for by s. 69 is a stay ipso facto and it is crucial to the orderly administration of the estate of the bankrupt. The stay ensures that a creditor will not benefit or improve his position at the expense of the other creditors (*Amanda Designs Boutique Ltd. v. Charisma Fashions Ltd.* (1972), 1972 CanLII 685 (ON CA), 17 C.B.R. (N.S.) 16 (Ont. C.A.)). Yet before the trustee is discharged, he has usually tried his best to make sure the bankrupt complies with his duties. The trustee has usually gathered in the property he can from the bankrupt and the trustee has distributed what funds he has on hand. Once the trustee is discharged, there is no longer a need for the stay. Therefore, the bankrupt should lose his right to the stay and a creditor should be free to continue or commence any type of proceeding against an undischarged bankrupt or his property.
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> [20] Furthermore, on the plain meaning of s. 69.3(1), a creditor should not be required to seek leave of the court to commence or continue any action against the bankrupt once the trustee has been discharged. [emphases added]

[15] Registrar Herauf (as he then was) adopted *Ramjag* in *Re Fraser* (1996), 41 CBR (3d) 33 (Sask. QB)

[16] Shortly thereafter, Registrar Lee considered and rejected *Ramjag* and *Fraser* in *Re Morgan*, 1999 CanLII 14178 (MBQB). However, the Registrar did so on the basis that s. 69.3 *as it then read* was "not unambiguous" in removing the requirement for leave, given the historicity of the 1992 amendment[3]. The Registrar also appears to have been influenced by the fact the Trustee sought to be re-

[3] As will appear, 69.3(1.1) came later, and 69.3(1) amended to remove the terminal reference to the Trustee.

appointed, over CRA objection, to administer the estate. At paras. 25-7, the Court stated:

> [25] In *Re Fraser* the Registrar does not consider s.69.4. As pointed out in the Case Comment of Scott Bomhof which immediately follows the reported decision of *Re Fraser* in 41 C.B.R. (3d), there are some strong counter arguments to the conclusion reached by the Registrars in *Re Ramjag* and *Re Fraser*. The 1992 stay provisions of the *BIA* were part of a larger amendment which saw the introduction of new circumstances where a stay is imposed under the *BIA*. Bomhof suggests that the addition of s.69.4 to reflect this makes the text deleted from s.69 redundant to s.69.3(1). Accordingly, it is not clear and unambiguous that the 1992 amendment was intended to be a legislative direction that an action could be continued or commenced against an undischarged bankrupt once the trustee had been discharged. (at.p. 40)
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> [26] Bomhof also suggests that it is the entirety of the bankruptcy legislation and not strictly s. 69.3 which imposes a stay until the bankrupt is discharged. He cites a portion of the decision of Collins, J. in the *Markis* case and concludes at p. 41 that:
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> > "….. the BIA contains a complete code of procedures that apply to protect the bankrupt's property from preferential seizure by one or more creditors both before and after the discharge of the trustee. The result of allowing individual creditors to proceed against an undischarged bankrupt after the trustee has been discharged is that creditors who are able to get to court the quickest will have the best chance of receiving a distribution of the bankrupt's assets. Given that all of the bankrupt's exigible property, including any property acquired by the bankrupt after the date of bankruptcy but before the bankrupt's discharge, is vested in the trustee, there would appear to be no reason for commencing or continuing an action for a provable debt other than to harass a bankrupt in the hope of obtaining a preferred settlement outside of the BIA distribution."
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> [27] I agree with Bomhof that this has historically been and continues to be the intent of the *BIA* and the predecessor bankruptcy legislation. Although there is something attractive about the notion of placing greater negative consequences on an undischarged bankrupt who has not cooperated with the bankruptcy process, I am persuaded that a much clearer legislative amendment is required to give that effect. I am not prepared to accede to the interpretation of s. 69.3(1) given in *Re Ramjag* and *Re Fraser* and, having rejected that interpretation, I am satisfied that the trustee should be reappointed to complete the administration of the estate and that the application of the bankrupt for his discharge should be considered on its merits. [emphases added]

[17] *Morgan* was followed by Justice Hambly in *McKerron v. Marshall*, 2002 CanLII 49600 (Ont. SC). It was *not* followed by Registrar Sproat in *Re Ross*, 2003 CanLII 64260.

