Date: 20240124
Docket: BK 19-02-01898
(Brandon Centre)
Indexed as: Bankruptcy of Dwight Charles Logeot
Cited as: 2024 MBKB 6

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

IN THE MATTER OF THE BANKRUPTCY OF: DWIGHT CHARLES LOGEOT	)	Crystal D. Buhler, the Trustee
	)	Renato Y. Mamucud for the Bankrupt
	)	Richard W. Schwartz for Darrell Carlisle and other creditors
	)	Eva Mendez for the Office of the Superintendent of Bankruptcy
	)	Reasons for Decision: January 24, 2024

REGISTRAR PATTERSON

INTRODUCTION

[1] Dwight Charles Logeot (the "Bankrupt") made an assignment in bankruptcy for the general benefit of his creditors on July 22, 2019 (the "date of bankruptcy").

[2] Following multiple contested interim proceedings, the Bankrupt has applied for a discharge from bankruptcy in accordance with the ***Bankruptcy and Insolvency Act***, R.S.C., 1985, c. B-3 (the "***Act***").

[3] While the Bankrupt is not opposed to the Trustee's submission that a conditional discharge should be pronounced by the Court, the Bankrupt is contesting the Trustee's position that there ought to be a substantial payment obligation imposed.

[4] Certain creditors of the Bankrupt have opposed the discharge application of the Bankrupt. The Office of the Superintendent of Bankruptcy (the "OSB") also participated in the discharge hearing. Consistent with the Trustee, the objecting creditors and the OSB take the position that there should be a significant payment responsibility required of the Bankrupt as a condition of his discharge.

[5] Ultimately, this case involves consideration of whether a conditional discharge should be ordered, and if so, establishing an appropriate quantum that ought to be payable by the Bankrupt, while balancing factors such as the integrity of bankruptcy system and recovery for creditors with relief for the Bankrupt from his liabilities.

BACKGROUND

[6] The Bankrupt is 48 years old. He is married to Denise Logeot ("Denise"), and they have two children (both of whom are under the age of majority). The Bankrupt and his family presently reside in Brandon, Manitoba.

[7] This is the first bankruptcy for the Bankrupt (he has never made a proposal pursuant to the ***Act***).

[8] Within the Statement of Affairs dated July 16, 2019 ("the Form 79"), the Bankrupt confirmed that as of the date of bankruptcy, he was employed as a sales manager with a large farm equipment dealership.

[9] The Bankrupt also disclosed within the Form 79 that he was the sole shareholder and principal of Blue Diamond Holdings Ltd. ("BDH") and Hometown Ag Ltd. ("HAL"), as well as a shareholder (with fifty percent of the issued shares) in Corner Equipment Ltd. ("CEL") as of the date of bankruptcy.

[10] The Form 79 sets forth that as of the date of bankruptcy, the Bankrupt had the following liabilities:

a) secured debt in an amount of $1,120,432.00;

b) unsecured debt in an amount of $964,119.00; and

c) total debt in an amount of $2,084,551.00.

[11] At the first meeting of creditors held on August 9, 2019, Stephen (Sam) Zurawski was appointed to serve as an inspector in these proceedings by CEL and 10026861 Manitoba Ltd. ("100 MB"), two of the creditors involved.

[12] A standard form of affidavit typically utilized for discharge applications was sworn by the Bankrupt on March 15, 2021 (the "Bankrupt's March 2021 Affidavit"), which was supplemented by a more comprehensive affidavit of the Bankrupt sworn May 12, 2021 (the "Bankrupt's May 2021 Affidavit").

[13] The Bankrupt's May 2021 Affidavit provided the following noteworthy details:

a) as of March 4, 2019, the Bankrupt was employed with Rocky Mountain Equipment as a branch sales manager (on a full-time basis). His "gross rate of pay" was $105,000.00;

b) between March of 2020 and August of 2020, the Bankrupt was on leave from work and in receipt of short term disability benefits (approximately $5,000.00 monthly); and

c) from August of 2020 until his return to employment in a sales capacity at Rocky Mountain Equipment, the Bankrupt received long term disability benefits ($4,972.00 monthly).

[14] At page 17 of the Bankrupt's May 2021 Affidavit, a summary is provided entitled "Bankrupt's Response to the Trustee's Opposition", which addresses the grounds relied upon by the Trustee to oppose the Bankrupt's discharge application (in consideration of section 173(1) of the ***Act***).

[15] The OSB conducted an examination of the Bankrupt on March 5, 2020, in accordance with section 161 of the ***Act***.

[16] The initial report of the Trustee dated March 16, 2021 (the "Trustee's First Form 82"), was filed in advance of the discharge hearing that had been originally scheduled.

[17] The Trustee also filed a Notice of Intended Opposition to Discharge of the Bankrupt dated March 18, 2021 (the "Trustee's First Form 81"). The following grounds were relied upon by the Trustee to oppose the Bankrupt's application for a discharge:

> 173(1)(a) - the assets of the bankrupt are not of a value equal to .50 cents on the dollar of the amount of unsecured liabilities;
>
> 173(1)(b) - the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt to sufficiently disclose the business transactions and financial position of the bankrupt for the period of 3 years prior to the date of bankruptcy;
>
> 173(1)(c) - the bankrupt continued to trade after becoming aware of being insolvent;
>
> 173(1)(e) – the bankrupt contributed to the bankruptcy by neglect of business affairs;
>
> 173(1)(f) - the Bankrupt has put the Bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action; and
>
> 173(1)(o) - the Bankrupt's failed to perform the duties imposed under the Act.

[18] Notice of Intended Opposition to Discharge of Bankrupt dated May 4, 2021, was filed on behalf of Darrell Carlisle ("Carlisle"), CEL, Carlisle Liquids Ltd. ("Carlisle Liquids") and 100 MB (collectively, the "Carlisle Group"). The grounds asserted by the Carlisle Group for opposing the discharge application of the Bankrupt are as follows:

> a) Those grounds set out in the Trustee's Notice of Intended Opposition; and
> b) s.173(1)(k) – the Bankrupt fraudulently executed various documents in the name of Darrell Carlisle and Corner Equipment Ltd., and caused Corner Equipment Ltd. to sell out-of-trust equipment which was secured to one or more of its creditors.

INTERIM PROCEEDINGS

[19] The Trustee filed a motion on November 19, 2019, as well as a detailed affidavit in support from the Trustee, sworn on November 12, 2019. The Bankrupt was not opposed to the relief sought, and on November 27, 2019, I pronounced an order (the "November 2019 Order") which confirmed that the Trustee was authorized to accept the sum of $60,000.00 from Denise to settle the interest of the Bankrupt in their family home at 9 Maple Ridge Crescent in Brandon.

[20] On November 18, 2020, and December 9, 2020 respectively, two further motions were filed by the Trustee. Considerable affidavit material was also filed by the Trustee in support of these motions.

[21] Denise contested the foregoing motions, and she filed affidavit material in response (the Bankrupt supported the position advanced by Denise).

[22] Following my pronouncement of an interim order on December 15, 2020, I pronounced a further order on December 23, 2020 (the "December 2020 Order"), which stipulated as follows:

> **IT IS ORDERED THAT in accordance with section 192(1)(e) of the *Bankruptcy and Insolvency Act*, counsel handling the sale of 9 Maple Ridge Crescent, Brandon on behalf of Denise Logeot (the possession and closing date scheduled for January 29, 2021) shall hold in trust from the sale proceeds the sum of $70,191.73 pending resolution of the Trustee's motion with respect to the alleged Transfers Undervalue.**
>
> In the event the present unconditional Offer to Purchase for sale of 9 Maple Ridge Crescent is delayed or does not proceed, Ms. Logeot, or her counsel on her behalf, shall promptly notify the Trustee in writing.
>
> Should the present unconditional Offer to Purchase for sale of 9 Maple Ridge Crescent not proceed for whatever reason, and in the event Ms. Logeot accepts

> another offer to purchase for sale of this property, Ms. Logeot (or her counsel on her behalf) shall promptly notify the Trustee in writing, even if the offer to purchase accepted by Ms. Logeot is conditional, with the Trustee to thereafter be provided with prompt written notice once the offer to purchase becomes unconditional.
> **(emphasis added)**

[23] Consensus was subsequently reached by the parties in relation to the December 2020 Order, such that I pronounced an order on February 23, 2021 (the "February 2021 Order"), which resulted in a consent dismissal of the two motions that had been filed by the Trustee, without costs (an amount of $52,441.73 was eventually recovered for the benefit of unsecured creditors by the Trustee, subject to applicable legal expenses).

[24] Pursuant to another motion that was filed on behalf of the Trustee on August 13, 2021, and in accordance with my Reasons for Decision dated November 16, 2022 (which were issued following a contested hearing including viva voce testimony), I pronounced an order which was signed and filed on February 15, 2023 (the "Preference/Transfer Undervalue Order"). The Preference/Transfer Undervalue Order provided as follows:

> 1. **THIS COURT ORDERS THAT Victor and Annette Logeot, jointly and severally, as creditors in receipt of a preferential payment** pursuant to section 95 of the *Bankruptcy and Insolvency Act*, **or in the alternative, as persons privy to Transfers at Undervalue** pursuant to section 96 of the *Bankruptcy and Insolvency Act*, **pay the amount of $93,846.73 to the Trustee on behalf of the Estate of the Bankrupt, plus an amount of $5,325.00 on account of costs as agreed between the parties**, in accordance with section[s] 34(1), 95 and 96 of the *Bankruptcy and Insolvency Act*.
> **(emphasis added)**

[25] Victor Logeot ("Victor") and Annette Logeot ("Annette") are the parents of the Bankrupt. They are farmers, and reside in the Oak Lake, Manitoba area.

[26] Notice of Satisfaction was filed on behalf of the Trustee on July 7, 2023, confirming that the terms of the Preference/Transfer Undervalue Order had been fully met by Victor and Annette. In addition, the two "Attaching Orders" that I had pronounced on October 27, 2021 (at the request of the Trustee, and with consent) were to be discharged as registrations against title to certain real property owned by Victor and Annette.

[27] A further motion was filed by the Trustee on March 16, 2022, and resulted in the order that I pronounced on March 22, 2022 (the "March 2022 Order"), which directed that pursuant to section 37(4) of the ***Act***, the Trustee was authorized to accept the sum of $2,000.00 from Denise to settle the interest of the Bankrupt in certain mines and minerals accounts.

DISCHARGE HEARING

[28] A hearing date was eventually scheduled by the Trustee for the Bankrupt's discharge application. The Bankrupt was entitled to request a discharge in accordance with section 168.1(1)(a)(ii) of the ***Act*** (upon the expiry of twenty-one months following the date of bankruptcy, as the Trustee determined that the Bankrupt had a surplus income obligation).

[29] Pursuant to sections 172(1) and (2) of the ***Act***, the Court has the following options available when considering the Bankrupt's discharge application:

> **Court may grant or refuse discharge**
>
> **172(1)** On the hearing of an application of a bankrupt for a discharge, other than a bankrupt referred to in section 172.1, the court may

> **(a)** grant or refuse an absolute order of discharge;
>
> **(b)** suspend the operation of an absolute order of discharge for a specified time; or
>
> **(c)** grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to the bankrupt's after-acquired property.
>
> **Powers of court to refuse or suspend discharge or grant conditional discharge**
>
> **(2)** The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,
>
> **(a)** refuse the discharge of a bankrupt;
>
> **(b)** suspend the discharge for such period as the court thinks proper; or
>
> **(c)** require the bankrupt, as a condition of his discharge, to perform such acts, pay such monies, consent to such judgments or comply with such other terms as the court may direct.
>
> **NOTE:** The relevant "facts" contained within section 173(1) of the ***Act*** (upon which a discharge "may be refused, suspended or granted conditionally" pursuant to section 172(1) of the ***Act***) have been referred to previously herein, and are reviewed further within the balance of this decision.

[30] In preparation for the discharge hearing, the Trustee filed a further Notice of Intended Opposition to Discharge of Bankrupt (the "Trustee's Second Form 81").

[31] The Report of the Trustee on Bankrupt's Application for Discharge dated October 31, 2022 (the "Trustee's Second Form 82") was also filed in advance of the Bankrupt's discharge hearing. The Inspector approved the Trustee's Second Form 82 (as was the case with the Trustee's First Form 82).

[32] While the secured and unsecured liabilities of the Bankrupt contained within the Trustee's First Form 82 more or less mirrored the details confirmed within the Form 79, the Trustee's Second Form 82 disclosed the following:

> a) **the proven claims of secured creditors of the Bankrupt totalled $1,127,547.83**;
>
> b) **the proven claims of unsecured creditors of the Bankrupt totalled $2,159,109.22**; and
>
> c) **the total proven claims against the Bankrupt were in an amount of $3,286,657.05** (a sum that was **$1,202,106.05 greater** than the total outstanding liabilities set forth by the Bankrupt over one year earlier within the Form 79). **(emphasis added)**

[33] The Trustee's Second Form 82 confirmed that the Bankrupt had assets of a value of $1,456,415.00 as of the date of bankruptcy (subject to certain exemptions as well as any recovery by the Trustee pursuant to the prior interim contested proceedings). Certain specific assets of the Bankrupt included:

> a) cash on hand of $1,500.00;
>
> b) furniture valued at $1,500.00 (jointly owned);
>
> c) 2006 Nissan Maxima valued at $2,325.00;
>
> d) personal effects of $500.00;
>
> e) cash surrender value on a life insurance policy of $2,442.00; and
>
> f) the maximum exemption of $1,500.00 was claimed by the Bankrupt concerning his share of equity associated with the jointly owned family

residence of the Bankrupt and Denise in Brandon (which was subsequently sold as described earlier herein).

