Update on Insolvency Law in Atlantic Canada

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Introduction

It has been an active and interesting year in insolvency law in Atlantic Canada. As was likely the case in other regions, the considerable number of amendments to the Bankruptcy and Insolvency Act R.S.C., 1985, c. B-3 ["BIA"] and Companies’ Creditors Arrangement Act, R.S.C. 1985, c. C-36 ["CCAA"] proclaimed in September 2009, created much discussion. To date, however, the treatment of these amendments by Atlantic courts has been minimal. In general, beyond the amendments, Atlantic Canadian courts have issued a number of important decisions in both commercial and personal insolvencies. It is beyond the scope of this paper to review all insolvency decisions from Atlantic Canadian courts this past year. The following will summarise decisions that would be most significant to members of law societies across Canada.

Property

Treatment of the Supreme Court of Canada’s decision in Saulnier – Re Caines

It is undeniable that the fishing industry continues to be an important sector in Atlantic Canada. It is therefore an appropriate starting point to consider the impact of the Supreme Court of Canada’s decision in Saulnier v. Royal Bank of Canada, 2008 SCC 58, [2008] 3 S.C.R. 166 ["Saulnier"] and the decision that fishing licenses are property of the debtor fisherman and therefore vest in a Trustee in Bankruptcy.

The Newfoundland and Labrador Supreme Court (Trial Division) decision in Re Caines, 2010 NLTD 72, [2010] N.J. No. 123 (QL) is one of the first reported treatments of Saulnier in the Atlantic Region. Caines, the bankrupt fisherman, possessed a 100% interest in a commercial fishing license. In the original statement of affairs, the fishing license was shown to have an estimated dollar value of one dollar and an estimated realizable dollar value of zero. This reflected the pre-Saulnier position that there was no property interest in a fishing license. At the time, the Federal Minister of Fisheries and Oceans was clear that fishing licenses were not property in the hands of fisherman as the license could be revoked at any time pursuant to federal legislation. On April 3, 2008, Caines was discharged without realization on the fishing license.

The Saulnier decision was released on October 24, 2008, prior to the Trustee’s discharge. On December 22, 2009 the Trustee brought a motion that the fishing license had vested and thus the Trustee should be permitted to realize on the interest in that license.
The first issue to be decided by Hall J. of the Newfoundland Superior Court was whether the Supreme Court’s decision in Saulnier affected a vesting of Caines’ fishing license at the date of bankruptcy even though the date of bankruptcy predated the Saulnier decision. Caines argued that the state of the law prior to Saulnier, was at best, uncertain, and thus Saulnier could have no retroactive and retrospective effect. Hall J. noted that nowhere in the Saulnier decision did the Supreme Court of Canada indicate that the decision should be either prospective only or both retrospective and prospective. Hall J. noted the Supreme Court of Canada’s decision in British Columbia v. Imperial Tobacco Canada, 2005 SCC 49, [2005] 2 S.C.R. 473, in which Major J. for a majority of the Court held that the developments in the common law have always had retroactive and retrospective effect. However, Caines cited a number of decisions where courts ruled that their decision should not have retroactive effect. Hall J. distinguished these cases, holding that retroactivity is normally only denied from litigants where a constitutional issue is in dispute or where a litigant had relied on an existing state of the law in commencing legal action and where the state of the law dramatically changed prior to that action being decided. Hall J. found that neither situation was present in the current dispute. Hall J. concluded as follows:

I am therefore satisfied, based upon the Saulnier and British Columbia v. Imperial Tobacco of Canada Ltd. cases, that fishing licenses issued by DFO are "property" as defined under section 2 of the BIA and therefore vest pursuant to the BIA in the Trustee in Bankruptcy. I am further satisfied that the ruling of the Supreme Court of Canada in Saulnier has a retrospective effect in that it constitutes clarification and a clear statement of the rule of law which applies in situations of this nature. Therefore, at the time of his assignment in bankruptcy the Fishing License held by the Bankrupt was property under the BIA and vested in the Trustee.