[18] As will appear, it is my view that the addition of 69.3(1.1) provided, to the extent such was needed, the "much clearer legislative amendment." I believe that (with respect to those asserting otherwise) if *Morgan* ever was good law, it is not now.

[19] Next, we come to a decision of Justice Moir in *Graves v. Hughes*, 2001 NSSC 68. It is not directly on point, in that he was deciding that the Small Claims Court had jurisdiction to decide and declare whether a debt at issue before it was or was not discharged by a bankruptcy. But it guides me. In that case, the bankrupt *had* been discharged. The claim was grounded in fraudulent misrepresentation and, if so established, would be a debt that survived the discharge by virtue of s. 178(1) BIA. Justice Moir stated:

> I agree that the question of debts surviving bankruptcy is for the ordinary civil courts. Respectfully, I do not agree that the Small Claims Court is excluded from that jurisdiction.
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> It is helpful to bear in mind the scheme for treating debts owed by a bankrupt. I shall begin by describing that scheme and then I shall turn to the specific question of jurisdiction to determine whether a debt survives bankruptcy. Bankruptcy is initiated by an assignment made by the debtor, by a receiving order granted on petition of a creditor or by the failure of a proposal formally made under the legislation. It is not the initiation

of bankruptcy which releases liability. That happens at the end. In the meantime, the legislation stays proceedings and it eradicates judgments. Actions and judgments are stayed "until the trustee has been discharged": *Bankruptcy and Insolvency Act*, s.69.3(1). Generally, this applies to all claims against the bankrupt. The exceptions include child or spousal support: s.69.41 and s.121(4); claims not provable in bankruptcy such as liabilities arising wholly after bankruptcy: s.121(1); and actions to enforce security: s.69.3(2). Formerly, the *Act* permitted any creditor to proceed with an action or to enforce a judgment "... with leave of the court and on such terms as the court may impose.": see *Bankruptcy Act*, RSC 1985, c.B-3, s.69(1). Presently, the *Act* provides for the court to make a declaration that a stay no longer applies to a creditor "subject to any qualifications the court considers proper": s.69.4. The authorities still speak of granting leave: see, for example, Houlden & Morawetz at p.336, or chapter F53. Subsection 69.4 was enacted because of the new provisions respecting stays consequent upon proposals. I do not think there is any difference of substance between the new declaration and the old leave as regards stays under s.69.3. Leave is granted in a variety of circumstances, which are commented upon in Houlden & Morawetz's chapter F53. These include actions permitted to resolve complex factual disputes, to determine unliquidated claims, to determine contingent liabilities, and to resolve claims for personal injury. In addition to staying proceedings until the trustee is discharged, the *Bankruptcy and Insolvency Act* gives the assignment or receiving order precedence over judgments and remedies for the enforcement of judgements, such as recorded certificates of judgment: s.70(1). It is by virtue of this provision, rather than the provisions for stays, discharge of the trustee or discharge of the bankrupt, that judgments are eradicated by bankruptcy. Thus, at the beginning of a bankruptcy liabilities are put in suspense. Action cannot be taken without leave, actions already underway are stayed, as are processes to enforce judgments, and a creditor's enforcement rights under a certificate of judgment as well as the judgment itself are eradicated. During the course of the bankruptcy creditors may prove their claims and the trustee will call in any property of the bankrupt, liquidate property and make distributions. The last steps in the administration of an estate are usually the discharge of the trustee and discharge of the bankrupt. These are discrete. Although the trustee and the bankrupt will usually be discharged at about the same time, this does not always happen. Corporations are never discharged from bankruptcy unless all debts have been paid in full: s.169(4). The court may refuse to discharge an individual and it may suspend discharge, even though the administration of the estate is complete and the trustee is to be discharged: s.172. Also, it may be necessary for the trustee to continue administering property of the bankrupt long after the bankrupt deserves to be discharged. It is now possible for some bankrupts to be automatically discharged where the estate is in summary rather than ordinary administration: s.168.1, and provision has been made in that regard for discharge of trustees also: s.155(j). Otherwise, both discharges require an order of the Bankruptcy Court: s.172(1) and s.41(1). As I said, release from debts and other liabilities comes at the end. Subsection 178(2) provides "Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy." Subsection 178(1) provides for the exceptions including (e): "any debt or liability for obtaining property by false pretenses or fraudulent misrepresentation."