[34] An amount of $162,799.65 had been realized upon or recovered for the benefit of the Bankrupt's numerous unsecured creditors as of October 31, 2022.

[35] The Trustee's Second Form 82 states as follows in relation to what the Bankrupt cited as the causes of his bankruptcy:

"Business failure, Financial Mismanagement, Over-extension of credit, Lawsuit".

[36] No further affidavit material was filed on behalf of the Bankrupt for purposes of the discharge hearing.

[37] There were two documents entered as exhibits at the discharge hearing, which are as follows:

Exhibit 1: the Bankrupt's May 2021 Affidavit; and

Exhibit 2: the Trustee's Second Form 82.

[38] During the course of the Trustee's submission, there was reference to the Trustee's First Form 82 as well (it is mentioned commencing at paragraph 7 within the summary attached to the Trustee's Second Form 82).

[39] Shortly after completion of the discharge hearing, the following additional materials were filed:

a) On December 14, 2022, the Trustee filed an affidavit sworn December 9, 2022 (the "Trustee's December 9th Affidavit"). The Trustee's December 9th Affidavit provided a detailed review of the work, time and expenses

incurred by the Trustee with respect to this proceeding (with numerous exhibits attached thereto);

b) On December 19, 2022, an affidavit of Mr. Schwartz affirmed December 9, 2022 was filed, which included particulars with respect to the professional fees incurred by the Carlisle Group concerning this proceeding; and

c) On January 5, 2023, the Trustee filed a further affidavit sworn December 22, 2022 (the "Trustee's December 22nd Affidavit"). Attached as Exhibit 2 to the Trustee's December 22nd Affidavit is a copy of the Bill of Costs prepared by Donald Douglas, who represented the Trustee in relation to the motion that resulted in the Preference/Transfer Undervalue Order (the Bill of Costs submitted by Mr. Douglas was subsequently taxed by this Court).

JURISDICTION

[40] While there was no issue or concern raised by any of the parties with respect to jurisdiction, I nonetheless confirm that I proceeded to hear the contested discharge application in accordance with sections 192(1)(c) and (j) of the ***Act***, which provide as follows:

> **Powers of registrar**
> **192(1)** The registrars of the courts have power and jurisdiction, without limiting the powers otherwise conferred by this Act or the General Rules,
>
> …
>
> **(c)** to grant orders of discharge;
>
> …
>
> **(j)** to hear and determine any matter with the consent of all parties;
>
> …

PRELIMINARY PROCEDURAL ISSUE

[41] The Bankrupt's March 2021 Affidavit and the Bankrupt's May 2021 Affidavit were prepared by the Bankrupt with assistance from the Trustee. As noted earlier, there was no updated or subsequent affidavit filed on behalf of the Bankrupt for the discharge hearing.

[42] Counsel for the Bankrupt was candid when admitting there had been some uncertainty on his part (and of the Bankrupt) as to whether a further affidavit was necessary. The Trustee acknowledged that she had not made a request of the Bankrupt to supply an updated affidavit for the discharge hearing until contacting Mr. Mamucud on November 2, 2022, in this regard.

[43] Sections 170(1),(5),(6) and (7) of the ***Act*** confirm the following:

> **Trustee to prepare report**
> **170(1) The trustee shall**, in the prescribed circumstances and at the prescribed times, **prepare a report**, in the prescribed form, with respect to
>
> > **(a)** the affairs of the bankrupt,
> >
> > **(b)** the causes of his bankruptcy,
> >
> > **(c)** the manner in which the bankrupt has performed the duties imposed on him under this Act or obeyed the orders of the court,
> >
> > **(d)** the conduct of the bankrupt both before and after the date of the initial bankruptcy event,
> >
> > **(e)** whether the bankrupt has been convicted of any offence under this Act, and
> >
> > **(f)** any other fact, matter or circumstance that would justify the court in refusing an unconditional order of discharge,
> >
> > and the report shall be accompanied by a resolution of the inspectors declaring whether or not they approve or disapprove of the report, and in the latter case the reasons of the disapproval shall be given.
> >
> > …

> **Evidence at hearing**
>
> **(5) For the purposes of the application referred to in subsection (2), the report of the trustee is evidence of the statements therein contained.**
>
> **Right of bankrupt to oppose statements in report**
>
> **(6) Where a bankrupt intends to dispute any statement contained in the trustee's report** prepared under subsection (1), **the bankrupt shall** at or before the time appointed for hearing the application for discharge **give notice in writing to the trustee specifying the statements in the report that he opposes at the hearing to dispute**.
>
> **Right of creditors to oppose**
>
> **(7) A creditor who intends to oppose the discharge of a bankrupt on grounds other than those mentioned in the trustee's report shall give notice of the intended opposition**, stating the grounds thereof to the trustee and to the bankrupt at or before the time appointed for the hearing of the application for discharge.
> **(emphasis added)**

[44] Within "***The 2023 Annotated Bankruptcy and Insolvency Act***", the long-standing authoritative treatise concerning bankruptcy and insolvency law authored by Houlden, Morowetz and Sarra (the "***2023 Annotated Act***"), the following comments are provided on page 897 with respect to sections 170(1),(5),(6) and (7) of the ***Act***:

> **Since the report is evidence of the statements contained in it, it is unnecessary for the trustee to give oral evidence of what is contained in the report. Unless contradicted by other evidence, the court must accept the statements contained in the report. However the court is not bound by the trustee's report. The report is, however, entitled to considerable weight** (cases cited omitted).
> **(emphasis added)**

[45] At page 898 of the ***2023 Annotated Act***, it further states:

> **The bankrupt can contest the statements contained in the trustee's report and must**, **under section 170(6),** at or before the time appointed for the hearing of the application discharge, **give notice in writing to the**

> **trustee** specifying the statements in the report that he or she opposes at the hearing to dispute.
>
> **If the bankrupt does not give notice in writing as required by section 170(6), the court will take the facts as stated in the report as being established**. **Similarly, if the bankrupt calls no evidence to contradict what is contained in the report, the court will accept the facts as stated in the report** (cases cited omitted).
> **(emphasis added)**

[46] On behalf of the Carlisle Group, Mr. Schwartz submitted that the absence of current affidavit evidence to identify the basis upon which the Trustee challenges the Trustee's position should be a factor considered by the Court in view of the foregoing sections from the ***Act***.

[47] While the Trustee and the OSB concurred with Mr. Schwartz, there was no opposition on their part (or from the Carlisle Group) to the Bankrupt providing viva voce evidence at the discharge hearing in order to update his prior affidavit evidence, provided the Bankrupt could be cross-examined.

[48] For proportionality and practical reasons (the matter would have had to be adjourned if the Court allowed the Bankrupt an opportunity to provide further affidavit material), I permitted the Bankrupt to testify at the discharge hearing.

[49] Nonetheless, in consideration of the section 170(5) of the ***Act***, the Trustee's Second Form 82, as well as the Trustee's First Form 82, represents evidence as to what is contained therein for purposes of this discharge hearing, subject to the facts or grounds that are challenged by the Bankrupt within his affidavit and viva voce evidence.

ISSUES

[50] The issues to determine in this case can be summarized as follows:

a) Have any facts been proved pursuant to section 173(1) of the ***Act***?

b) If yes, and should the Court be prepared to pronounce a conditional discharge, what payment obligation and associated terms should be imposed upon the Bankrupt as a condition of his discharge?

c) Should costs be ordered against the Bankrupt (with respect to the professional expenses incurred by creditors, such as the Carlisle Group, as well as by the Trustee)?

SUMMARY OF TRUSTEE'S POSITION

Guiding principles

[51] At the outset, the Trustee emphasized that one of the primary objectives of current bankruptcy legislation is to enable an "honest but unfortunate debtor" to receive a discharge from their debts, subject to reasonable conditions.

[52] It was also articulated by the Trustee that "a discharge is not a matter of right".

Failure to disclose

[53] The Trustee contends that the Bankrupt contravened section 158(f) of the ***Act***, which provides as follows:

> **Duties of bankrupt**
>
> **158** A bankrupt shall
>
> …
>
> (f) **make disclosure to the trustee of all property disposed of within the period beginning on the day that is one year before**

> **the date of the initial bankruptcy event** or beginning on such other antecedent date as the court may direct, and ending on the date of the bankruptcy, both dates included, and how and to whom and for what consideration any part thereof was disposed of except such part as had been disposed of in the ordinary manner of trade or used for reasonable personal expenses;
> **(emphasis added)**

[54] The Trustee's position in relation to section 158(f) of the ***Act*** is premised, at a minimum, upon the following:

a) the preference, or alternatively, transfer undervalue, made by the Bankrupt in favour of Victor and Annette for an amount of $93,846.73, which was discovered by the Trustee to have occurred between October of 2018 and December of 2018 (as determined by the Court pursuant to the Preference/Transfer Undervalue Order); and

b) the undisclosed cheque in an amount of $17,000.00, which is reviewed further within paragraph 56(d) herein.

Lack of good faith

[55] It is further submitted by the Trustee that the Bankrupt failed to act in good faith, in consideration of sections 4.2(1) and (2) of the ***Act***, which stipulate as follows:

> **Good faith**
>
> **4.2 (1) Any interested person in any proceedings under this Act shall act in good faith** with respect to those proceedings.
>
> **Good faith — powers of court**
>
> **(2) If the court is satisfied that an interested person fails to act in good faith**, on application by any interested person, **the court may make any order that it considers appropriate in the circumstances.**
> **(emphasis added)**

[56] The Trustee has formed this position due to her contention that there are numerous discrepancies or inconsistencies of concern revealed upon review of the answers and information provided by the Bankrupt when he was examined by the OSB on March 5, 2020 (all of which is summarized at Exhibit "D" to the Trustee's Second Form 82). In particular, the Trustee requests that the Court consider the following responses provided by the Bankrupt during the course of the OSB examination (in the context of what the Bankrupt had previously disclosed to the Trustee, and what the Trustee had uncovered through her own due diligence):

a) **Q12(a)**: When asked if he was an officer, director or shareholder of any corporation, the Bankrupt responded "no", even though the Trustee confirmed and Form 79 describes that as of the date of bankruptcy, the Bankrupt was an officer and/or director for BDH, HAL and CEL. In addition, the Bankrupt had shares in BDH, HAL and CEL as of the date of bankruptcy.

b) **Q12(b)(iv) and Q12(d)**: When questioned by the OSB about his relationship with Advanced Growth Group Ltd. ("Advanced"), the Bankrupt stated that this business was never established, and was inactive. The Bankrupt further indicated that there had been no annual return filed, and no business activity whatsoever in the past five years involving Advanced. The Trustee, however, confirmed that Advanced was an active corporation, as recent as 2018, because an annual return had been filed with the Companies Office for Manitoba. In addition, the

Trustee learned that the Bankrupt was portrayed in a video concerning Advanced, which had been prepared for "Manitoba Potato Production Days" in 2012 (during the initial portion of the video, the Bankrupt stated "*Hi there, I'm Dwight Logeot with Advanced Growth Group. We're a new company based out of Brandon. We specialize in leasing and financing*…"). The Trustee further noted that within a 2012 edition of a magazine entitled "Manitoba Oil and Gas Producer", there was a two-page advertisement and article about Advanced, which confirmed the Bankrupt was in a partnership with two other individuals. According to the Trustee, the Bankrupt was a party, along with Advanced, in a Small Claims proceeding from 2011.

c) **Q18(a)**: The Bankrupt stated to the OSB that it was on or about December 2018 when he became aware that he was unable to pay his debts as they became due. The Trustee noted, however, that on June 4, 2018, Farm Credit Canada ("FCC") served the Bankrupt, as a director of CEL and HAL, with a formal demand in an amount of $2,889,093.13. **When discussing with the Trustee an email that the Bankrupt had sent to his accountant dated June 14, 2018 (a copy of which was provided to the Trustee), the Bankrupt acknowledged to the Trustee that "*this is probably when I realized I was finished*" (meaning, in June of 2018, when he had been served with the formal demand from FCC).** The Trustee

also pointed out that CEL filed notice of a Division I proposal on June 15, 2018 (the Bankrupt was a shareholder in CEL, as well as a guarantor for CEL). **(emphasis added)**

d) **Q24(c)**: When questioned by the OSB about there being a $17,000.00 cheque payable to the Bankrupt from Tangerine dated June 28, 2019, the Bankrupt admitted that he had provided this cheque to Denise (approximately three weeks prior to making an assignment in bankruptcy). He indicated that $12,000.00 was applied to an outstanding credit card account while $5,000.00 was used to pay the retainer for the Trustee (the Bankrupt indicating to the OSB that "LIT [the Trustee or Licensed Insolvency Practitioner] was aware of it"). To the contrary, the Trustee has confirmed that she was not aware of this cheque, or that it had been used by the Bankrupt's spouse for the aforementioned purposes "until we received the evidence of the cheque from Tangerine directly (February 21, 2020) and would not have consented to funds being transferred from the bankrupt to his spouse, and subsequently used to retain our services". It was further noted by the Trustee that when the Bankrupt provided funds to the Trustee, Denise had signed a third-party deposit agreement (confirming that the monies did not come from assets that would otherwise be assets of the bankruptcy estate).