The second issue to be decided concerned whether, despite that the fishing license was property, that Caines’ discharge divested the Trustee of the fishing license as it had not been disposed of or realized upon at the time of discharge. Caines relied on Subsection 40(1) of the BIA, in that property “incapable of realization must be returned to the bankrupt before the Trustee’s application for discharge...". Hall J. refused to find that the fishing license was unrealizable property, as at the time of the hearing the Trustee had not had the opportunity to test the markets with an offer to sell the license.

Finally, Caines argued that the Trustee was estopped from realizing on the fishing license considering the Trustee made assurances that the fishing license would not be realized upon
and such assurance was relied upon. Hall J. adopted the approach by the Ontario Court of Appeal in *Marino (Trustee of) v. Marino* (2004), 72 O.R. (3d) 274, [2004] O.J. No. 3104 (QL) and held that there needed to be evidence of a promise or assurance by the Trustee, an intention on behalf of the Trustee that the legal relationship would be affected and detrimental reliance on the representation. Hall J. accepted evidence that a representative of the Trustee, prior to Caines making his bankruptcy assignment, made it clear that the issue of whether a fishing license is realizable property was a contentious issue in the insolvency community and that there remained a possibility that it could be realized upon in bankruptcy. Thus, Hall J. found that Caines simply did not rely, to his detriment, on any representation by the Trustee that his fishing license would not be realized upon. Hall J. commented:

I am satisfied that in effect he gambled that his bankruptcy procedure would be completed and that he would retain the Fishing License. This distinguishes the case at bar considerably from the situations in Fehr and Marino, where there are clear representations by the trustee and clear reliance on those representations by the bankrupts to their detriment.

**Personal Property Security Legislation**


The appeal in *P.E.I. Lending Agency v. McCain Produce Inc.*, 2010 PECA 4, 294 Nfld. & P.E.I.R. 272 concerned a decision that the proceeds from crops ought to be interpreted as including payments made to the debtor pursuant to the Canadian Agricultural Income Stabilization Program [“CAIS”].

The Appellant, P.E.I Lending Agency [“PEILA”], was a creditor of the debtor potato farming corporation, Rural Realty Co. Ltd. [“Rural Realty”]. Rural Realty was also in debt to the Respondent, McCain Produce Inc. [“McCain”]. Previous to the 2004 crop year, Rural Realty had executed a number of General Security Agreements in favour of PEILA. In the spring of 2004, Rural Realty, under immense debt, was unable to fund the planting of a potato crop. Both PEILA and McCain decided it was in both of their financial interests that a crop be planted. Thus, the parties entered into a “Tri-Party Agreement” whereas, *inter alia*, McCain agreed to supply fertilizer product to Rural Realty in exchange for PEILA releasing some of its security in favour of McCain, PEILA subordinating its crop mortgage position respecting the 2004 year inputs of fertilizer products, and PEILA subordinating its priority with respect to “50% of all receivables/proceeds generated by the 2004 potato crop”.
The dispute arose as to whether the payments made to Rural Realty from CAIS, totalling almost three quarters of a million dollars for 2004, was to be considered “proceeds” from the 2004 crop yield and thus subject to a 50% split between PEILA and McCain.

Murphy J.A., for a unanimous Court, first considered how funds from CAIS were allocated to farmers. It was found that a complicated formula is used. To summarise, first, a reference margin of the farmer is measured by deducting production expenses from farm sales. Secondly, production margins from the last five years are taken, with lowest and highest years dropped. A payment would be triggered if the production margin were to fall below the reference margin.