> So, we could summarize the scheme for treating debts and other liabilities under the *Bankruptcy and Insolvency Act* as involving, in the beginning, an eradication of judgments and a stay of proceedings respecting claims provable in bankruptcy; through the course of the bankruptcy until discharge of the trustee, a continuation of the stay subject to any order the Bankruptcy Court might make relieving the stay; and, at or near the end of the administration, a release of all claims provable in bankruptcy except those described in s.178(1). [emphases added]

[20] Justice Moir was speaking of court-ordered removals of the stay of proceedings, but it is worth noting his comments (again, in the light of s. 69.3 as it then read) that the stay is in place "until the trustee has been discharged" and then, as now, a Court will lift a stay if it considers it just to do so in the circumstances. The difference is that now (if not before) the stay is *also* lifted when the Trustee has been discharged. This is as alluded to by Justice Moir, as discussed in the *Ramjag* and *Fraser* cases, and as now explicitly added in s. 69.3(1.1) to add the "much clearer legislative amendment" called for in *Morgan*.

[21] Next, we have the notable decision of Justice Hood in *Thiessen v. Antifaev*, 2003 BCSC 197. In that case, the bankrupt had received – but had not complied with – a conditional order, which order clearly disapproved of Mr. Antifaev's conduct throughout. Eventually, the Trustee obtained its discharge from the Court. Justice Hood reviewed the authorities to date as follows:

> Issue No. 2
>
> Whether The Court May Grant Mr. Thiessen Relief From The
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> Stay Provisions Of s.69.3 As They Relate To His Action

[24] Neither Counsel spent any time on this issue. I would have preferred detailed briefs with sufficient analysis of the law which might have been of some assistance, given the state of the law. I was provided with a book of some relevant authorities. And I am unable to follow suit. The issue turns on the meaning to be given to the wording used in s.69.3(1) of the ***Act***. The section reads in part as follows:

> 69.3(1) Subject to sub-s.(2) and ss.69.4 and 69.5 on the bankruptcy of any Debtor, no Creditor has any remedy against the Debtor or the Debtor's property, or shall commence or continue any action, execution or other proceeding, for the recovery of a claim provable in bankruptcy, until the Trustee has been discharged. (My emphasis).

[25] Once a bankruptcy takes place there is an automatic Stay of Proceedings against all of the ordinary Creditors, which remains in effect unless and until the Trustee is discharged, or a Creditor who is affected by the operation of the Stay provisions of ss.69 to 69.3(1) applies to the Court under s.69.4 and obtains a Declaration that a particular section no longer operates in respect of his claim; and which lifts the Stay.

[26] In the case at Bar the Trustee has been discharged, and one might conclude from the specific wording of the section that the Stay no longer applies once a Trustee has been discharged, and that Mr. Thiessen can proceed with his action to Judgment, and execute upon it, without having to apply to this Court for leave to do so. However, there is a difference of opinion among reported decisions, some seemingly based on different provisions of the ***Act***, as to whether leave of the Court is necessary in order to take proceedings against an undischarged debtor after his Trustee has been discharged.

[27] Such a conclusion would be consistent with one line of authorities of which the ***Attorney General of Canada v. Ramjag*** (1995), 1995 CanLII 9107 (AB QB), 33 C.B.R. (3d) 89 (Alta. Q.B), a decision of Alberta Registrar Breitkreuz, is an example. In that case it was held that on the plain meaning of s.69.3(1) an unsecured creditor should not be required to seek leave of the Court to commence or continue any action against the undischarged Bankrupt once the Trustee has been discharged; and that the unsecured creditor should also be able to keep any proceeds recovered, based upon the plain language of the section.

[28] The decision of the British Columbia Court of Appeal in ***Potapoff v. Kleef*** (1964), 1964 CanLII 442 (BC CA), 6 C.B.R. 165 is said to be representative of the opposite line of authorities; and ***Re: Morgan*** (1999), 1999 CanLII 14178 (MB QB), 12 C.B.R. (4th) 48 (Man. Q.B.), a decision of Manitoba Registrar Lee, certainly is.