[57] It is also argued by the Trustee that evidence of a lack of good faith on the part of the Bankrupt exists in relation to sale of the S½ 25-7-20W, which was jointly owned by the Bankrupt and Denise (the "S½"). There was a mortgage registered against title to the S ½ in favour of Manitoba Agricultural Services Corporation ("MASC"). The mortgage payout provided by MASC to the solicitor with conduct of the sale confirmed the sum outstanding as of the intended closing date was in an amount of $299,110.75. The portion of the sale proceeds forwarded to MASC were distributed as follows according to the Trustee (set forth at page 8 of the Trustee's Second Form 82):

> a) The Trustee executed the documents to complete the sale on behalf of the bankrupt estate, and realized $4,046.75 from the bankrupt, in recognition of the equity in the land.
>
> b) MASC received proceeds sufficient to discharge the mortgage against property, however, they applied the sale proceeds to different loans - specifically loans of Denise Logeot, for which the bankrupt was not jointly responsible, but rather guaranteed, and for which demand had not yet been made. MASC did discharge the mortgage to facilitate the sale of the subject property.
>
> c) As a result, the bankrupt remains jointly liable for the balance on the Loan 18-1, which was $154,488.96 as of May 26, 2022, a debt for which MASC proved a secured claim in bankruptcy. The proceeds of sale were applied to debts for which the bankrupt may, in the future, have been called upon to pay, reducing his post-bankruptcy liability.

[58] Another situation of concern to the Trustee involves a listing on Kijiji in January of 2020 by "Sifton Sands" for sale of certain agricultural assets. The Trustee explained that Sifton Sands is a trading name of the Logeot family farm, and that the advertisement displayed the Bankrupt's phone number for contact purposes. When the Trustee inquired, Denise and Annette claimed ownership of these items, although no explanation or reason was provided (from the Bankrupt, Denise or Annette) as to why the Bankrupt was listed as a contact person for the sale.

[59] The final item raised by the Trustee in relation to an alleged absence of good faith on the part of the Bankrupt involves the December 15, 2020, Order. Even though settlement was achieved by virtue of the February 2021 Order (which the Court notes resulted in there being no determination made upon the merits of the two motions that had been filed by the Trustee, and consent to dismissal of the these motions, without costs), the Trustee reiterated that these interim proceedings were initiated due to the Trustee discovering there had been transfers undervalue made by the Bankrupt in favour of Denise (with some recovery eventually obtained for the benefit of unsecured creditors).

Section 173(1) of the *Act*

[60] In view of the foregoing, and based upon further evidence reviewed within the balance of this decision, it is the position of the Trustee that the Bankrupt's conduct has resulted in establishment of the following facts in accordance with section 173(1) of the ***Act***. In particular:

s.173(1)(a) - the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities ... ;

a) The Trustee submits that the evidence before the Court confirms this fact unequivocally (proven claims of secured creditors in an amount of $1,127,547.83, and proven claims of unsecured creditors in an amount of $2,159,109.22, for a total of proven claims against the Bankrupt in an amount of $3,286,657.05, versus the Bankrupt disclosing that he had assets valued at $1,456,415.00, subject to certain exemptions, and there being recovery for the benefit of the Bankrupt's unsecured creditors in an amount of $162,799.65 as of October 31, 2022).

b) It is also the Trustee's position that the Bankrupt has not met the onus to satisfy the Court that this substantial indebtedness "has arisen from circumstances for which the Bankrupt cannot justly be held responsible".

s. 173(1)(b) - the bankrupt has omitted to keep such books of account as are usual and proper in the business carried on by the bankrupt and as sufficiently disclose the business transactions and financial position of the bankrupt within the period beginning on the day that is 3 years before the date of the initial bankruptcy event and ending on the date of the bankruptcy event, both dates included;

c) When the businesses of BDH and HAL were failing, the Bankrupt admitted that he did not obtain accounting services so that 2018 financial statements for these two corporations could be prepared. The

August 31, 2017, year-end financial statement was the last financial statement completed for BDH, whereas the November 30, 2017 year-end financial statement was the last financial statement completed for HAL (both financial statements prepared by BDO Canada LLP).

d) The Bankrupt acknowledged to the Trustee that Denise had been involved with "doing the books" previously for businesses in which the Bankrupt had an interest.

e) In addition, the Trustee confirmed that the required annual returns for BDH and HAL were not filed, such that both corporations were dissolved by the Companies Office for Manitoba.

f) The Trustee submits that regardless of the business difficulties encountered by the Bankrupt with BDH and HAL, it was the duty of the Bankrupt to ensure that accurate financial records were compiled for these corporations, which he failed to do (and especially when there were significant liabilities involved).

g) Within the Trustee's First Form 82, the Trustee provided the following further details of concern:

> **During the Trustee's investigations of the bankrupt's financial records, several instances of deficient record-keeping and unreconciled personal and corporate transactions were discovered.** Notably, at the time of the bankrupt's examination pursuant to section 161, the bankrupt advised that the cheque in the amount of $149,013.15 drawn on the BDH corporate chequing account was used to purchase the family home 9 Maple Ridge. When asked why, he advised that a corporate cheque was used and that he pulled it through Blue Diamond because that is where he held his finances out of convenience. There is no evidence as to the handling of the

> shareholder loan accounts for taxation or to account for the shareholder withdrawals.
> **(emphasis added)**

s. 173(1)(c) - the bankrupt has continued to trade after becoming aware of being insolvent;

h) With FCC making its demand in June of 2018, the Trustee submits that the Bankrupt knew or ought to have known that there were serious financial difficulties facing BDH, HAL and CEL (as well as for himself personally), and this was well before December of 2018, which is when the Bankrupt claims that he became aware that he would not be able to reasonably attend to his debts (the email dated June 14, 2018, which the Trustee discussed with the Bankrupt that is referred to at paragraph 56(c) herein, being relevant to the issue of the Bankrupt's knowledge).

i) The Trustee confirmed that on or about early January of 2018, the Bankrupt was successful increasing the limit associated with a line of credit provided to HAL by Sunrise Credit Union (the "Credit Union") to an amount of $400.000.00, from what was the previous limit of only $30,000.00 (Line 6 of the summary attached at Exhibit "E" to the Trustee's Second Form 82). The Credit Union subsequently filed an unsecured claim (for over $300,000.00), although according to the Trustee, the sum outstanding upon this line of credit was in an amount of $187,935.50 as of the date of bankruptcy.

j) It was further emphasized by the Trustee that the Bankrupt proceeded to incur unsecured debt with CNH Capital for the sum of $74,690.64 (shortfall on a baler, two tractors and a wheel rake), and with CWB in an amount of $37,122.00 (shortfall on hay trailers and for cattle handling), at a point in time when the Bankrupt knew or ought to have known that he was insolvent.

k) With reference to the Trustee's First Form 82, the following further details were outlined by the Trustee:

> The bankrupt was a director and shareholder of Corner Equipment Ltd. The corporation filed a notice of intention to make a proposal under subsection 50.1 of the *BIA* on June 15, 2018, and a Division 1 proposal on December 6, 2018 (collectively the "court proceedings"), following a failed attempt to segregate the interests of the corporation from those of HAL. At the time of the filing of the NOI, the company declared debts of $10,049,953. As part of the corporate proceedings, the Corporation filed a statement of claim against the bankrupt personally, and his corporations HAL and BDH in an amount of $1,038,543.86.
>
> **The Trustee was provided with a summary of discussions between the bankrupt and the business consulting firm in late 2016 and early 2017, wherein the bankrupt was advised prior to commencing operations as HAL, that the structure of Corner Equipment LTD at that time would not support a 2nd location without an infusion of cash or other unsecured funding. Despite this advice, the bankrupt proceeded to commence operations under the HAL name and purchased a building at Shoal Lake. The consultant subsequently identified equipment sales taking place with low margin, and in few cases negative margins, on trading deals. The Trustee is aware that there have been allegations of encumbered equipment being sold out of trust.** Ultimately, FCC did issue demand pursuant to section 244 of the *BIA* for indebtedness totaling $2,889,094.13 plus interest and costs, on June 4, 2018. The demand was issued on Corner Equipment Ltd. and Hometown Ag Ltd.
> **(emphasis added)**

s. 173(1)(e) - the Bankrupt has brought on, or contributed to, the bankruptcy by … neglect of the bankrupt's business affairs;

l) The Trustee submits that the conduct of the Bankrupt had a detrimental impact upon BDH and HAL. As an illustration, the Trustee stated that there was corporately owned equipment located at property of Victor and Annette, and that funds were received by Denise from sale of certain corporate assets (these monies being utilized for household expenses, on a tax-free basis).

m) It is also asserted by the Trustee that there were certain sales of equipment where, without explanation, the items were sold at a loss by BDH and HAL. The Trustee noted that the responses provided by the Bankrupt were vague when questions had been posed during the OSB examination.

s. 173(1)(f) - the bankrupt has put any of the bankrupt's creditors to unnecessary expense by a frivolous or vexatious defence to any action;

n) It is the position of the Trustee that the Bankrupt's opposition to certain of the interim proceedings initiated by the Trustee, such as the motion which resulted in the Preference/Transfer Under Value Order, was without merit and resulted in considerable time and expense to the Trustee and the Bankrupt's estate (as well as to the creditors who participated in these contested hearings).

o) The Trustee advised the Court that the Bankrupt and his family (Denise, Victor and Annette as well as the Bankrupt's sister) filed a

complaint to the OSB about the Trustee. The OSB has closed its file according to the Trustee, although the Trustee stated that responding to the complaint resulted in further time and costs (in circumstances where the Trustee believes there was no validity to the concerns raised by or on behalf of the Bankrupt). This is not, however, an issue that the Court will review or comment upon as it was determined before the OSB.

s. 173(1)(o) - the bankrupt failed to perform the duties imposed on the bankrupt under this Act;

p) According to the Trustee, this fact is established by the breaches of the ***Act*** on the part of the Bankrupt that have been summarized thus far, as well as by other conduct of the Bankrupt which is reviewed within the balance of this decision.

[61] The Trustee contends that there is sufficient evidence of the Bankrupt's actions to conclude that the following further facts have been established in accordance with section 173(1) of the ***Act***.

s. 173(1)(d) - the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency to meet the bankrupt's liabilities;

a) Exhibit "E" to the Trustee's Second Form 82 is a summary entitled "Timeline of events impacting share value". There are 53 notations within this summary concerning the conduct of the Bankrupt. As an illustration, the Trustee directed the Court's attention to line 21 of this summary, which reads as follows:

Sept 4 - HAL Sales Agreement to Annette Logeot for a 2004 Case IH Deep Tiller [serial number omitted] for $16,800, less trade in allowance $7,200 for 1992 Flexcoil harrow system [serial number omitted]. Net price $9,600.00. Annette asked to provide evidence of payment to HAL for the unit – none provided (RB Auction bill denotes this unit as a 1998 model year, not 2004).

b) Within paragraph 16 on page 9 of the Trustee' Second Form 82, the Trustee provided a summary in relation to section 173(1)(d) of the ***Act***:

> In addition to the commentary on the prior report, pursuant to Section 173(1)(d), the bankrupt has failed to account satisfactorily for any loss of assets or any deficiency of assets to meet the bankrupt's liabilities. Review of the most recent set of financial information available for the Bankrupt's 2 wholly owned entities shows the following:
>
> | Entity | Year End Date | Retained Earnings | Assets (Gross) |
> |---|---|---|---|
> | BDH | August 31, 2017 | $211,756.00 | $1,010,959.00 |
> | HAL | November 30, 2017 | $148,762.00 | $8,242,786.00 |
>
> From the time of its incorporation on November 30, 2017, HAL accrued a debt owing to a related party in the amount of $1,420,060.00, which was confirmed not to be BDH.
>
> This information was taken from the following sources:
>
> BDH - Draft, Unaudited Notice to Reader Financial Statement prepared by BDO and supplied by the bankrupt. No tax return was filed for the time period, as BDO was not paid to do so.
>
> HAL – T2 tax return supplied by BDO, filed in early 2018.

c) At paragraph 21 on page 10 of the Trustee's Second Form 82, the Trustee reached the following conclusion:

> **A review of the bankrupt's actions as sole shareholder and director of BDH and HAL which resulted in the dissipation of assets, or reduction in value of the entity's shares for the bankrupt estate, or which created a debt to a creditor has been summarized in a timeline attached to this report at Exhibit E. The summary also includes other notable events for context.**
> **(emphasis added)**

Surplus income of the Bankrupt

[62] The Trustee reviewed the surplus income calculations that she had prepared (which serve as evidence in relation to the extent of payment that the Bankrupt could reasonably facilitate should the Court be prepared to pronounce a conditional discharge):

a) Exhibit "A" to the Trustee's Second Form 82 is a summary prepared by the Trustee which confirms the Bankrupt's income over the first twenty-one months following his assignment in bankruptcy. Commencing at paragraph 7 thereof, the Trustee calculated that there was a surplus income obligation owing by the Bankrupt in an amount of $11,784.34. The Trustee explained this conclusion as follows:

> Exhibit "D" to the Bankrupt's affidavit for discharge sworn May 12, 2021, evidences the Bankrupt's spouse's gross farming income for 2019, and states that her gross income from farming was $473,299.00, and after deducting undisclosed expenses, her net farming loss reported was $53,772.00. However, without detailed evidence of his spouse's farm income or loss as is required by Directive 11R2, her actual net income for the post bankruptcy period is not known. As such, in accordance with the Directive, the Bankrupt's surplus income obligation for the first 21 months of the bankruptcy is calculated by applying one-half of the Superintendent's Standard for a Household of 4 when determining the surplus income due to the Estate. Based upon the bankrupt's average income during the first twenty-one months of the file, the total surplus income due for the period would be $26,327.59, of which $14,543.25 was paid. The under-payment of $11,784.34 is a result of the change to the surplus income calculation method, as a result of the non-disclosure of the spouse's farming income/loss.
> …

b) At Exhibit "B" to the Trustee's Second Form 82, the Trustee prepared a further summary which contains calculations in support of the Trustee's position (confirmed at paragraph 9 thereof) that "the

bankrupt appears to have had surplus income in an amount of $1,948.40 per month":

> Although the Trustee is not certain if the bankrupt's spouse continues to farm, her income from employment has been disclosed through the bankruptcy process. In the 12-month period between October 1, 2021 and September 30, 2022, her income, net of her share of the household non-discretionary expenses, averaged $3,773.48 per month. Based on her average income, and that of the bankrupt over the same 12-month period, the bankrupt appears to have had surplus income in the amount of $1948.40 per month.

c) A summary of the Bankrupt's income and expenses over a twelve-month period preceding the discharge hearing (October of 2021 to September of 2022) was also prepared by the Trustee, and is attached as Exhibit "C" to the Trustee's Second Form 82.

d) The Bankrupt did not dispute the foregoing calculations during the discharge hearing.

Litigation against the Bankrupt

[63] Apart from issuing demands in reliance upon its security, FCC initiated litigation against the Bankrupt pursuant to file CI 19.01.19377 (which was transferred from the Winnipeg Centre to the Brandon Centre). HAL and the Bankrupt are the named Defendants, with CEL and Darrell Carlisle being third parties.

[64] The following excerpt from page 6 of the Trustee's First Form 82 provides further details surrounding the action launched by FCC:

> FCC filed an unsecured proof of claim in the amount of $1,021,922.61. By email dated July 6, 2020, the solicitor for FCC advised that the balance outstanding at that time had been reduced to $613,090.48 which is the amount included in the value of the unsecured claims above. In their

> statement of claim issued February 14, 2019, FCC stated that they would seek a declaration that a portion of the claim is a debt or liability arising out of misappropriation or defalcation by the bankrupt in a fiduciary capacity and that this debt would not be released by an order of discharge from bankruptcy. That action is currently stayed by section 69.3(1) of the BIA.

[65] In addition, CEL commenced an action against HAL, BDH and the Bankrupt (in accordance with file CI 18.02.03625). This litigation is also stayed presently.

Terms and conditions proposed for conditional discharge

[66] In this case, the Trustee submits that the Bankrupt continued in business, and with transactions including his family, when he knew or ought to have known that he and the businesses in which he had an interest were insolvent, as of on or around June of 2018. The Trustee also asserts that there was reckless use of assets by the Bankrupt, even though there were numerous outstanding claims of creditors.

[67] The Trustee has argued that the multiple discrepancies or inconsistencies in the Bankrupt's disclosure to the Trustee, as well as the OSB, quite justifiably gives rise to concern with respect to the Bankrupt's credibility.

[68] As of the date of the last year-end financial statements that were completed for BDH and HAL, there were total retained earnings between the two corporations in an amount of $360,518.00 (page 9 of the Trustee's First Form 82). When this sum is added to the further debt that the Trustee has confirmed was incurred by the Bankrupt with the Credit Union, CNH Capital and CWB (as well as the surplus income obligation of the Bankrupt calculated to be in an amount of $11,784.34), the result according to the Trustee is an all-inclusive total of $672,049.98.

[69] When considering the above noted figures, the Trustee ultimately submits that the Court should order that the Bankrupt be discharged, conditional upon payment in an amount of $500,000.00.

[70] Should a discharge conditional on payment by the Bankrupt of a sum of $500,000.00 be ordered by the Court, the Trustee advised that it would represent an amount equal to approximately one quarter (25%) of the total of all unsecured claims in this bankruptcy proceeding.

[71] The Trustee confirmed that a suspension of the Bankrupt's discharge is not being sought in addition to the substantial payment obligation requested.

SUMMARY OF BANKRUPT'S POSITION

Viva voce evidence and cross-examination

[72] The Bankrupt provided the following evidence with respect to his circumstances, which served as an update from the Bankrupt's May 2021 Affidavit:

a) The Bankrupt is no longer a branch sales manager with Rocky Mountain Equipment. He is now a sales associate with the farm implement dealership. The Bankrupt had been in receipt of long-term disability payments for a number of months (due to stress and from being diagnosed with testicular cancer). He returned to full time work in August of 2021.

b) As a sales associate, the Bankrupt advised that his annual income is $65,000.00. His net income is approximately $1,800.00 bi-weekly (he also receives a travel allowance of $800.00 monthly because he uses his own vehicle for work purposes).

c) The Bankrupt has no other employment, business ventures or sources of income at this time. He has a grade 12 education, and advised that ninety percent of his work history has been in sales.

d) Concerning his family, the Bankrupt advised that Denise is now working on a 0.8 basis as a nurse at the Brandon Regional Health Centre.

e) As Victor and Annette continue to "live on the farm", the Bankrupt says that he regularly attends there to assist them.

f) The Bankrupt says that he has "downsized" as part of a lifestyle change upon going bankrupt. The family home was sold, and they now live in a mobile home in Brandon. The Bankrupt also noted that he has "downsized" his vehicle.

g) The bankruptcy process was described by Bankrupt to have been a very stressful experience for him.

[73] Interestingly from the Court's perspective, the direct viva voce evidence of the Bankrupt devoted little time to information contained within the Bankrupt's May 2021 Affidavit, and also did not address in detail the grounds relied upon by the Trustee for opposing his discharge application.

[74] Upon cross-examination by Mr. Schwartz, there were certain noteworthy responses from the Bankrupt:

a) The Bankrupt confirmed that his cancer is in remission.

b) When it was put to the Bankrupt that he and his sister stand to inherit the family farm from Victor and Annette (who were aged 82 and 78 respectively as of the date of the discharge hearing), the Bankrupt claimed, that to his knowledge, he is "out of their wills" at this point in time.

c) The criminal charge(s) which the Bankrupt had been facing were stayed by the Crown in 2021. Nonetheless, when Mr. Schwartz strongly asserted that the Bankrupt had fraudulently signed Darrell Carlisle's name to six documents, he denied doing so.

d) Mr. Schwartz suggested to the Bankrupt that he knew there were serious financial difficulties with CEL when FCC made its demand, which subsequently resulted in a Division I proposal being made by CEL. Mr. Schwartz also put to the Bankrupt that he knew full well that an "out of trust" situation existed with CEL. The Bankrupt denied both assertions, and claimed that he did not know how dire the situation was with CEL because he had been "shut out of the business".

e) When Mr. Schwartz mentioned the audit of CEL which FCC had initiated in the spring of 2018, and suggested to the Bankrupt that he must have known CEL's business was in peril at that time, the Bankrupt

denied having this knowledge. The Bankrupt also disputed he was aware that he could be liable pursuant to the guarantee he had provided to FCC for the indebtedness of CEL (and for any other guarantees) as early as the spring of 2018 when the FCC audit was commenced.

[75] The Bankrupt supplied the following replies of relevance during cross-examination by the Trustee:

a) The Bankrupt admitted that his income of $65,000.00 annually with Rocky Mountain Equipment is a base salary, such that he can earn more income depending upon factors such as sales and bonuses, if any.

b) It was acknowledged by the Bankrupt that when he had calculated his net bi-weekly income to be in an amount of $1,800.00, he did so in error (to convert bi-weekly pay to an annual figure, there are 26 bi-weekly pay periods, not 24).

c) Even though Denise works as a nurse on a 0.8 basis, the Bankrupt conceded that there are overtime and extra shifts sometimes available to her.

d) The Bankrupt could not explain why he failed to provide information to the Trustee about the "Simply" bank account (which was discovered by the Trustee).

e) When asked what he thought "selling out of trust" or "being out of trust" meant (phrases mentioned by Mr. Schwartz), the Bankrupt acknowledged generally that it is a situation where the business

"doesn't have the funds to pay" the debt associated with acquiring the specific equipment for sale.

f) Concerning the application of land sale proceeds by MASC, the Bankrupt advised that he had "no say", as MASC decided to which accounts the funds would be distributed.

Section 173(1) of the *Act*

[76] In relation to section 173(1) of the ***Act***, Mr. Mamucud made the following submissions on behalf of the Bankrupt:

s.173(1)(a)

a) While it was acknowledged that the assets of the Bankrupt were of a value less than $.50 cents on the dollar considering the liabilities of the Bankrupt, Mr. Mamucud asserted that the Bankrupt had made his best efforts to cooperate with the Trustee and comply with his statutory obligations.

s.173(1)(b)

b) Mr. Mamucud commented that while the Bankrupt could not afford to pay BDO to prepare any further financial statements for BDH and HAL beyond their respective 2017 year-end financial statements, or to file any more income tax returns leading up to the date of bankruptcy, all prior financial reporting was completed and all previous tax returns were filed. Mr. Mamucud also stated that the Bankrupt was "escorted off' the CEL property in 2018, such that he argued it was unfair to

suggest the Bankrupt should bear any responsibility for any incomplete financial reporting concerning CEL.

s.173(1)(c)

c) The work history of the Bankrupt has predominantly been in sales according to Mr. Mamucud, and as a result, it is what the Bankrupt continued to do, in an effort to address personal and corporate financial issues.

s.173(1)(e)

d) It was asserted by Mr. Mamucud that the Bankrupt did not neglect business affairs, other than failing to file the required annual returns with the Companies Office for Manitoba immediately preceding the date of bankruptcy, as well as not having up to date financial records prepared or tax returns filed as of the date of bankruptcy (which, as reviewed previously by Mr. Mamucud, was due to the financial difficulties encountered by the Bankrupt at that point in time).

s.173(1)(f)

e) Even though the motion of the Trustee concerning the former family home at 9 Maple Ridge Crescent was contested at the outset by Denise (and the Bankrupt supported her position), Mr. Mamucud noted that a settlement was eventually reached.

s.173(1)(o)

f) Mr. Mamucud submitted that the Bankrupt has acted in good faith, and even if there were some discrepancies in certain information or disclosure from the Bankrupt, clarification was provided in situations where questions were raised by the Trustee. Given the scope of the businesses in which the Bankrupt was involved, Mr. Mamucud argued that it should not be all that surprising for there to have been inconsistencies or difficulty encountered by the Bankrupt in this regard.

g) Concerning MASC, Mr. Mamucud pointed out that a solicitor was retained to have conduct of the sales and discharges on behalf of the Bankrupt.

h) While the Trustee had raised some questions concerning sale of equipment by Sifton Sands, Mr. Mamucud stated that once clarification was provided by the Bankrupt, the Trustee eventually released any potential claim to these assets.

Terms and conditions proposed for conditional discharge

[77] Mr. Mamucud submitted on behalf of the Bankrupt that the Court should pronounce a discharge, conditional upon the Bankrupt being required to pay the sum of $150,000.00.

[78] All income tax refunds and other credits available to the Bankrupt would be assigned to the Trustee until such time as the proposed payment obligation was satisfied in full. In addition, Mr. Mamucud suggested that the Bankrupt be required

to make minimum monthly payments of $700.00 (which it was acknowledged would involve a considerable period time until payment in full was received by the Trustee).

[79] Mr. Mamucud emphasized that this was the first bankruptcy for the Bankrupt. He also submitted that while recovery for creditors and the integrity of the bankruptcy system are primary objectives, relief from substantial debt for a bankrupt is an equally important cornerstone of these proceedings.

[80] With respect to the payment recommendation advanced by the Trustee, Mr. Mamucud commented as follows:

> a) If the Bankrupt was called upon to pay an amount of $500,000.00 as a condition of his discharge, Mr. Mamucud calculated that it would take him approximately 21 years to make full payment (and this is if the Bankrupt paid approximately $1,900.00 monthly, based upon the Trustee's calculation of surplus income available to the Bankrupt).
>
> b) Requiring the Bankrupt to be responsible for paying an amount equivalent to essentially 25% of the total of all unsecured claims in this bankruptcy proceeding would be punitive and not consistent with financial rehabilitation for the Bankrupt.
>
> c) It was anticipated there would be no appeal of the Preference/Transfer Undervalue Order (and there was no appeal), such that an amount of $93,846.73 would be recovered for the bankruptcy estate, plus whatever funds had already been realized (which totalled

$162,799.65 as of the date of the Trustee's Second Form 82). On this basis, Mr. Mamucud suggested that there would be an amount of $256,646.38 available to unsecured creditors, as well as the amount which the Bankrupt is proposing to pay ($150,000.00), subject to any adjustments and other expenses (an example of such expenses would include the costs for the Trustee's services, as well as legal expenses incurred by the Trustee in connection with the Preference/Transfer Undervalue Order).

