

**Family**

## Court ruling an example of clash between bankruptcy law, family law: scholar

By **Terry Davidson**

(January 26, 2022, 9:14 AM EST) --

A Nova Scotia court decision involving a divorcee being left with no equalization payment from matrimonial property division and no ability to recoup money she paid to clear her ex-husband's tax debt is an example of how bankruptcy law trumps family law, says a legal mind.

The Jan. 13 Nova Scotia Court of Appeal written decision in *Woods v. Ferguson* 2022 NSCA 1 focuses on Michael Woods and Sherry Ferguson, who divorced in 2014, with a court ruling on the division of assets, including four properties.

Woods turned to the Appeal Court after another trial judge in 2018, during a second set of proceedings, granted Ferguson's motion that *Nova Scotia Civil Procedure Rule*, known as the "slip rule," be used to award her \$41,052.82 as repayment for clearing an income tax debt she learned Woods owed that resulted in a lien being placed on two of the properties.

The slip rule is a tool used by judges to fix clerical mistakes or mathematical errors in orders, or to amend an order to provide for something that was left out.

The wrinkle in this particular case is that Woods had declared bankruptcy in 2015, after the initial divorce proceedings.

At the time of their divorce in 2014, Woods and Ferguson had assets and debts in their own names, a matrimonial home, of which Ferguson had exclusive possession

and three jointly owned rental properties complete with mortgages, lines of credit and "a judgment registered by one of Mr. Woods' previous lawyers," according to the written appeal decision.

As part of the divorce, Ferguson made a Corollary Relief Order (CRO) to get what she felt she was owed in the split.

Presiding over the divorce was Justice Deborah Gass, who ordered an unequal division of some assets and an equal net-value division of the matrimonial home and the three rental properties.

Justice Gass ruled that Ferguson would deal with selling the rental properties "as Mr. Woods had failed to cooperate in the past." Justice Gass also ordered Woods to pay Ferguson \$27,000 in costs.

Ferguson would go on to sell two of the rental properties.

But then Ferguson learned Woods owed the Canada Revenue Agency (CRA) tens of thousands in back taxes.

Ferguson discovered the CRA had put a lien for \$38,552.82 against the matrimonial home and the third rental property due to the unpaid taxes. Ferguson chose to pay this debt in order to remove the lien and allow her to sell the third rental property. She also paid \$2,500 to obtain deeds from Woods' bankruptcy trustee to convey his interest in the two properties to her.

As for Woods' bankruptcy, Ferguson was listed as an unsecured creditor in Woods' Statement of Affairs.

At the same time, Woods still owed a "significant amount" to Ferguson as an equalization payment as laid out in her 2014 relief order.

Woods was discharged from bankruptcy in 2017, after which Ferguson turned to the Supreme Court of Nova Scotia in 2018 in a bid to be paid what she felt she was owed in unpaid equalization payments and to recoup what she paid to clear Woods' tax debt.

The issues before that court were: One, does Woods' discharge from bankruptcy extinguish what he owes Ferguson? Two, was Ferguson able to recover what she paid for Woods' tax debt? Three, was the \$27,000 in costs awarded to Ferguson lost in the bankruptcy?

Turning to the Supreme Court of Canada's decision in *Schreyer v. Schreyer* 2011 SCC 35, the court found Woods' unpaid equalization payment fell under his bankruptcy and that he was released from that debt once his bankruptcy ended. The court found this was also the case with the \$27,000 in costs Woods was ordered to pay Ferguson.

In other words, both awards were lost to the bankruptcy.

However, the court treated Ferguson's payments to both the CRA and Woods' trustee differently, finding these should survive the bankruptcy because Woods' tax debt was not discovered until Ferguson tried to sell the third rental property, and that she had no option but to pay Woods' tax debt in order to sell it.

In the end, the court ordered Woods to pay Ferguson the \$38,552.82 for what she paid the CRA and the \$2,500 for what she paid Woods' trustee.

But Appeal Court Justices Elizabeth Van den Eynden, Jill Hamilton and Edward Scanlan found the lower court to have erred in doing this.

For one, the Appeal Court noted case law in *Donner v. Donner* 2021 NSCA 30, which

found that the province's *Marital Property Act* does not allow for the variation of a final order that deals with the division of property — in this case, the final order being Ferguson's court approved CRO decided on in the 2014 divorce.

For this reason, Ferguson's use of the slip rule in this case does not work, ruled the Appeal Court.

"The law set out in *Donner, supra*, indicates there are limited circumstances in which the slip rule will apply because the issuance of an order is a watershed moment in litigation triggering the common law doctrine of *functus officio*," it found. "While accidental slips and oversights may be corrected, deliberate decisions and afterthoughts cannot be effected under the slip rule."



Rollie Thompson, Dalhousie University's Schulich School of Law

It also found the award given to Ferguson during the 2018 proceedings to be "an impermissible variation of the CRO made seven years after the CRO and following the intervening event of Mr. Woods' bankruptcy."

Professor Rollie Thompson, of Dalhousie University's Schulich School of Law, says Ferguson was hit with "double unfairness," having lost both her equalization payment and the ability to recoup the money she paid towards Woods' tax debt.

"Even the court admits it, which is there is a clash between bankruptcy law and family law, between the CRA and the tools it has available to collect back taxes, and family law," said Thompson. "The problem is ... the case is another example of how the fairness in family law — as, between spouses — gets trumped by rigid and unfair bankruptcy laws that treat a spouse as an ordinary creditor. You can see that at work in this case."

Thompson also pointed to a conflict between the levels of court, with one attempting to be fair to

litigants and the other feeling the need to follow the law.

"Watching the slip rule at work here, there is another conflict here, and the conflict is between a trial judge who is trying to maintain some semblance of justice between the parties on the facts of a particular case, in a difficult legal situation, and a court of appeal, which does what courts of appeal do, which is worry about the long-run implications of making a decision of individual justice in a hard case, and therefore accept an unfair result as the price you pay to maintain the law. Courts of appeal worry about the law, and trial courts worry more about the people in front of them. [Those are their] institutional roles."

*If you have any information, story ideas or news tips for [The Lawyer's Daily](#), please contact Terry Davidson at [t.davidson@lexisnexis.ca](mailto:t.davidson@lexisnexis.ca) or call 905-415-5899.*

---

© 2022, The Lawyer's Daily. All rights reserved.