[29] In ***Re: Morgan***, Registrar Lee refused to follow ***Ramjag*** and other similar decisions, and held that even though the Trustee has been discharged, an unsecured creditor cannot take proceedings against the undischarged Bankrupt unless leave of the Court is obtained.

[30] In ***Potapoff,*** Mr. Justice Norris speaking for the Court, had occasion to interpret then s.40(1) of the ***Act***, which subsequently became s.69.(1) which is the predecessor to s.69.3(1) of the present ***Act***. Section 40(1) then provided:

> Upon the filing of a proposal made by an insolvent person or upon the bankruptcy of any debtor, no creditor with a claim provable in bankruptcy shall have any remedy against the debtor or his property, or shall commence or continue any action, execution of other proceedings for the recovery of a claim provable in bankruptcy until the Trustee has been discharged, or until the proposal has been refused, unless with the leave of the Court and on such terms as the Court may impose. (My emphasis).

It is to be noted that the provisions relating to the filing of a proposal made by an insolvent person, contained in s.40, are not contained in s.69.3(1). However, they are contained in s.69.1(1)(a) of the ***Act***, which contain the same Stay provisions contained in s.69.3(1) pertaining to the Trustee being discharged, with the added provision "or the insolvent person becomes bankrupt." Section 69.1(1)(a) then is, as with regards to proposals, quite similar to s.40(1), save for one important difference, that the words: "unless with leave of the Court and on such terms as the Court may impose" contained in and with which s.40 ends, are not contained in s.69.1(1)(a).

[31] And more importantly, these words, on which Norris J. seemingly relied, are not contained in s.69.3(1). And it will be seen that in my opinion the effect of s.69.3(1) being subject to s.69.4 is not the same. Having to obtain leave to have a remedy or to commence an action and so on is one thing. Having to lift a Stay, although to achieve the same result, is another. The former is general in the sense that it could be interpreted as being required even after the Trustee has been discharged, as Mr. Justice Norris seemingly found. The latter, on the other hand, is more specific and limiting in that this format makes it quite clear that under s.69.4 the applicant creditor or other person must obtain a declaration lifting the Stay with regard to his remedy or action, and that s.69.4 only comes into play when the Stay or prohibition is in effect. Section 69.3(1) and s.69.4 cannot possibly be interpreted as requiring leave of the Court to have a remedy or to commence an action once the Trustee has been discharged. I will return to this point in a moment. [emphases those of Hood, J]

[22] He went on to discuss the Bomhof article approved in *Morgan*, and continued:

> [63] I am unable to agree with the opinions expressed by Mr. Bomhof. In my view the clear and specific provisions of s.69.3(1) should not be overridden by other provisions of the ***Act***, whether general such as s.67(1)(c) or otherwise specific such as s.38, by basic principles of bankruptcy law set out in the cases or by interpretative concepts such as

legislative intent or the purpose of the ***Act*** as a whole; all of which perhaps are clearer in their consideration and application when the situation, as I have said, is the usual or normal one, where the Trustee is actively engaged in his duties. In my view, as I have said, the situation is different, and I think the legislation envisaged this, when the Trustee has done what he could do in the bankruptcy and has obtained his discharge.

[64] If the legislature intended to repeal s.40(1), for that would be the result of the argument advanced, the legislature could easily have said so. In my view the more recent and specific provisions of s.69.3(1) should prevail over the sections, principles and concepts referred to, if in fact there is any competing; for in the circumstances the provisions are not inconsistent with them or sufficiently inconsistent to warrant the opposite and implausible interpretation of them. In my view, the legislative intent is quite clear, given the specific provisions of ss.69.3(1) and 69.4.

[65] What is being stayed under s.69.3(1) is the unsecured creditor's remedy, his claim provable in the bankruptcy, and his right to bring action to recover it. When the Stay ceases in the circumstances of the Trustee being discharged, his remedy and right of action are revived; unless another equally specific section of the ***Act*** can be referred to as continuing the Stay or bringing about a new Stay which is absolute and remains until the bankrupt is discharged, and thereafter by s.178(2). There is no such section or sections evidencing such a legislative intent.