[81] It was further clarified by Mr. Mamucud that his instructions were to seek pronouncement of a conditional discharge at this time, regardless of what is being contemplated by the OSB insofar as a possible investigation.

SUMMARY OF CARLISLE GROUP'S POSITION

[82] The following summary represents an outline of the through submissions made to the Court on behalf of the Carlisle Group:

a) Mr. Schwartz made a point of highlighting that there was little to no evidence provided by the Bankrupt to contradict or counter the Trustee's position, and the position of the Carlisle Group, with respect to the conduct of the Bankrupt in consideration of section 173(1) of the ***Act***.

b) In addition to supporting the Trustee's submissions to the Court, it was also confirmed by Mr. Schwartz that the Carlisle Group had no issue with the calculations relied upon by the Trustee.

c) Mr. Schwartz argued that the submissions made on behalf of the Bankrupt were primarily focused upon his ability to pay.

d) The Carlisle Group contends that the Bankrupt was aware CEL was out of trust as early as on or about the spring of 2018, when an audit was initiated by FCC (that there were insufficient funds to make required payments to the manufacturers who had supplied the farm equipment for sale).

e) It was articulated by Mr. Schwartz that a Division 1 proposal takes considerable time to prepare, such the Bankrupt knew or ought to have known he was insolvent far sooner than he is prepared to admit.

f) Mr. Schwartz pointed out that while the Bankrupt may have been a guarantor in favour of FCC, he did not pay anything upon such guarantees, as was the case for certain of the Carlisle Group.

g) Consistent with the action brought by FCC, the litigation commenced against the Bankrupt by the Carlisle Group has been stayed as a result of the assignment in bankruptcy. Nonetheless, Mr. Schwartz submitted that an argument could be made to the effect that the claim of the Carlisle Group should survive the Bankrupt being discharged. The Carlisle Group alleges that BDH and HAL received approximately $1,000,000.00 dollars in parts and equipment that had been purchased by CEL. Mr. Schwartz explained that the Bankrupt physically moved inventory of CEL to BDH and HAL, and used this inventory as a means of obtaining credit for BDH and HAL, not

CEL. It is further alleged that the Bankrupt proceeded as described without the knowledge or consent of Darrell Carlisle (such that this conduct of the Bankrupt should be considered as tantamount to fraud).

h) The explanation of the Bankrupt as to why he could not keep up with corporate financial records made no sense to Mr. Schwartz, as significant retained earnings were disclosed within the last year-end financial statements from 2017 for both BDH and HAL.

i) The Carlisle Group is not convinced that the Bankrupt has been rehabilitated, based on his conduct. For instance, Mr. Schwartz categorized the preference/transfer undervalue involving Victor and Annette as being evidence of an intention on the part of the Bankrupt to get as many assets out in his name as possible before he made an assignment in bankruptcy.

j) According to Mr. Schwartz, there have been too many instances where the Trustee discovered an asset or certain fact, and then had to confront the Bankrupt to receive an explanation, as opposed to full disclosure being provided at the outset. Mr. Schwartz categorized this situation as one where the Trustee had to regularly "pull" information from the Bankrupt.

k) No medical report was provided to the Court with respect to the Bankrupt's long-term prognosis for employment given his disclosure of being diagnosed with cancer (which, thankfully, is now in remission as confirmed upon cross-examination).

l) The Carlisle Group believes that the Bankrupt has attempted to minimize his current income, and his corresponding ability to pay, with there being no recent affidavit from the Bankrupt to provide evidence concerning his present expenses. The Bankrupt had disclosed having gross annual income of $105,000.00 (as a branch sales manager) within the Bankrupt's May 2021 Affidavit, which has now been reduced to a base annual salary of $65,000.00 according to the Bankrupt's testimony (as a sales associate with the farm equipment dealership).

m) Mr. Schwartz suggested that the Bankrupt may eventually inherit one-half of Victor and Annette's respective estates, which could be a significant sum in consideration of the farm and land holdings owned by Victor and Annette.

Terms and conditions proposed for conditional discharge

[83] Mr. Schwartz clarified at the outset that his clients had been prepared to support there being a conditional discharge pronounced for the Bankrupt, including a payment obligation in an amount of $500,000.00, if the Bankrupt agreed with this disposition, the Trustee consented, and the professional costs of the Carlisle Group (such as legal fees) were also paid by the Bankrupt.

[84] Because there was a contested discharge hearing, however, the Carlisle Group now requests that the Bankrupt be discharged conditional upon payment of a sum greater than $500,000.00, plus an order that the Bankrupt pay the

professional expenses (legal costs) incurred by the Carlisle Group, as well as certain professional expenses of the Trustee (such as legal costs).

[85] As support for the Carlisle Group's position, Mr. Schwartz referenced the Manitoba decision of the Honourable Master Ring in ***The Bankruptcy of Janos Kresz, also known as John Kresz***, 2007 MBQB 67 (CanLII) ("***Kresz***").

[86] In ***Kresz***, the bankrupt was initially ordered to pay an amount of $1,000,000.00 pursuant to an order of conditional discharge (which was subsequently reduced to the sum of $175,000.00 through negotiations and agreement of the parties involved).

[87] Mr. Schwartz emphasized that the seven figure conditional payment obligation imposed in ***Kresz*** was the result of the court being offended by the bankrupt's conduct (it being determined that the bankrupt was not an honest but unfortunate debtor).

[88] By application to the case at bar, it is submitted by Mr. Schwartz that ordering the Bankrupt to be responsible for a significant payment obligation could achieve a similar measure of deterrence and denunciation. Mr. Schwartz also noted that the Bankrupt could apply to the Court after a minimum period of one year following pronouncement of a conditional discharge to revisit whatever payment obligation had been ordered. In the interim, he suggested that the Bankrupt could perhaps look to family or other sources for assistance.

[89] During the course of requesting that there be a substantial payment obligation imposed upon the Bankrupt, Mr. Schwartz reminded the Court that the criminal charge(s) facing the Bankrupt were stayed, and that the civil proceedings initiated on behalf of the Carlisle Group, as well as FCC, have also been stayed by virtue of the assignment in bankruptcy of the Bankrupt.

[90] With respect to the issue of professional expenses, Mr. Schwartz noted that the bankrupt in ***Kresz*** was ordered to pay costs in an amount of approximately $26,000.00 in favour of a creditor.

SUMMARY OF OSB'S POSITION

[91] Ms. Mendez had nothing further to add on behalf of the OSB in light of the submissions made by the Trustee and by Mr. Schwartz, other than reiterating that the OSB was of the position that a substantial payment obligation ought to be required of the Bankrupt as a condition of his discharge.

[92] As of the date of the discharge hearing, an investigator had not been assigned by the OSB, and Ms. Mendez believed it could take a number of months for that to occur, if it was ultimately decided to proceed in that manner. Ms. Mendez did acknowledge, however, that the Court could proceed with the discharge application, even if it results in an OSB investigation being undertaken and completed at a later date.

ANALYSIS

Considerations from the *2023 Annotated Act*

[93] The following passages from the ***2023 Annotated Act*** provide guidance to the Court in these circumstances:

> Section 7:69 on page 891:
>
> > **A discharge is not a matter of right**: *Re Wensley (Trustee of)* (1985), 59 C.B.R. (N.S.) 95, 67 A.R. 184 (QB) (the other cases that were cited have been omitted). **Every application for discharge must be determined on its own particular facts and by the due exercise of judicial discretion**: *Re Young* (1928), 10 C.B.R. 53 (N.B.K.B.) (the other case cited has been omitted). **The *BIA* provides no guidance for the exercise of discretion except that the court must refuse an absolute discharge if a s.173 fact is proved against the debtor**: *Re Crowley* (1984), 54 C.B.R. (N.S.) 303, 66 N.S.R. (2d) 390, 152 A.P.R. 390 (T.D.)
> >
> > **One of the prime objects of the *BIA* is to enable an honest but enforcement debtor to obtain a discharge from his or her debts, subject to such reasonable conditions,** if any, as the court may see fit to impose, so that the debtor can make a fresh start: *Re Posner* (1960), 3 C.B.R. (N.S.) 49 (Ont. S.C.).
>
> Section 7:70 on page 892:
>
> > **The following factors** have been identified by the courts as being worthy of consideration in considering **applications for discharge by a person who is in bankruptcy for the first time**:
> >
> > > **a). the necessity for providing relief for a bankrupt from his or her financial obligations;**
> > > **b). the integrity of the bankruptcy process itself and the public perception of the integrity of the process;**
> > > **c). the amount that the creditors have received or may receive on their claims by way of dividend.**
>
> Section 7:104 on page 903:
>
> > Section 172 sets out the orders that the court may make on an application for discharge. **If no facts are proved under section 173(1), one of the four orders set out in s. 172(1) may be made. If facts are proved under section 173(1), then one of three orders set out in section 172(2) may be made**.
> > **(emphasis added)**

Principles from Case Law

[94] With respect to the overarching principles to consider on a discharge application, the Honourable Registrar Thompson made the following observations in ***Gordon Harvey Avramenko (Re)***, 2017 SKQB 64 (CanLII) ("***Avramenko***"), at paragraph 50:

> [50] The bankruptcy process is designed to address two societal objectives: **1) to provide an equitable system for the distribution of a bankrupt's property to the bankruptcy creditors; and 2) the financial rehabilitation of the debtor** (*Alberta (Attorney General) v Moloney*, 2015 SCC 51, [2015] 3 SCR 327).
> **(emphasis added)**

[95] Similar commentary is contained within ***Martino (Bankruptcy) Re*****,** 2004 CanLII 17978 (ON SC) ("***Martino***"), where it was stated by the court as follows (at paragraph 26 of the Endorsement):

> [26] **The decision on the granting or withholding of a discharge is discretionary, to be exercised upon well-known principles. There are many decisions which have held that in addition to balancing the interests of the creditors and the bankrupt, the integrity of the bankruptcy process must also be preserved. They include *Satish, Johnson, Katari* and *Raftis*.**
> **(emphasis added)**

[96] In ***Munro (Re),*** 2016 ABQB 541 (CanLII) ("***Munro***"), the decision issued by a registrar had been appealed, and the presiding justice noted the following (at paragraph 31):

> [31] The Registrar observed that **deterrence and punishment were among the goals to be considered in determining what discharge order to make**. In the context of considering the order to be made he said: (para. 29)
>
> > **Among the factors to be balanced are: rehabilitation or reform of the bankrupts' habits, deterrence and punishment, preservation of integrity of the system and the confidence of**

> **those who participate in it in good faith, and obtaining the highest possible dividend for creditors.**
> **(emphasis added)**

[97] Another decision from Saskatchewan is ***Kurtz (Re)***, 2015 SKQB 290 (CanLII) ("***Kurtz***"), where Registrar Thompson reviewed one of the aims of the ***Act***, namely, to assist an "honest but unfortunate debtor" (at paragraphs 12 and 13):

> [12] **The bankruptcy system was established to relieve the honest but unfortunate debtor from the crushing burden of his or her debts.** When an individual assigns in bankruptcy, most unsecured creditors are stayed from executing on their debt claims. If a bankrupt is honest and unfortunate and it is clear that he or she had no other option but bankruptcy, and if the bankrupt conducts himself or herself honestly and in accordance with his or her obligations under the *BIA* during the bankruptcy administration, then he or she will be eligible for an automatic discharge from bankruptcy within a prescribed period of time. Discharge from bankruptcy means that the unsecured creditors with proven claims in the bankruptcy will no longer be in a position to pursue the bankrupt for the pre-bankruptcy debts and the bankrupt will have an opportunity to start afresh.
>
> [13] **When a bankrupt conducts himself or herself dishonestly, either before the bankruptcy or during the course of the bankruptcy administration, the integrity of the bankruptcy system comes into question. It is not acceptable for a bankrupt to receive the protection and benefits of the *BIA* without having to meet his or her obligations. For the system to work, a bankrupt must disclose all of his or her property to the trustee. When a bankrupt hides assets from the trustee, so that he can shelter them from his creditors, this is abuse of the bankruptcy system.**
> **(emphasis added)**

Section 173(1) facts

[98] In accordance with the foregoing guidance from the ***2023 Annotated Act*** and case law, I have considered the evidence presented, and made certain determinations which immediately follow in relation to section 173(1) of the ***Act***.

173(1)(a)

[99] There is no dispute by the Bankrupt that as of the date of bankruptcy, his assets were not of a value equal to $.50 on the dollar considering his substantial liabilities. The total of all proven claims against the Bankrupt amounted to $3,286,657.05, whereas the Bankrupt's assets were valued at $1,456,415.00.

[100] As a result, section 173(1)(a) of the ***Act*** clearly sets forth the Bankrupt bears the onus to establish that this situation has arisen from circumstances for which the Bankrupt "cannot justly be held responsible".