Finding that the Tri-Party Agreement was a contract, Murphy J.A. considered contractual interpretation rules with respect to the meaning of the word “proceeds”. Murphy J.A., at paragraph 20, cited from the Supreme Court of Canada’s pronouncement of contractual intent in the decision of *Eli Lilly & Co. v. Novopharm Ltd.*, [1998] 2 S.C.R. 129 in which the Court held that contractual intent should not be ascertained through the subjective intent of the parties, but rather, “by reference to the words used in drafting the document, read in light of the surrounding circumstances” (¶ 54 – 59). Murphy J.A. also found that the inclusion of the word “proceeds” in the agreement was not ambiguous. Relying on the Supreme Court of Canada’s decision in *Scott v. Wawanesa Mutual Insurance Co.*, [1989] 1 S.C.R. 1445, she concluded that as an unambiguous contractual term, the plain meaning of the word should be given.

Relying on both Black’s Law Dictionary and the PEI *Personal Property Security Act*, R.S.P.E.I 1988, Ch. P-3-1, Murphy J.A. concluded that the plain wording of the word proceeds:

> [A]ppears to mean something which has been derived as a result of converting an article or item into something else. It is something which can be identifiable, traceable or linked to the original item.

Murphy J.A. held that although planting a 2004 crop entitled Rural Realty to CAIS funds, the funds did not come about as a result of converting the crop into money. The CAIS funding formula accounts for a five year period of production. Funds are not traceable or identifiable to any particular crop or commodity in any given year and thus based on the accepted definition, could not be considered proceeds.

*Refinancing and Purchase Money Security Interest – Sudbury Credit Union Ltd. v. Ezekiel*
The Newfoundland and Labrador Supreme Court (Trial Division) in *Sudbury Credit Union Ltd. v. Ezekiel*, 2010 NLTD 22, 293 Nfld. & P.E.I.R. 286 was faced with determining whether a Purchase Money Security Interest [“PMSI”] retains the character of a PMSI upon subsequent loan refinancing and consolidation.

Ezekiel purchased a truck in January 2006, financed by TD Bank. It was not disputed that the security interest taken on the truck by TD Bank was a PMSI. Upon moving from Newfoundland to Ontario two months later, Ezekiel secured a new loan from Sudbury Credit Union [“Credit Union”]. With this loan, Ezekiel paid the balance of the TD Bank truck loan as well as another TD Bank personal loan. The Credit Union took a security agreement covering the truck and registered same accordingly. Eventually, Ezekiel defaulted on his loan payments and the Credit Union sought an order for possession of the truck.

At issue at trial was whether the truck was exempt from seizure pursuant to Subsection 59(3) of the Newfoundland and Labrador Personal Property Security Act S.N. 1998, c. P-7.1 [“NL PPSA”]. Paragraph 59(3)(d) of the NL PPSA exempts seizure of a motor vehicle where the value of the vehicle does not exceed an amount prescribed by the regulations (being, at the time of the dispute, $2,000). However, Subsection 59(5) states that exemption provisions do not apply where the goods are subject to a PMSI. Paragraph 2.(1)(hh) defines PMSI as:

(i) a security interest taken in collateral, other than investment property, to the extent that it secures all or part of the purchase price of the collateral, other than investment property,

(ii) a security interest taken in collateral, other than investment property, by a person who gives value for the purpose of enabling the debtor to acquire rights in the collateral, other than investment property, to the extent that the value is applied to acquire the rights,

(iii) the interest of a lessor of goods under a lease for a term of more than one year, and

(iv) the interest of a consignor who delivers goods to a consignee under a commercial consignment, but does not include a transaction of sale by and lease back to the seller, and for the purpose of this definition, “purchase price” and “value” include interest, credit costs and other charges payable for the purchase or loan credit;

Orsborn C.J.T.D held that because there was substantial evidence that the truck had a value well above the exempt limit of $2,000, whether the PMSI character of the security interest was
erased by the subsequent refinancing, did not have to be decided in this case. In *obiter*, Orsborn C.J.T.D. cited a number of decisions from various Canadian jurisdictions which found that a PMSI would be continued upon refinancing of the collateral (Orsborn C.J.T.D cited a number of decisions in support of this rule, including the following cases from Atlantic Canada: *Trans Canada Credit Corp. v. Wonnacott (Trustee of)*, 2000 PESCTD 11 [In Chambers]; *Gerrard, Re* (2000), 188 N.S.R. (2d) 224 (N.S.S.C.). As pointed out by Orsborn C.J.T.D., the premise for these rulings was typically rooted to article 2.1(hh)(ii) as reference above (and equivalent provisions in other jurisdictions), that the refinancing allows a debtor to obtain clear title to a vehicle that was subject to a purchase loan.