[66] I respect the basic tenets of bankruptcy law referred to in ***Markis*** and emphasised by Mr. Bomhof. However, the fears expressed about the possible disruption of the orderly distribution of the property of the Bankrupt on a *pari passu* basis, and of the honest bankrupt's ability to integrate himself back into the business world, and the foot race by the unsecured creditors to obtain an advantage and so on are not warranted in the circumstances referred to. Before obtaining his discharge the Trustee would have distributed any property of the Bankrupt which was found, and integration is solely up to Mr. Antifaev. And I ask what property is being referred to as the subject matter of a creditor's foot race, when the Trustee has been discharged.

[67] Generally, as in the case at bar, the Trustee obtains his discharge when he can do no more in the bankruptcy, and after a conditional discharge has been made. The only thing that remains to be done in the bankruptcy is for Mr. Antifaev to obtain his absolute discharge by paying the monies referred to in the order for conditional discharge. If he does so and obtains his absolute discharge, then Mr. Thiessen's proceedings to recover any portion of his claim, at whatever stage, would be barred.

[68] Unless and until Mr. Antifaev obtains his absolute discharge, why should Mr. Thiessen not be able to proceed in his action to recover as much as he can of his claim? There is no evidence before me of other property which might be the subject matter of the foot race, other than perhaps some income. The only claim Mr. Thiessen wishes to advance is his personal claim, and he is hopeful that he will be able to recover

> some of it by continuing in his action at his own expense in the same manner as a s.38 proceeding.
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> [69] This is not the case of a Trustee obtaining his discharge in the ordinary event of the completion of the bankruptcy proceedings. The proceedings in this case apparently never really got under way. Mr. Antifaev simply stonewalled or refused to cooperate with the Trustee. No monies were collected. It was in these frustrating circumstances that the Trustee obtained his discharge. Mr. Thiessen's attempts to recover his damages for the vicious assault on him which occurred almost ten years ago, from Mr. Antifaev who apparently has been working throughout this period, then is in limbo**.** This is grossly unfair.
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> [70] In summary then, on the basis of the post-***Potapoff*** sections of the ***Act***, what I consider to be the clear and unambiguous provisions of ss.69.3(1) and 69.4, I am of the opinion that the ***Act*** does not require Mr. Thiessen to obtain leave of the Court to commence an action, to continue his present action, or to execute on any Judgment obtained against the Bankrupt or his property. [emphasis added]

[23] *Thiessen v. Antifaev* was criticized by the learned editors of the Houlden, Morawetz and Sarra *Annotated Bankruptcy and Insolvency Act*. At F119 of the 2009 looseleaf release, the editors stated that the ability to execute against the undischarged bankrupt "appears to overlook the provisions of s. 67(1)(c) that the property of the bankrupt includes all property that devolves upon the bankrupt before his [sic] discharge." With respect to the learned editors, I believe this to be a *non-sequitur* as the ability to execute is not limited to non-exempt property. In fact, is may be more likely than not that such execution would be satisfied, if at all, by garnishment of an income stream rather than against property. As well, Hood, J. specifically considered and rejected the s. 67 argument at para. 63 of the decision.

[24] Next, we have *Re Dyrland*, 2008 ABQB 356. After observing that approximately 20% of Alberta bankrupts are undischarged at the time the Trustee is discharged, Justice Veit was succinct:

> 3. In Alberta, once a trustee is discharged, does the statutory stay of proceedings against the bankrupt contained in the BIA come to an end even though the bankrupt is undischarged?
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> [41] The short answer to the question is: Yes.
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> [42] Although it is apparently not the law in Manitoba (***Morgan***), in Alberta, it has been decided that once the trustee in bankruptcy is discharged, but the bankrupt is undischarged, there is no longer a stay under section 69.3(1): ***Ramjag***. A similar result was reached in Saskatchewan (***Re Fraser*****),** in Ontario (***Re Sherazee***), in British Columbia (***Thiessen***) and by the Quebec Court of Appeal (***Fortin***).
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> [43] With respect, I agree with the Registrar's decision in ***Ramjag,*** and similar case law including that from the Quebec Court of Appeal, to the effect that the combination of the clear wording of s. 69.3, together with the legislative change that was effected in that section from the previous wording of the predecessor section (which change removed the words requiring leave of the court), together with the policy implications of an uncooperative bankrupt maintaining the benefit of a stay, result in the conclusion that when a trustee has been discharged, if the bankrupt is not discharged, there is no longer any statutory stay of proceedings against the bankrupt.