[101] Despite the submissions made on behalf of the Bankrupt, I agree with the Trustee, and find that the Bankrupt has not met this statutory onus. Best efforts on the part of the Bankrupt to cooperate with the Trustee (as submitted by Mr. Mamucud) does not explain or answer why the Bankrupt should not be determined to be justly responsible for his significant liabilities as of the date of bankruptcy.

173(1)(b)

[102] The excerpts to follow from the ***2023 Annotated Act*** are of relevance for this case:

> Section 7:154 on page 936:
>
> > **The second fact in s.173 is the omission to keep such books of account as are usual and proper in the business carried on by the bankrupt** and as sufficiently disclose the business transactions and financial position **in the period beginning on the day that is three years before the date of the initial bankruptcy event and ending on the date of bankruptcy.** This fact has no application where the principal occupation and means of livelihood of the bankrupt is farming or tillage of the soil: s.173(2).

Section 7:155 on page 936:

> In determining whether or not the debtor's books are sufficient, the test is: **could the debtor tell at any time just how he or she stood with regard to his or her assets and liabilities?**
> **(emphasis added)**

[103] It is not denied by the Bankrupt that the August 31, 2017 year-end financial statement was the last professionally prepared financial statement for BDH, and that the November 30, 2017 year-end financial statement was the last professionally completed financial statement for HAL.

[104] While the Bankrupt has stated that he could not afford to retain BDO any further, he acknowledged that Denise had been involved "doing the books" previously, and did not explain why that could not continue in relation to BDH and HAL for the balance of 2017, for 2018, and until the date of bankruptcy in 2019 (especially when healthy retained earnings were reported within the 2017 year-end corporate financial statements). In addition, the Bankrupt's reference to being escorted from the CEL property (such that he could not participate with respect to completion of financial records for CEL) is a response in relation to CEL, but not concerning BDH or HAL.

[105] Ultimately, I accept the Trustee's submission, and find that the Bankrupt breached his duty in this regard. An illustration of the resulting consequences for the Trustee is described within the Trustee's First Form 82 (as confirmed earlier herein), where it was stated that "deficient record-keeping and unreconciled personal and corporate transactions were discovered" when reviewing what financial records that were available from the Bankrupt.

[106] For completeness sake, an exemption exists for "farmers" at section 173(2) of the ***Act***:

> **Application to farmers**
> (2) Paragraphs (1)(b) and (c) do not apply in the case of an application for discharge by a bankrupt whose principal occupation and means of livelihood on the date of the initial bankruptcy event was farming or the tillage of the soil.

[107] No evidence was referenced and no argument was advanced on behalf of the Bankrupt to suggest that the above noted exemption is or could be applicable for the Bankrupt.

173(1)(c)

[108] The following passages from the ***2023 Annotated Act*** are of assistance purposes of considering this provision:

> Section 7:158 on page 937:
>
> > **Section 173(1)(c) makes it imperative that a debtor who knows that he or she is insolvent should cease trading and either call a meeting of creditors or file an assignment in bankruptcy**. *Re Lunenfeld* (1929) 10 C.B.R. 457 (Ont. S.C.). **If the debtor continues in business, he or she has committed a fact under section 173(1)(c)**.
> >
> > **Section 173(1)(c) can only apply to a trader**; it is no application to non-traders. **A trader is generally someone who is a merchant or retailer and his business is to** buy and **sell goods, hopefully for profit.**
> > **(emphasis added)**

[109] From ***Martino***, there is commentary as to what should be considered when assessing if trading continued despite business insolvency (at paragraph 28):

> [28] … **In my view, the critical time is when it becomes apparent to the businessman that failure of the business, and a personal bankruptcy as a result, is not a remote contingency, but a serious issue for the near term. After that point, even though the transactions may not be voidable under the BIA, any steps taken to**

> **divert assets or streams of income from the possible claims of the Trustee are legitimately reviewed by the discharge court in assessing whether there should be an absolute or a conditional discharge ...**
> **(emphasis added)**

[110] In this case, the Trustee has established that FCC issued a demand against CEL and HAL in early June of 2018 for indebtedness of $2,889,094.13, together with interest and costs. The Bankrupt was a principal of both corporations. Shortly thereafter, notice of intention to make a proposal in accordance with the ***Act*** was filed on behalf of CEL on June 15, 2018.

[111] Based upon the foregoing, the Trustee submits that the Bankrupt knew or ought to have known by June of 2018 (well over one year prior to the date of bankruptcy) that CEL, HAL and BDH, as well as the Bankrupt personally, were in substantial financial difficulty and unable to meet their liabilities when due. The Carlisle Group suggests that the Bankrupt had or ought to have had this awareness even sooner, such as on or around the spring of 2018 when FCC conducted an audit.

[112] During cross-examination, the Bankrupt claimed that he was unaware of how serious his overall financial situation was until on or about December of 2018, noting he had been "shut out" of CEL and its business. This claim, however, is at odds with what the Bankrupt stated to the Trustee in relation to an email sent to his accountant dated June 14, 2018. The Bankrupt admitted to the Trustee, that at the time of sending this particular email, "this is probably when I realized I was

finished" (which is well before December of 2018, and over one year prior to the date of bankruptcy).

[113] As a result, I do not find the Bankrupt's explanation to be plausible with respect to when he became aware of the ominous financial circumstances facing these corporations and himself. Quite frankly, the Bankrupt's answer lacks credibility.

[114] The Trustee has presented evidence that the Bankrupt incurred unsecured debt with CHN Capital ($74,690.64) and CWB ($37,122.00), and contends this was at a point in time when the Bankrupt knew or ought to have known that he was insolvent. It was not disputed by the Bankrupt that liabilities existed with CHN Capital and CWB, and critically, the Bankrupt did not contest the Trustee's assertion that this debt was incurred when he knew or ought to have known of his insolvency.

[115] The Court also recognizes that the Trustee has confirmed the Bankrupt increased the limit associated with the line of credit provided to HAL by the Credit Union (from $30,000.00 to $400,000.00), which occurred on or around early January of 2018 and resulted in indebtedness to the Credit Union, as of the date of bankruptcy, in an amount of approximately $187,000.00.

[116] In addition, the Trustee has referred the Court to the Bankrupt's decision to proceed with expansion of HAL's business (which included sale or "trading" of farm equipment), contrary to the prior advice of a business consultant, and when the business consultant identified that in late 2016 or early 2017, there was

evidence of sales transactions at low or negative margins. None of this evidence was refuted by the Trustee.

[117] Accordingly, I find that there is sufficient evidence to reach the conclusion that the Bankrupt continued to trade and carry on in business (sale of farm equipment and related services such as parts) when he knew or ought to have known that he was insolvent, as well as the corporations in which he was involved.

173(1)(d)

[118] With reference to the ***2023 Annotated Act***, the following summary is helpful for analysis purposes:

> Section 7:159 on page 937:
>
> > **The fourth factor in s. 173 is that the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet his or her liabilities: s. 173(1)(d).** "Assets" in s. 173(1)(d) do not include money loaned or advanced to the bankrupt: they are limited to the property or effects of the bankrupt available for payment of his or her liabilities: *Re Herd* (1989), 77 C.B.R. (N.S.) 209 (B.C.C.A.).
> > **(emphasis added)**

[120] The Trustee contends that the Bankrupt's conduct as a principal of BDH and HAL (as well as CEL) resulted in dissipation of assets and a reduction in value of the Bankrupt's estate, based upon Exhibit "E" to the Trustee's Second Form 82 (the summary prepared by the Trustee entitled "Timeline of events impacting share value"). For example, one of the numerous notations within this summary involved sale of a Case IH Deep Tiller to Annette, where there was no evidence of payment being received for this item.

[121] It has also been emphasized by the Trustee that despite the significant liabilities of the Bankrupt as of the date of bankruptcy, there was a substantial value recorded for assets within the year-end financial statements of both BDH and HAL (as of August 31, 2017 and November 30, 2017 respectively), as well as more than nominal retained earnings recorded for both corporations at that time.

[122] Even though there were no admissions, the Bankrupt did not provide a detailed explanation or any specific evidence to disprove or challenge the Trustee's position in this regard.

[123] It is my determination that this fact pursuant to the ***Act*** has been established by the Trustee as well.

173(1)(e)

[124] The excerpt below from the ***2023 Annotated Act*** offers guidance when assessing this provision:

> Section 7:164 on page 939:
>
> > **The failure of the bankrupt to maintain proper books of account and to supervise sales of the business being carried on by him or her constitutes culpable neglect of business affairs:** *Re McLeod* (1995), 37 C.B.R. (3rd) 63 (Man Q.B.); and see *Re Brawn* (2004), CarswellBC 1562, 2 C.B.R. (5th) 81 (B.C.S.C.).
> > **(emphasis added)**

[125] The Trustee has already established to the satisfaction of the Court that the Bankrupt failed to maintain current and complete financial records in light of section 173(1)(b) of the ***Act***. As a result, this conduct on the part of the Bankrupt can be accepted as evidence of neglect of business affairs (similar to the

dissolution of BDH and HAL, which was due to failure by the Bankrupt to file the required annual returns).

[126] In addition, the Trustee has identified certain sales of equipment, where the items were sold by either BDH or HAL at a loss, in the absence of explanation or clarification from the Bankrupt. The Trustee is also of the view that when questioned by the OSB in this regard, the responses from the Bankrupt were vague.

[127] From the Bankrupt's perspective, he has denied neglecting his business interests. That being stated, the Bankrupt has not presented specific evidence to counter these serious assertions made by the Trustee.

[128] As a result, I find that this fact pursuant to the ***Act*** has been confirmed.

173(1)(f)

[129] From the ***2023 Annotated Act***, the following passage is of guidance:

> Section 7:165 on page 937:
>
> > **The sixth fact in section 173 is that the bankrupt has put any of his or her creditors to unnecessary expense by a frivolous or vexatious defence to any action properly brought against the bankrupt: section 173(1)(f).** A frivolous defence is one lacking in any legal merit. A vexatious defence is one put in to annoy or embarrass the creditor. "Abuse of process" is another description of a proceeding which can be categorized as vexatious": *Re Paskauskas* (1995), 36 C.B.R. (3d) 288 (Ont. Gen. Div.).
> > **(emphasis added)**

[130] The Preference/Transfer Undervalue Order was pronounced as I had determined, following a contested hearing, that Victor and Annette had received a

preferential payment or were privy to a transfer undervalue in an amount of $93,846.73.

[131] Technically speaking, it was Victor and Annette who defended the motion filed by the Trustee (and whom were ordered to pay the above noted sum). Nonetheless, the Bankrupt disputed the Trustee's position that he had made a preferential payment or transfer undervalue in favour of his parents (between on or about October and December of 2018). He stood in unison with his parents concerning these contested issues before the Court.

[132] The Trustee has also referred to the December 2020 Order, which was pronounced as a result of a contested hearing involving Denise (this matter being subsequently resolved pursuant to the February 2021 Order as reviewed previously herein). The Bankrupt fully supported Denise's position.

[133] With respect to both the Preference/Transfer Undervalue Order, and the December 2020 Order, I was not convinced there was sufficient merit to the defences raised to challenge the Trustee's position.

[134] According to the Trustee, the Bankrupt's opposition to these interim proceedings resulted in considerable time and expense for the Trustee and the Bankrupt's estate. This reality is abundantly apparent from the Trustee's December 9th Affidavit, and the Trustee's December 22nd Affidavit (which included the Bill of Costs that was taxed earlier this year by the Court).

[135] In view of the foregoing, I am prepared to find that this particular fact pursuant to the ***Act*** has been satisfactorily established by the Trustee.

173(1)(o)

[136] For purposes of considering this section, the excerpt to follow from the ***2023 Annotated Act*** is instructive (concerning a case from British Columbia):

> Section 7:180 on page 945:
>
> **The failure of the bankrupt to list his or her property completely, to provide sufficient information as to his or her financial affairs, or to aid his or her trustee and creditors in mitigating the damage caused by the assignment amounted to a failure to perform duties under section 173(1)(o) [and] justifies the imposition of a conditional order for payment** and a suspension of discharge for six months following the payment: *Re Jefferson* (2004), 2004 CarswellBC 378, 1 C.B.R. (5th) 209 (B.C.S.C)**.... (emphasis added)**

[137] In ***Martino***, the court provided the following commentary in relation to the expectation that a bankrupt fulfill the required duties set forth at section 158 of the ***Act***:

> [20] In summary, I accept the Trustee's evidence that the level of co-operation fell far short of the openness expected of Bankrupts. **Persons seeking the benefit of relief from their debts must make total disclosure of their affairs. It is not good enough to say, as these Bankrupts say through their counsel, that it is not their fault that the Trustee did not ask the right questions. This is not a game of 'Catch me if you can', and those who play that game can expect little sympathy from the court. (emphasis added)**

[138] The Trustee contends that the preference or transfer undervalue by the Bankrupt to Victor and Annette for the sum of $93,846.73 (which occurred between October of 2018 and December of 2018) represents evidence of failure by the Bankrupt to comply with section 158(f) of the ***Act*** (insofar as the requirement for full disclosure of all transactions made within one year prior to making an assignment in bankruptcy, with the Trustee discovering these

circumstances, and having to seek relief from the Court). By extension, the Trustee submits that the Bankrupt did not satisfy his required duties pursuant to the ***Act***.