**Perfecting Security – Robie Financial Inc. v. PricewaterhouseCoopers Inc.**

There is an abundance of case law addressing the necessity of registering notices of security agreements in compliance with personal property security legislation to effect perfection and maintain priority. The Nova Scotia Supreme Court case of *Robie Financial Inc. v. PricewaterhouseCoopers Inc.* (2009), 285 N.S.R. (2d) 329, 2009 CarswellNS 723 (WL) explores the extent of this required compliance through considering an inadvertent omission of a middle name of a debtor in the registration of security particulars.

Robie Financial Inc. ["Robie"] registered a financing statement pursuant to the Personal Property Security Act S.N.S. 1995-96, c. 13 ["NS PPSA"] for the financing of a vehicle purchased by Barry Kevin Pye. The financing statement was registered under the name “Pye, Barry” and the correct serial number of the vehicle. The middle name of the debtor was not included in the registered name. Evidence indicated that a search using the correct name of the debtor, “Pye, Barry Kevin”, did not reveal any near or close matches to the proper financing statement. The Trustee subsequently disallowed a claim by Robie for the recognition of their security interest. Robie appealed and in addition to arguing that the failure to include the middle name of the debtor was not fatal to the security interest, Robie argued that in the event the security is found to be unperfected, the Trustee ought to be estopped from denying Robie’s claim due to an alleged representation made by an employee of the Trustee firm.

As identified by Registrar Cregan, Subsection 44(7) of the NS PPSA stipulates:

> The validity of the registration of a financing statement is not affected by any defect, irregularity, omission or error in the financing statement unless the defect, irregularity, omission or error is seriously misleading.
(Note, a proposed amendment, not yet in force, to Subsection 44(7) would add “Except as otherwise provided in this Section”)

Furthermore, Subsection 44(8A) states:

44(8A) For greater certainty, if there is a seriously misleading defect, irregularity, omission or error in the name of any of the debtors required to be included in the financing statement other than a debtor who does not own or have rights in the collateral, the registration is invalid even if there is no seriously misleading defect, irregularity, omission or error in a serial number.

Subsections 44(7) and (8) of the NS PPSA (replicated in the statutes of New Brunswick (Subsections 43(7) and (8)), Newfoundland and Labrador (Subsections 44(7) and (8)) and Prince Edward Island (43(7) and (8))). Also, as provided in the other Atlantic Canadian statutes, Subsection 44(9) of the NS PPSA adds:

In order to establish that a defect, irregularity, omission or error is seriously misleading, it is not necessary to prove that anyone was actually misled by it.

The Trustee cited Ontario case law which adopted a reasonable searcher / dual search test. Registrar Cregan quotes from the Ontario Court of Appeal case of Lambert, Re (1994), 28 C.B.R. (3d) 1 in which the Court held at paragraphs 46 – 47:

46 Bearing this reasonable person in mind I move to the final question. Is this reasonable person "likely to be misled materially" by a financing statement which contained an error in the debtor’s name, but accurately set out the V.I.N.? ...  

47 A reasonable person would not likely be misled materially by an error in a financing statement relating to the debtor’s name if that same financing statement accurately set out the V.I.N. That financing statement would come to the attention of the reasonable person through a V.I.N. search despite the error in the name. The reasonable person would, therefore, be put on notice of the security interest referred to in the financing statement and could proceed accordingly.