[25] And now we come to the 2009 amendments, which amended 69.1(1) to remove the terminal reference to the Trustee's discharge, and added 69(1.1). Those amendments were proclaimed in force on September 18, 2009. The Senate briefing book's clause-by-clause analysis sets out the following comment:

> The addition of subsection (1.1) clarifies that a creditor may realize against the property of the bankrupt without leave of the court once the trustee has been discharged. This change was necessary as creditors could not realize claims, without court approval, after the trustee was discharged, since a debtor who has not been discharged would still be protected from creditor claims under stay of proceedings provisions of the BIA.

[26] As I have discussed, this statement may have been over-inclusive at the time. Although there was conflicting authority, the weight (with the exception of *Morgan* and *McKerron*) appears to have tilted towards the ability to proceed without leave against an undischarged bankrupt for whom the Trustee had been discharged. To my thinking, the key in the Senate analysis is the word "clarifies," making it explicit that in such circumstances the undischarged bankrupt was in effect "back to square one" *vis-à-vis* their creditors.

[27] In *National Retail Credit Services v. Delorme*, 2011 MBQB 290, the Manitoba courts again had occasion to visit the issue, this time in light of the 2009 amendments (which, to reiterate, added s. 69.3(1.1) to the BIA). Ultimately, Justice Clearwater (after analyzing the conflicting authorities) appears to recognize that the amendment was remedial[4] and stated:

> [15] Registrar Lee's analysis and conclusions in ***Re Morgan*** [as opposed to the decisions to the contrary noted in paragraph 12 of these reasons (***Re Fraser*** and ***Re Ramjag***)] is supported by the fact that Parliament recognized what it considered to be a deficiency in the legislation which caused (or could cause) prejudice to legitimate creditors when a trustee had been discharged and a bankrupt failed to pursue a discharge by including the following amendment to the ***BIA*** in 2005 (S.C. 2005, c. 47):
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> > 62.(1) Subsection 69.3(1) of the Act is replaced by the following:
> >
> > Stays of proceedings – bankruptcies

[4] Justice Clearwater did not cite, but I am reminded of, the well-known provision in s. 12 of the *Interpretation Act*, RSC 1985, c. I-21 that "Every enactment is deemed remedial, and shall be given such fair, large and liberal construction and interpretation as best ensures the attainment of its objects."

> 69.3(1) Subject to subsections (1.1) and (2) and sections 69.4 and 69.5, on the bankruptcy of any debtor, no creditor has any remedy against the debtor or the debtor's property, or shall commence or continue any action, execution or other proceedings, for the recovery of a claim provable in bankruptcy.
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> End of stay
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> (1.1) Subsection (1) ceases to apply in respect of a creditor on the day on which the trustee is discharged.

> [16] Unfortunately, at least from the perspective of a creditor such as the plaintiff who is claiming to have an enforceable cause of action, this amendment was not proclaimed into force until September 18, 2009, several months after the plaintiff commenced the second action and obtained the second default judgment. The plaintiff failed to seek or obtain leave to bring this action in January 2009 in the face of the stay of proceedings and the September 18, 2009 amendment, *supra*, is clearly not retroactive, and cannot validate the commencement of the second action without leave. The failure to obtain leave in this instance does not necessarily result in the second action being void, at least under the scheme of the bankruptcy legislation, but, at best, it is voidable. In appropriate circumstances courts have granted leave "*nunc pro tunc*". (emphasis added)

[28] In other words, s. 69.3(1.1) removes any ambiguity, but it was of no assistance to the plaintiff in *National Retail Credit* as Justice Clearwater concluded that *Morgan* was correctly decided for the law as it then stood and the change was not retroactive. The decision does, however, appear to recognize that post-September 18, 2009, the discharge of the Trustee lifts the stay as against an undischarged bankrupt and creditors may pursue their remedies prospectively.

[29] To put it another way, if I am wrong in following the *Ramjag*, *Fraser*, and similar line of cases, I am now able to assert that by virtue of the 2009 amendments, the stay ends when the Trustee is discharged. See also Robert De

Toni, *Essential Bankruptcy Law for the Civil Litigator: Orders under sections 38 and 69 of the Bankruptcy and Insolvency Act*, 2014 CanLIIDocs 33397 at p.20.