[139] With pronouncement of the Preference/Transfer Undervalue Order, I agree with the Trustee in that this fact pursuant to section 173(1)(o) of the ***Act*** has been confirmed.

[140] The Trustee has also asserted that the Bankrupt did not fulfill his required statutory duties by failing to act in good faith, contrary to section 4.2(1) of the ***Act***.

[141] In support of this position, the Trustee relies upon evidence reviewed earlier herein, such as but not limited to the Bankrupt's responses when questioned by the OSB about the cheque for the sum of $17,000.00 dated June 28, 2019. This cheque was payable to the Bankrupt, who admitted that he had provided it to Denise approximately three weeks prior to making an assignment in bankruptcy. In addition to $12,000.00 being paid to an outstanding credit card account, the Bankrupt advised the OSB that $5,000.00 was used to pay the retainer for the Trustee's services, with full knowledge and approval of the Trustee.

[142] The Trustee has explained that she was not at all aware of this cheque, or that it had been used by Denise for the purposes described, until the Trustee undertook further inquiries and obtained evidence of the cheque directly from Tangerine on February 21, 2020. In addition, the Trustee was emphatic that she did not and never would have consented to funds being transferred from the Bankrupt to his spouse, in order for those monies to then be utilized to retain the

Trustee (to do so would be inconsistent with the third-party deposit agreement signed by Denise with the Trustee).

[143] Mr. Schwartz echoed the sentiments of the Trustee, arguing on behalf of the Carlisle Group that there were too many instances where the Trustee did not receive complete or accurate background details from the Bankrupt, necessitating further inquiry and due diligence by the Trustee.

[144] Upon balancing the precise explanation of the Trustee against the general explanation offered by Mr. Mamucud for the Bankrupt (which did not dispute the Trustee's version of events concerning this particular cheque, and instead suggested that it should not be surprising if there were some inconsistencies with information provided by a first time bankrupt), I prefer the Trustee's evidence. I also find that this entire scenario with the undisclosed cheque is demonstrative of there being an absence of good faith on the part of the Bankrupt.

[145] As a result, pursuant to both grounds advanced by the Trustee, it is my determination that the Bankrupt failed to perform his required duties in accordance with the ***Act***.

173(1)(k)

[146] The following excerpts from the ***2023 Annotated Act*** address this particular provision, which has been raised by the Carlisle Group:

> Section 7:172 on page 942:
>
> > **The eleventh fact in s.173 is that the bankrupt has been guilty of fraud or fraudulent breach of trust: s.173(1)(k)**

Section 7:173 on page 942:

> **Fraudulent means something more than merely wrongful. There must be an element of dishonesty. To constitute a fact under section 173(1)(k), the conduct of the bankrupt must be actually fraudulent as distinct from deemed fraudulent**: *Re Aby* (1995), 37 C.B.R. (3d) 259 (Sask Q.B.).
>
> **There is a difference between a breach of trust and a fraudulent breach of trust**.
> **(emphasis added)**

[147] Mr. Schwartz has submitted on behalf of the Carlisle Group that the Bankrupt was aware CEL was selling out of trust as early as the spring of 2018. It is also the position of the Carlisle Group that the Bankrupt arranged for BDH and HAL to receive approximately $1,000,000.00 in parts and equipment, which had been purchased by CEL. The Carlisle Group contends that the Bankrupt moved inventory of CEL to BDH and HAL, and used these items as a means to obtain credit for BDH and HAL, all of which was without the prior knowledge and consent of Darrell Carlisle. In particular, it is alleged by the Carlisle Group that the Bankrupt fraudulently signed Darrell Carlisle's name to six documents.

[148] It is of note, however, that the allegations in relation to movement by the Bankrupt of CEL inventory for purposes of obtaining credit for BDH and HAL, or in connection with the Bankrupt inappropriately signing documentation on behalf of Darrell Carlisle, are the result of submissions made before the Court by Mr. Schwartz. For instance, there is no forensic handwriting analysis in evidence.

[149] The Bankrupt has denied these most serious allegations.

[150] While it was intimated by Mr. Schwartz that there is an argument to be made to the effect that the action initiated by the Carlisle Group should survive the Bankrupt's discharge (as his conduct should be considered as tantamount to fraud), the criminal charge(s) involving the Bankrupt were stayed by the Crown in 2021. The litigation commenced by the Carlisle Group against the Bankrupt (in addition to the FCC action) has also been stayed given his assignment in bankruptcy.

[151] In the circumstances, with there being no fraud conviction (guilt or culpability to be established beyond a reasonable doubt), and there being no determination of fraud pursuant to the civil proceedings initiated (on a balance of probabilities), I am not prepared to find that this particular fact in accordance with the ***Act*** has been sufficiently established pursuant to the evidence presently before the Court.

Type of Discharge Order

[152] Based upon the foregoing determinations that multiple facts in accordance with section 173(1) of the ***Act*** have been substantiated by the Trustee, a foundation has been established for the Court to pronounce a conditional discharge (which is what has been requested by the Trustee and the Bankrupt, and is supported by the Carlisle Group as well as the OSB).

[153] Even should I be in error with respect to certain of my findings, only one such fact being proven pursuant to section 173(1) of the ***Act*** is sufficient to serve as a basis for granting a conditional discharge in favour of the Bankrupt.

[154] For clarification purposes, I do not perceive there to be a practical or proportionate benefit to any of the parties involved in these proceedings if the Court refused to discharge the Bankrupt.

[155] As to suspending the Bankrupt (in addition to a conditional discharge), the quantum and term of payment to be expected of the Bankrupt (as reviewed within the balance of this decision) is such that I am not convinced this is an appropriate or necessary component of the disposition in these circumstances. A suspension of discharge has also not been requested by the Trustee or the Carlisle Group.

Considerations for quantum of payment

[156] In this case, the payment obligation to be imposed upon the Bankrupt as a condition of his discharge will be of a substantial nature, as evidenced by the Bankrupt volunteering to pay an amount of $150,000.00.

[157] The Court has been essentially tasked with deciding if the Bankrupt's proposal is satisfactory, and if not, determining whether a much greater payment obligation to the extent requested by the Trustee, or by the Carlisle Group, is warranted.

[158] Conditional discharge orders are reviewed in detail within the ***2023 Annotated Act***, with the excerpts included below providing additional guidance to the Court:

> Section 7:17 on page 914:
>
> > Most conditional orders direct payment of a sum of money. **Generally speaking, an order for payment should only be made if, after providing for the adequate support of the bankrupt and his or her family, there is a surplus sufficient to permit payments to be made to the trustee for the benefit of creditors**.

> **In deciding whether or not to make a conditional order, the court should balance the rehabilitation of the bankrupt**, supported by sufficient income to provide the requirements of living for the bankrupt and his or her dependents in an appropriate manner, **against the right of creditors to receive an additional dividend from the bankrupt** *Marshall v. The Bank of Nova Scotia* (1986), 62 C.B.R. (N.S.) 118 (BC CA).
>
> Section 7:141 on page 931:
>
> **No consideration should be given to the mere possibility of a bankrupt inheriting a legacy; it must be a real probability, in the sense of the bankrupt can almost be assured of receiving the legacy**: *Re Baker* (1987), 63 C.B.R. (N.S.) 21 (Ont. S.C.) (other case cited has not been listed).
> **(emphasis added)**

[159] With respect to case law from which the Court may derive guidance, I have already referred to the conditional discharge initially ordered in ***Kresz***, where the bankrupt was not considered to be an honest and unfortunate debtor, and was required to pay the sum of $1,000,000.00 (plus costs of approximately $26,000.00 in favour of one of the creditors).

[160] The amount of the conditional discharge payment in ***Martino*** was not insignificant either. For context, paragraph 13 is included, as well as paragraphs 37 through 42, which summarize the outcome in this case:

> [13] Further, even though Royal Crest could not pay the employee deduction remittances, the brothers continued to cause Royal Crest to pay them dividends at the rate of $25,000 per month, $300,000 each annually, which Farley J. called "puzzling" for companies with substantial negative equities.
> …
>
> **[37] Rather, the Trustee submits that the discharges should be granted, but conditional upon the payment of $300,000 by each of the Bankrupts. The rationale for these requested payments is that they represent: "one years worth of the 'puzzling dividends' taken at a time when the company was insolvent".**

> [38] Counsel for the applicants submits that this is not reasonable; it is a punishment of the wives and families which they have done nothing to incur; will inhibit the economic rehabilitation of the Martinos; and is based on efforts to use the discharge hearing improperly as a vehicle to attempt to recover funds from third parties. He points out that CRA (formerly CCRA) has withdrawn its objection and no other creditor opposed the discharge.
>
> [39] This submission overlooks the fact that the Inspectors, including a representative from CRA, approved the Trustee's recommendation to the Court for a conditional discharge and a $300,000 payment. **The Trustee is not off on some frolic of his own; he represents the views of the creditors**. As the foregoing narrative illustrates, **there are many unanswered questions about the affairs of the Martinos; they have been far from forthcoming in providing answers to the Trustee or evidence before me; and such evidence as there is points to a deliberate scheme to obtain income tax-free, allowing arrears to build for eventual elimination in the bankruptcy; while diverting income into the hands of others to hold for their benefit**. They are nowhere near satisfying me that an absolute discharge is warranted.
>
> **[40] In my view, the Bankrupts cannot be discharged unconditionally on these facts without damaging the integrity of the bankruptcy system. The condition suggested by the Trustee is sufficiently burdensome to make the point that such conduct cannot be tolerated, but ought not to be unduly hard for the Bankrupts to bear, particularly once they decide to return to employment.**
>
> **[41] Aldo Anthony Martino will be discharged upon condition that he make a payment to the Trustee of $300,000 upon such terms as the Trustee may agree to.**
>
> **[42] Giovanni Martino, also known as John Martino, will be discharged upon condition that he make a payment to the Trustee of $300,000 upon such terms as the Trustee may agree to.**
> **(emphasis added)**

[161] In ***Avramenko***, Registrar Thompson concluded as follows in relation to the conditional discharge that she ultimately ordered (at paragraphs 153 through 156):

> [153] The circumstances of this bankruptcy are serious. Seven creditors objected to the discharge, five inspectors were appointed, and there have been a number of hearings to get to this point. Most of the farm assets were held in the non-bankrupt spouse's name at the time of the bankruptcy

> assignment. Moreover, **the Bankrupt hopes to discharge a debt in excess of $1.2 million.**
>
> [154] To discharge the Bankrupt within three years is now impossible. **The Bankrupt has conducted himself in a manner that is subject to censure and he has surplus income.** I am of the view that the $36,000.00 that Mr. Fritzler suggested the Bankrupt pay for outstanding surplus income is not sufficient to maintain the integrity of the bankruptcy system under the circumstances of this bankruptcy.
>
> [155] **The Bankrupt is presently 46 years old with many earning years ahead of him**. I agree with the Trustee and the Minister that **a significant order of discharge is required under the circumstances of this bankruptcy.** The bankrupt originally proposed to pay his creditors $100,000.00 prior to bankruptcy and he agreed to pay $120,000.00 at the time of the consent order.
>
> [156] **For the foregoing reasons, I agree with the recommendation of the Trustee and the Minister and I hereby order that the Bankrupt will be required to pay $120,000.00 to the bankruptcy estate as a condition of his discharge**.
> **(emphasis added)**

[162] The summary provided at page 912 of the ***2023 Annotated Act*** concerning ***Re Dykes***, 2014 CarswellAlta 878, 14 C.B.R. (6th) 98, 2014 ABQB 323 ("***Dykes***") is also of relevance:

> The Alberta Court of Queen's bench dismissed a bankrupt's appeal from a decision of the registrar granting her a conditional discharge in which she was ordered to pay 50% of her proven unsecured debt, plus the trustee's fees.
> …
>
> **The findings of the registrar reasonably demonstrated that the appellant was not honest as to how she intended to use the money (loan proceeds).** The appellant's bankruptcy was not the result of some intervening unfortunate event or inexperience, but rather, from extravagant personal expenditures, and her inexplicable and suspicious failure to pursue recovery of the significant debt owed to her by her business associate. Campbell J. concluded that the evidence was more than sufficient to support the registrar's findings; **and in finding the appellant's conduct was reprehensible, the registrar was entitled to make a conditional order without regard to the appellant's income and ability to pay.**
> **(emphasis added)**

[163] At the outset, and while I appreciate decisions of this nature involve a measure of judicial discretion, determining a payment obligation for the Bankrupt is not to be arrived upon arbitrarily.

[164] For purposes of formulating a position concerning the quantum of payment that should be required of the Bankrupt, the Trustee has placed emphasis upon the following evidence (as reviewed earlier herein):

a) The last verifiable retained earnings reported for BDH and HAL ($211,756.00 and $148,762.00 respectively, for a total of $360,518.00) in accordance with the last year-end financial statements prepared for these two corporations (which was in 2017); and

b) The unsecured debt which the Trustee has established was incurred when the Bankrupt knew or ought to have known that he was insolvent ($74,690.64 to CNH Capital and $37,122.00 with CWB), as well as the outstanding surplus income as calculated ($11,784.34) and the amount owing for the Credit Union line of credit ($187,935.00), all of which totals $311,531.98.

[165] I find favour with the approach adopted by the Trustee insofar as reliance upon evidence of established values, especially in connection with unsecured liabilities that were incurred when the Bankrupt knew or ought to have known that he was insolvent (which was not disputed by the Bankrupt).