However, considering the wording in Section 44 of the NS PPSA, Registrar Cregan held that in Nova Scotia, the emphasis is not what the reasonable search would or would not do, but on the defect itself. At paragraph 37, Registrar Cregan found that the omission of the middle name was a seriously misleading error, agreeing with the decision by the New Brunswick Court of Appeal in GMAC Leaseco Ltd. v. Moncton Motor Home & Sales Inc. (Trustee of) 2003 NBCA 26, 257 N.B.R. (2d) 141 in which Robertson J.A. at paragraph 98 held:
An error in a financing statement, tied to either the debtor's name or serial number of collateral, is "seriously misleading" if a search using the correct information fails to reveal any exact or close match.

With respect to the estoppel issue, Registrar Cregan found that it could not be made out as the representative of the Trustee who allegedly made the representation that the claim would be released by the Trustee was too junior to have either actual or ostensible authority.

**Companies Creditors Arrangement Act**

*Stay of proceedings – Re Blue Note Caribou Mines Inc.*

The New Brunswick Court of Queen's Bench, in *Re Blue Note Caribou Mines Inc.*, 2010 NBQB 12, 2010 CarswellNB 2 (WL) [*“Re Blue Note”*], considered the scope of stays of proceedings as provided for in both the *CCAA* and the *BIA*.

The applicant in the motion heard by Léger J., Breakwater Resources [*“BWR”*], attempted to have a notice of its intention to exercise certain Rights of First Refusal contemplated in a Joint Venture Agreement it had with Blue Note Metals Inc. (Blue Note Caribou Mining Inc. at the time the motion was heard; collectively to be referred to as “BNC”) in July 2006. The Joint Venture Agreement was eventually the subject of separate litigation between the two parties in December 2008. In February 2009, BNC sought protection pursuant to the *CCAA*. Subsequently, an Order of the Court later in February 2009 declared that pursuant to Section 11 of the *CCAA*, any and all proceeds commenced, taken or continued against or in respect of BNC, were stayed. Later in 2009, BNC made a voluntary assignment into bankruptcy and the proceedings by the Monitor appointed under the *CCAA* were continued as Trustee under the *BIA*. Shortly after the voluntary assignment, the Trustee entered into an agreement with a buyer for the sale of all BNC assets. Despite numerous communications with BWR, BWR did not express any objection to the sale even upon receiving notice of the completed sale transaction in September 2009.

As summarised by Léger J. at paragraph 22, despite its initial acquiescence to the sale of BNC assets, BWR sought a declaration that it was entitled to give notice of its intention to exercise its Rights of First Refusal or, alternatively, an order retroactively validating its giving of the notice, or, in the further alternative, an order temporarily lifting the stay so as to enable it to give notice.
BWR’s arguments were essentially two-fold: the stay imposed by virtue of the CCAA and the BIA applies only to parties “proceeding” against the debtor corporation and delivery of the notice of intention does not constitute a “proceeding; the stay under the BIA applies only to creditors who are recovering a “claim provable in bankruptcy”.

Léger J. ruled that the motion was barred by virtue of the original order and subsequent stay pursuant to the CCAA. Léger J. held that courts, by virtue of Section 11 of the CCAA, are vested with discretionary power to restrain judicial or extra-judicial conduct against a debtor company. Léger J. quoted the Ontario Court, General Division, in Campeau v. Olympia & York Developments Ltd., [1992] O.J. No. 1946, 14 C.B.R. (3d) 303 that this restraining power extends “to conduct which could seriously impair the debtor’s ability to focus and concentrate its efforts on the business purpose of negotiating the compromise or arrangement”. Léger J. ruled that because delivery of the notice of intention to exercise the Right of First Refusal is required for ultimately exercising the right, taking that initial step must be considered in light of the effect of the ultimate remedy. In other words, procedural steps ought to be interpreted in the same manner as the remedy for which they strive to achieve would be interpreted. Léger J. held that the remedy of exercising the Right of First Refusal is a proceeding contemplated by Section 11 of the CCAA. Thus the necessary procedural steps in exercising the right are also stayed.