[30] *Bank of Nova Scotia v. Avramenko*, 2020 SKQB 54 is a final, *post*-2009 case which considers the *Fraser/Ramjag pre*-2009 cases and reaches the same conclusion, apparently without considering the law to have changed substantively as a result of those amendments. In that case, the bankrupt had received a conditional (but unfulfilled) order and remained undischarged. The Trustee had been discharged. Two years elapsed between the conditional order and the Trustee's discharge. The bankrupt was less than impressive in his conduct, before or after that conditional order. The bank sought to renew a January 2009 judgment. The Court allowed the renewal to proceed.

[31] *Avramenko* does not appear to have considered the fact that the January 2009 judgment pre-dated the September 2009 proclamation of s. 69.3(1.1), and the retroactivity (or retrospectivity) issue discussed in *National Retail Credit*. Instead, Elson J. specifically adopted and endorsed the *Fraser/Ramjag* analysis, and allowed the renewal to proceed.

[32] When construed in this way, it may be suggested that *Avramenko* decides that s. 69.3(1) as it read before 2009, and s. 69.3(1) and (1.1) as they now read,

achieve the same result. I am inclined to agree and opine that the Senate was correct in asserting this was a clarification, with all respect to the Manitoba authorities (and *McKerron*); but in all events this is now a distinction without a difference at least insofar as it pertains to debts incurred after proclamation of s. 69.3(1.1) in September 2009.

[33] Therefore, in the present case it is appropriate that when a bankrupt flouts his obligations – apparently not only without justification or excuse, but with overt contempt and a "catch me if you can" attitude, it is appropriate for the Court to:

- Direct the Trustee to be on its way and obtain its discharge, at least after 'fair warning' to the bankrupt as to the consequences thereof (*Re Jewkes*, 2020 NSSC 287);

- Order discharge of the Trustee, with or without other orders respecting the bankrupt as the circumstances warrant; and

- Arrange to highlight to creditors that this has occurred and what is the result of the Trustee's discharge.

[34] Mr. Frost has had more than fair warning. He has left Mr. Hopkins, his creditors, and the Court to twist in the wind from the other side of the pond. To

allow the stay of proceedings to remain in place would make a mockery of the integrity of the insolvency system.

[35] It would also do a disservice to the creditors for this not to be brought to their attention in an overt fashion. The problem with the Trustee simply proceeding to its discharge under the General Rules, or inserting a reference in its statement of receipts and disbursements of its discharge, is that the effect may not come suitably to the attention of creditors. I will return to this.

[36] I add four concluding points of caution.

[37] First, the Court should not simply proceed as of rote to the Trustee's discharge because a file has been slow or difficult, if there is a just explanation or context. These may well exist. As I put it in *Jewkes*:

> [3] Sometimes, there has been a lack of activity on a file because of a Debtor's own difficulties. She or he may have mental or physical health problems. They may have not been within easy means of communication for perfectly valid reasons, such as overseas military service or remote work commitments. They may have genuinely misunderstood the duties incumbent upon them. It is the responsibility of the Trustee and, that failing, the Court to set matters aright. Such files, generally, I adjourn either with or without day, sometimes coupled with a s. 68 order if I deem it appropriate.
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> …
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> [29] At the risk of overservicing Justice Saunders' notation that courts and others will "bend over backwards" to serve the legitimate interests of those seeking justice and access to justice, I provide Mr. Jewkes one final avenue. I have noted that there can be narrow instances in which "radio silence" has a rational explanation. The Trustee was aware of none. That does not mean they are non-existent. If any he has, Mr. Jewkes will have one week from the date of publication of this decision to contact the Trustee, with a

> fulsome explanation and a coherent plan for expeditious compliance with his duties. The Trustee is to communicate such developments, if any there be, to the Court. I will hold off issuing the relevant order, which the Trustee is to prepare, for that period.

[38] As it turned out, in *Jewkes* my disposition in fact had the effect of "flushing out" the bankrupt, who then complied with his obligations and obtained an absolute discharge some months ago. I am happy when this is the end result, and I am seeing it in a number of cases in which bankrupts have it made known to them that they will get their fresh start when they keep up their end of the BIA's statutory bargain. As I have observed, Mr. Frost has eschewed this opportunity.