[166] A method somewhat similar to the Trustee's approach in this case was employed in ***Martino***, as the payment obligation requested by the trustee (and

ultimately imposed by the court) was linked to the amount of "puzzling dividends" which had been received by the bankrupts in one year despite the corporation in question being insolvent.

[167] With respect to the retained earnings figures for BDH and HAL, however, the last year-end financial statements are from 2017, such that the extent of retained earnings for these two corporations are not known as of the date of bankruptcy. That being stated, the Bankrupt should not derive advantage from his failure to ensure that there were more current financial records prepared for BDH and HAL as of on or around the date of bankruptcy. In addition, the last reported sums for retained earnings with both BDH and HAL were considerable, with the Trustee establishing that there has been a failure on the part of the Bankrupt to satisfactorily explain the loss or deficiency of assets for these businesses, and what specifically happened to these retained earnings by the date of bankruptcy.

[168] Ultimately, the Trustee is not requesting that the Bankrupt be compelled to pay an amount of $672,049.98 as a condition of his discharge (which is the all-inclusive total of the figures relied upon by the Trustee as confirmed within paragraph 164 herein). Rather, the payment obligation which is being recommended for the Bankrupt by the Trustee ($500,000.00) could be viewed as including a sum representative of approximately one-half of the retained earnings disclosed for year-end purposes in 2017 by BDH and HAL.

[169] While I am persuaded by the Trustee's contention that the circumstances surrounding the last reported retained earnings for BDH and HAL (including the

dissipation of assets as revealed by the Trustee) serves as reasonable justification for increasing the payment obligation of the Bankrupt to an amount beyond $311,531.98 (the sum that is equivalent to and linked with the unsecured liabilities that were incurred by the Bankrupt when he knew or ought to have known that he was insolvent), the extent or amount of any such increased payment obligation should not be determined without also taking into account the conduct of the Bankrupt in connection with these proceedings.

[170] The following circumstances are of serious concern to the Court insofar as the Bankrupt's conduct:

a) Multiple facts being proved in accordance with section 173(1) of the ***Act***.

b) The acknowledgment of the Bankrupt to the Trustee (in connection with the June 14, 2018 email) that "this is probably when I realized I was finished" (when he had been served with the formal demand from FCC), and yet taking the position before the Court that it was not until on or about December of 2018 when he became aware of the extent of his serious financial difficulties.

c) The Trustee establishing that the Bankrupt continued to incur liabilities when he knew or ought to have known that he was insolvent, with the total debt outstanding to CNH Capital and CWB, as well as the Credit Union, being in an amount of $299,748.14 at the date of bankruptcy.

d) The comments made by the Bankrupt during the OSB examination in relation to the cheque dated June 28, 2019, which were false and misleading.

e) The Preference/Transfer Undervalue Order (it was the Bankrupt who preferred, or in the alternative, transferred property to Victor and Annette of significant value, less than a year prior to the date of bankruptcy, with this situation demonstrating a failure to disclose and lack of good faith cooperation on the part of the Bankrupt).

f) The conduct of the Bankrupt in connection with the Preference/Transfer Undervalue Order, which could also be categorized as an attempt by the Bankrupt to divert assets from creditors.

g) The additional time, effort and expense incurred by the Trustee due to the Bankrupt's support for the position of his parents concerning the Trustee's motion that resulted in the eventual pronouncement of the Preference/Transfer Undervalue Order.

h) The necessity for the Trustee to follow up and conduct further due diligence when inaccurate answers or incomplete disclosure was provided by the Bankrupt.

i) The dissipation of assets by the Bankrupt and corresponding failure to satisfactorily account for the inability to meet liabilities (as concluded by the Trustee, and summarized within Exhibit “E” to the Trustee's Second Form 82).

j) The discovery by the Trustee of several instances of deficient record-keeping and unreconciled personal and corporate transactions (noted within the Trustee's First Form 82).

k) The total of all proven claims against the Bankrupt (both secured and unsecured) amount to $3,286,657.05, versus an asset value for the Bankrupt of $1,456,657.05 at the date of bankruptcy (the proven unsecured claims alone total $2,159,109.22 pursuant to the Trustee's Second Form 82).

[171] It is also fundamental to this case to emphasize that there was little to no challenge from the Bankrupt insofar as critical portions of the submissions made before the Court by the Trustee (primary examples of which include but are not limited to there being no specific denial from the Bankrupt that he incurred liabilities with CNH Capital and CWB when he knew or ought to have known he was insolvent, and there being no explanation offered by the Bankrupt to refute what the Trustee has described concerning the cheque dated June 28, 2019).

[172] When considering the totality of evidence in this case, and in particular, the circumstances of concern summarized at paragraph 170 herein, I reject the Bankrupt's claim that he is an honest but unfortunate debtor.

[173] Accordingly, it is my determination that a disposition incorporating a substantial payment obligation, which is of an amount within the range of what is being requested by the Trustee, and the Carlisle Group, is necessary for purposes of deterrence and denunciation. A clear message must be delivered in this case,

as there can be absolutely no perception fostered that a bankrupt can benefit from relief under bankruptcy legislation when neglecting or failing to meet required statutory duties. Maintaining public confidence in proceedings of this nature is vital.

[174] Even though I concur with Mr. Schwartz in that affordability to the Bankrupt should not take precedence over the other objectives to be achieved in this case, I am concerned about the utility of imposing a payment obligation of an amount which will most likely prompt immediate review and the potential for alternate payment arrangements (exactly as what transpired in ***Kresz***).

[175] The Bankrupt is in his late 40's, and not nearing retirement in the immediate future. He is gainfully employed, within an industry in which he has extensive experience. During cross-examination, it was reassuring to learn that the Bankrupt's cancer is now in remission. While the Bankrupt and his wife have two children (both dependent minors), Denise contributes to the family finances through her employment as a nurse.

[176] As reviewed earlier herein, the Bankrupt's current base annual salary as a sales associate is less than what he had earned previously as a branch sales manager. It was not canvassed through direct viva voce testimony, however, if the Bankrupt can reasonably expect to return to a management position, and if so, by when? In addition, there was no focus during cross-examination as to whether or not the Bankrupt is presently under employed.

[177] While Mr. Mamucud encouraged the Court to take into account that the sum of $93,846.73 would recovered for the Bankrupt's estate (by virtue of there being no appeal of the Preference/Transfer Undervalue Order), it cannot be ignored that the net sum available to the Trustee for distribution among creditors is expected to be reduced significantly, when considering the time and associated costs committed to that particular contested hearing by the Trustee, as well as the legal expenses incurred by the Trustee. For illustration, the account of Mr. Douglas for legal services has been taxed by the Court, with the approved sum for fees, disbursements and taxes being in excess of $45,000.00.

[178] Nonetheless, some net proceeds are reasonably anticipated as a result of the Preference/Transfer Undervalue Order, for which there can be a measure of credit in favour of the Bankrupt.

[179] I should clarify that I am not giving any consideration to the suggestion that the Bankrupt may potentially receive an inheritance from Victor and/or Annette in due course. In addition, I reiterate that a fact has not been established pursuant to the evidence before the Court at this time in accordance with section 173(1)(k) of the ***Act***.

Conclusion for quantum of payment

[180] I have considered the evidence and submissions as well as the principles reviewed from the ***2023 Annotated Act***, and from decisions such as ***Kresz***, ***Avramenko***, ***Martino***, ***Munro*** and ***Kurtz***. I also acknowledge that there is to be a balancing of interests involving relief for the Bankrupt from his financial

obligations, achieving reasonable recovery for the creditors, and preserving the integrity of the bankruptcy system.

[181] Based upon the foregoing, it is my determination and I hereby order that the Bankrupt shall be discharged, conditional upon payment in an amount of $475,000.00 in favour of the Trustee for the Bankrupt's estate.

Terms of payment

[182] Mr. Mamucud had proposed that the Bankrupt make payments of $700.00 monthly, as well as assign his income tax refunds and all other credits in favour of the Trustee until full payment had been completed.

[183] In contrast, the Trustee performed detailed calculations (reviewed earlier herein), the result of which was that the Trustee formed the opinion that the Bankrupt appeared to have surplus income of $1,948.00 monthly (which could be utilized towards monthly payments to the Trustee).

[184] One further factor to be considered in this context is the Bankrupt's present employment as a sales associate, with his base annual salary now considerably less than when he previously served as a branch sales manager.

[185] While it could very well take a considerable period of time for the Bankrupt to satisfy the payment obligation that I have imposed, there should nonetheless be a minimum monthly payment required of the Bankrupt.

[186] Accordingly, I am ordering that the Bankrupt shall pay a minimum monthly amount of $1,000.00 to the Trustee, payable upon the first of the day of each month, commencing effective February 1, 2024, and continuing each month

thereafter until the Bankrupt's payment obligation under the conditional discharge has been fully satisfied.

[187] The Bankrupt shall also comply with the ***Income Tax Act*** (which shall include but not be limited to filing his personal income tax return on or before the deadline each year, and to promptly pay any sum owing to CRA, if applicable), with there to be an assignment of the Bankrupt's income tax refunds and any other credits in favour of the Trustee (which shall become effective immediately, and remain in place until such time as the Bankrupt has made all required payments in full).

[188] With respect to the length of this conditional discharge order, I refer to the following excerpt from page 916 of the ***2023 Annotated Act***:

> Generally speaking, three years is regarded as an acceptable period of time for a bankrupt to be burdened with a conditional order; a longer-term should only be imposed in exceptional circumstances *Re Thompson* (1991), 8 CBR (3rd) 1 (BCSC) (other cases cited have not been listed).

[189] There is also mention of the decision in ***Stoski Estate (Trustee of) v. Royal Bank***, 2009 CarswellMan 30, 51 C.B.R. (5th) 40 (MBQB) ("***Stoski***") at page 904 of the ***2023 Annotated Act***, where it states as follows:

> …
> The court ordered payment in the amount of $150,000, recognizing her particular circumstances, and the payments to be made over a longer period of time than is normally acceptable, specifically, six years.

[190] While establishing a term or duration for the conditional discharge of the Bankrupt would be appropriate, I am mindful that it would need to be of a much greater duration than contemplated within the above noted authorities.

[191] A remedy exists for the Court to revisit and enforce a conditional discharge order, as discussed at page 917 of the ***2023 Annotated Act***:

> Where the bankrupt fails to comply the terms of a conditional order, the remedy is to bring an application under s.187(5) to rescind the order. This matter is discussed in 8:37 to 8:44 "Power of Court to Review, Rescind or Vary an Order - (7) Varying or Rescinding Orders Discharging Bankrupts".

[192] The Bankrupt also has a review option (as exercised in ***Kresz***), which is summarized at the bottom of page 931, and at the top of page 932, within the ***2023 Annotated Act***:

> If, at any time after the expiration of one year from the date of the making of a conditional order of discharge, the bankrupt satisfies the court that there is no reasonable probability of his or her being in a position comply with the terms of the order, the court may modify the terms of the order in such manner and upon such conditions as it may think fit: s.172(3).

[193] As a result, I have not placed a term or duration upon the monthly payment obligation to be satisfied by the Bankrupt in accordance with the conditional discharge.

OSB INVESTIGATION

[194] The Court has not been apprised by the Trustee, or the OSB, that the special investigations unit of the OSB is intending to move forward with an investigation concerning the Bankrupt.

[195] At paragraph 4 in ***Kurtz***, the court decided that there was no reason to delay disposition until the outcome of the OSB's investigation became available.

[196] In this case, I have decided to adopt the same approach as in ***Kurtz***.

SUMMARY

[197] The Bankrupt shall be discharged, conditional upon payment in an amount of $475,000.00 to the Trustee (for the estate of the Bankrupt), with the Bankrupt to be bound by and comply fully with the following additional terms:

a) The Bankrupt shall pay a minimum monthly amount of $1,000.00 to the Trustee (for the Bankrupt's estate), payable upon the first of the day of each month, commencing effective February 1, 2024, and continuing each month thereafter until the Bankrupt's payment obligation under the conditional discharge has been fully satisfied; and

b) The Bankrupt shall comply with the ***Income Tax Act***, which shall include but not be limited to filing his personal income tax return on or before the stipulated deadline annually, and promptly paying any sum owing to CRA, if applicable, with there to be an assignment of the Bankrupt's income tax refunds and any other credits in favour of the Trustee, effectively immediately, which shall remain in place until such time as the Bankrupt has fully satisfied his payment obligation to the Trustee in accordance with the conditional discharge.

COSTS

[198] As alluded to earlier herein, additional affidavit material has been filed on behalf of the Trustee and the Carlisle Group following the discharge hearing concerning the issue of costs (which includes a request that the Bankrupt be

responsible to pay the professional expenses incurred by the Carlisle Group, and potentially, the professional fees incurred by the Trustee as well).

[199] Even though I have reviewed this documentation, the Court welcomes the opportunity to receive submissions from the parties concerning the costs issue, which will no doubt address section 197(1) of the ***Act*** and other considerations.

[200] The Trustee and counsel are encouraged to contact the Brandon Centre Trial Co-ordinator so that a further hearing date may be scheduled accordingly.

R. L. Patterson
Registrar