Though noting that courts do have discretion in lifting CCAA stays, Leger J. disposed of the BWR’s second and third arguments, that the stay should be lifted retroactively to validate the notice that was delivered by BWR or should be lifted prospectively to allow a new notice to be delivered. Leger J. refused to lift the stay. A number of considerations appeared to be relied upon in determining whether discretion should be exercised. Léger J. also noted that allowing the delivery of the notice would introduce uncertainty to the entire bankruptcy process:

there is also no doubt that the delivery of a Notice would inject an element of uncertainty in the sale process and could interfere with the orderly process followed by the Monitor to date, under the supervision of the Court.

Léger J. also noted that the Monitor as well as all of the other secured and unsecured creditors relied on the representation of BWR that they would not interfere with the sale process. Léger J. also appeared to be concerned by the lateness of BWR’s efforts to have their rights recognized. He states:
There is no denying that the Applicant have brought the within motion in the very late stages of the insolvency process. They have known for quite some time of the sale of BNC by the Monitor, or of the intentions of the Monitor and his efforts to sell the mines.

Although there is discretionary room to have CCAA stays lifted for the exercising of particular rights by creditors without provable claims, it appears that courts will consider a number of factors to determine whether it would be equitable vis-à-vis the other interest holders of a bankrupt corporation to allow a particular proceeding to continue.

**Conditional Discharge Orders**

**Conditional discharge and Section 71 of the BIA – Re Speranza**

The case of *Re Speranza*, 2010 NBQB 139, 2010 CarswellNB 190 (WL) decided by Registrar Bray dealt with the intersection between direction provided in an order of discharge of a bankrupt and the property vesting provisions of the *BIA*.

Just prior to his discharge from bankruptcy, Nando Speranza’s ["Nando"] mother passed away, leaving the bankrupt and his brother, Sandro Speranza ["Sandro"] as sole beneficiaries of an estate consisting of two parcels of real estate and 100% of the common shares of a corporation.

Nando agreed with the Trustee that liquidation of at least some of the assets inherited from his mother’s estate, would satisfy the remainder of his creditors’ claims as well as administrative fees. A conditional discharge order was subsequently issued in December 2007, outlining a payment schedule the bankrupt was to follow for satisfaction of all claims and fees. The final paragraph of the conditional discharge order read:

> THE BANKRUPT IS HEREBY AUTHORIZED to dispose of his interest in any of the assets owned by him or to which he has a beneficial interest, provided he pays to the Trustee the lesser of his share of the net proceeds, (being the gross proceeds of sale less real estate commissions paid to third parties, legal fees and outstanding property taxes) and the balance of the afore-mentioned $47,364 then outstanding.

Following the conditional discharge, Nando became delinquent in meeting the payment schedule obligations outlined in the conditional discharge. At the hearing of the motion, Nando alleged that he frequently communicated to the Trustee that the delays were a result of a lack of cooperation on behalf of Sandro to maintain the business they jointly inherited from their mother
as a going concern. Eventually, the Trustee received an offer from Sandro to purchase the shares of Nando, being held by the Trustee, for $98,240.11, an amount far exceeding the remaining balance owed by the bankrupt. Subsequently, the Trustee brought the present motion, requesting that he be permitted to accept the offer and sell the shares.

Nando opposed the motion and at the hearing insisted that the amount required to fulfill his obligations under the conditional discharge order had been placed in trust with his lawyer. Moreover, Nando argued that the Motion was an attempt to circumvent the oppression remedy available to him pursuant to Section 166 of the *Business Corporations Act*, S.N.B. 1981, c.B-9.1 for relief as a shareholder of the corporation. Also, Nando argued two jurisdictional issues: that the Registrar in Bankruptcy was not the proper forum for determination of a question of provincial law; pursuant to Subsection 30(4) of the *BIA*, a new provision as a result of the September 2009 amendments, the Registrar is no longer the proper forum for an opposed motion brought by the Trustee. Subsection 30(4) reads:

> The trustee may sell or otherwise dispose of any of the bankrupt’s property to a person who is related to the bankrupt only with the court’s authorization.
> [Emphasis added].