[39] My second point of caution is how the end of the stay and resumption of creditors' rights of collection intersects with any statutory or contractual limitation period. I am inclined to the view that the stay suspends the running of the limitation periods and the clock resumes when the stay is ended (*Re Dyrland*, *supra*, at para. 40; *Business Development Bank of Canada v. Quattro Exploration and Production Ltd.* 2021 ABQB 638); however, this was not raised or argued before me. I leave such issues to an appropriate case.

[40] Third, I leave open the issues suggested above when a bankrupt has obtained, but not complied with, a *conditional* order. The reasons for and extent of non-compliance can run the span of the human experience. As I have noted, I would expect it to be unusual for a Trustee to be discharged when a conditional

order is an ongoing work-in-progress, as opposed to one that has fallen fallow or is simply ignored. The bankrupt working towards compliance, and the stalled bankrupt may well be on completely different footings as to whether they should remain cloaked with the BIA's protective stay, or not. If they are unable, as opposed to unwilling, to comply with a conditional order, they have their remedy under s. 172(3), 172.1(6), or 187(5) as the case may be – it is not an adequate answer to "ostrich" a valid order.

[41] I would leave to a case by case analysis whether the Court would discharge a Trustee in respect of whom there is a valid and subsisting conditional order, and under what circumstances. The lack of compliance, and other conduct, appears for instance to have influenced the Court in *Antifaev* and in *Avramenko*, and I would put these on a different footing from, say, a bankrupt who is undischarged because of a missing pay stub.

[42] For clarity, this does not affect the circumstances under which the Trustee may seek its discharge under BIA General Rules 62-65 in summary administration estates, or what if any reaction the Superintendent may have in such matters. I do, however, expect that most cases of egregious default would come before me first; my practice in "radio silence" files would, in general, follow the *Jewkes* "fair warning" method and, absent compliance or a rational explanation, follow with a

direction to the Trustee to seek its discharge *from the Court* under s. 41(2). I expect this decision would thereupon provide guidance as to what stakeholders may expect.

[43] Fourth, nothing in this decision should be misconstrued as discouraging or affecting re-appointment of a Trustee when appropriate under s. 41(11) BIA.

[44] Returning to Mr. Frost, and others of his ilk. I append to this decision a form of letter I am directing the Trustee to send to all known (proven or unproven) creditors[5] with its statement of receipts and disbursements, and this Court's Order. This shall serve as a template for Trustees in similar situations.

[45] The Trustee is discharged; its SRD is approved (with the appreciation of the Court for its efforts and observance that may reduce, but has no discretion to increase summary administration fees)[6]; and it is directed forthwith to send creditors a cover letter, on a separate page and in substantially the form annexed to this decision, in at least 14 point type.

Balmanoukian, R.

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[5] I appreciate that Mr. Hopkins inserted a note in his draft SRDs to like effect; for the reasons I have discussed, I believe a more overt notification is appropriate.

[6] *Re Freckleton*, 2021 NSSC 144, supplemental reasons at 2021 NSSC 146; see also *Wasserman, Arsenault Ltd. v. Sone*, 2002 CanLII 41494 (Ont. CA); *Re Thomson*, 1991 CanLII 4468 (NSSC); *Re MacFarlane*, 2019 NSSC 201; and *Re Rafter*, 2018 NSSC 331.

Appendix

Form of letter to be sent to all known creditors on Trustee letterhead

To: All known creditors of the estate of [bankrupt]

[Date]

Please be advised that the Trustee of the estate of [bankrupt] was discharged by order of the Supreme Court of Nova Scotia in Bankruptcy and Insolvency on [date], by reason of non-compliance by the bankrupt with duties imposed under the Bankruptcy and Insolvency Act. A copy of that order, and of the Trustee's statement of receipts and disbursements, are enclosed.

The effect of the Trustee's discharge is to lift the stay of proceedings against the bankrupt, by virtue of s. 69.3(1.1) of the Bankruptcy and Insolvency Act. Creditors may now pursue any rights and remedies they have at law, directly against the bankrupt. The bankrupt's last known address and contact information is:

[insert last known information, including telephone and email if available]

Yours very truly,

[Trustee signature, as former Trustee of the estate of {bankrupt}]

Enclosures:

Order of the Supreme Court of Nova Scotia in Bankruptcy and Insolvency

Statement of Receipts and Disbursements