Registrar Bray declined to rule on the jurisdictional issues, electing instead to dismiss the motion pursuant to the terms of the conditional discharge order. Though noting that Section 71 of the *BIA* would have necessarily lead to allowing the Trustee’s proposed sale, Registrar Bray could not overlook the wording of the conditional discharge. At paragraph 30, Registrar Bray ruled that he was bound to respect the authorization in the final paragraph of the order, that the bankrupt could dispose “of his interest in any of the assets owed by him or to which he has a beneficial interest”. Considering that the Bankrupt had placed in trust the funds required to fulfill his condition of discharge, Registrar Bray was required to find that the conditional discharge was met, thus trumping the ability for the Trustee to realize on the sale of assets, which would normally have been within his Section 71 rights to do so.

**Varying conditional discharge orders – Re Harris**

In *Re Harris*, 2009 NSSC 292, 2009 CarswellNS 527 (WL), heard by Registrar Cregan, the Bankrupt, pursuant to Subsection 172(3) of the *BIA*, applied for modification of the terms of his conditional discharge order. Registrar Cregan took the opportunity to affirm that although, under
certain circumstances, terms of conditional discharge orders can be varied, agreed purchase prices cannot be varied down as doing so would prejudice the responsibility of the Trustee to realize on the assets of an estate.

At the time the bankrupt, Harris, was granted his conditional discharge, he was operating a successful sales agency and had surplus income. His order required a payment of $56,800, consisting of three components:

1. Surplus income of $1,400 per month for 12 months: -$16,800
2. Equity in marital home: -$10,000
3. Equity in property previously conveyed to daughter: -$30,000

Following the granting of the order, Harris’ personal circumstances changed dramatically for the worse. One month after his conditional discharge order was granted, he was diagnosed with a serious heart condition. Harris and his common law spouse, following the conditional discharge, attempted to refinance the mortgage of the marital home to meet the payment requirements in the order, however, they were not successful in doing so. The employment he had at the time of the conditional discharge was terminated and only recently had he been able to find further employment, albeit at a much lower salary. His spouse, though able to maintain employment, also had several health problems. Harris, at the time of the hearing was once again in substantial income tax arrears. Registrar Cregan concluded that it is “fair to find that there is no reasonable probability of his being in a position to comply with his conditional discharge order”. At the hearing, both the Trustee and Superintendent accepted that position.

At the time of the hearing, the Bankrupt had made payments of $30,067.95 toward the satisfaction of his conditional discharge. Registrar Cregan agreed to cancel the bankrupt’s obligation to pay the balance and thereby grant an absolute discharge pursuant to Subsection 172(3) of the BIA.

Registrar Cregan noted that the BIA did not provide for reducing the $10,000 that Harris was required to pay with respect to the equity in his marital home. Doing so, Registrar Cregan noted, would prejudice the Trustee’s responsibility to realize on the assets of the state. Normally, the payments received, if not in satisfaction of 100% of obligations, would be distributed proportionally in satisfaction of the constituent elements of a conditional discharge order. Registrar Cregan proposed that the first $10,000 of the payments made by Harris would be directed toward the satisfaction of the amount owing for the equity in the home. The remainder
of the payments would be distributed proportionally to the surplus income owed and the equity in the daughter’s home. With respect to the later, it was conceded Harris had no rights to the daughter’s home and any attempt to realize on this equity would be at the behest of the Trustee and pursuant to the new transfers for an undervalue provisions of the BIA (Section 96) or provincial fraudulent conveyance legislation. Such action would have to be decided another day.