
CANADA / JUDGMENT

Atwal (Re)

2011 BCSC 687

COURT

Supreme Court of British Columbia

DECIDED

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2011 BCSC 687 Atwal (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Atwal (Re),

2011 BCSC 687

Date: 20110527

Docket: B110408

Registry: Vancouver

In Bankruptcy and Insolvency

In the matter of the Bankruptcy of

Lakhminder Singh Atwal

Before: The Honourable Mr. Justice Burnyeat

Reasons for Judgment

(from Chambers)

Appearing on behalf of Trustee in Bankruptcy,

E. Sands & Associates Inc.:

Deane Gurney

Counsel for Mr. Atwal:

G.H. Dabbs

Place and Date of Hearing:

Vancouver, B.C.

May 13, 2011

Place and Date of Judgment:

Vancouver, B.C.

May 27, 2011

- [1] Pursuant to ss. 37 and 67(1)(b) of the Bankruptcy and Insolvency Act, R.S.C. 1985, C. B-3 ("BIA"), and ss. 2(b), 71(1)(c), 71.2(2)(b) and 71.2(3) of the Court Order Enforcement Act, R.S.B.C. 1996, c. 78 ("Act ") and B.C.R. Regulation 28-98 (Court Order Enforcement Exemption Regulation) ("Regulation"), Lakhminder Singh Atwal ("Applicant") applies for a declaration that he is entitled to a \$5,000 personal exemption for his motor vehicle.

BACKGROUND

- [2] On March 14, 2011, the Applicant made an assignment into bankruptcy for the benefit of his creditors pursuant to the BIA. E. Sands & Associates Inc. ("Trustee") was appointed as the Trustee in Bankruptcy of the Estate of the Applicant. On the date of the assignment, the Applicant was the registered owner of a 2005 Chevrolet Uplander motor vehicle, having a value of \$5,800 ("Vehicle"). There was no security registered against the Vehicle.
- [3] In a March 17, 2011 letter, the Trustee advised the Applicant that, because the Vehicle had an estimated dollar value in excess of \$5,000, the Applicant was not entitled to the \$5,000 motor vehicle exemption under the Act. The letter included the following advice: "As a result of the ruling on November 17, 2010 of Mr. Justice Burnyeat in the case of Ian Gregory Thow, this exemption is no longer applicable to a vehicle valued over \$5,000." The Applicant now applies pursuant to s. 37 of the BIA requesting a reversal of the decision of the Trustee.

APPLICABLE STATUTORY PROVISIONS

- [4] The applicable provisions of the BIA are:
37. Where the bankrupt or any of the creditors or any other person is aggrieved by any act or decision of the trustee, he may apply to the court and the court may confirm, reverse or modify the act or decision complained of and make such order in the premises as it thinks just.
67. (1) The property of a bankrupt divisible among his creditors shall not comprise
- (b) any property that as against the bankrupt is exempt from execution or seizure under any laws applicable in the province within which the property is situated and within which the bankrupt resides;
- [5] The applicable provisions of the Act are:

71 (1) Subject to subsections (2) to (4) of this section and section 71.2, the following goods and chattels of a debtor, at the option of the debtor, are exempt from forced seizure or sale by any process at law or in equity:

(c) one motor vehicle that is of a value not exceeding a prescribed amount;

71.2 (2) If property to which subsection (1) applies is sold under this Act, a sheriff or other officer must, unless otherwise provided by law or by the agreement of all interested parties, distribute any of the proceeds of the sale as follows: ...

(b) pay secondly to the debtor an amount not exceeding the prescribed amount of the exemption.

(3) The sum received by the debtor under subsection (2) (b) is exempt from attachment.

[6] The applicable section of the Regulation is s. 2, which states: "For the purposes of section 71(1) of the Act, the prescribed amounts of exemption are as follows: ... (b) \$5,000 for one motor vehicle ...".

RECONSIDERATION OF THE DECISION IN THOW

[7] In *Re Thow*, 2010 BCSC 1561, I came to the following conclusions regarding whether the exemption under s. 71(1)(c) of the Act applies where a vehicle has a value in excess of \$5,000:

The Trustee also raises the issue of whether the exemption applies to a vehicle having a value in excess of \$5,000. Section 71(1)(c) of the Court Order Enforcement Act deals with the exemption for "one motor vehicle that is of a value not exceeding a prescribed amount (\$5,000)". This question has been raised in decisions from other provinces although there is no consistent approach.

In Alberta, a motor vehicle having a value of less than \$5,000 is exempt from seizure. Once a motor vehicle having value in excess of \$5,000 is sold by a trustee in bankruptcy, the proceeds will be used to pay secured claims against the vehicle, to pay \$5,000 to the bankrupt, to pay storage costs and the costs of seizure and sale and to pay any amount remaining to the trustee for the benefit of the Creditors: *Re Pearson* (1997), 46 C.B.R. (3d) 357 (Alta. Q.B.). Bielby J., as she then was, concluded that it was the intent of the legislation that the execution debtor's equity in a vehicle would be exempt to a maximum of \$5,000, even if that vehicle was worth more than that sum.

Ontario decisions establish that a motor vehicle is exempt from seizure only if the value of the vehicle does not exceed \$5,000. If the vehicle has a greater value, there is no exemption: *Re Fields* (2002), 32 C.B.R. (4th) 216 (Ont. S.C.J.), affirmed (2004), 2 C.B.R. (5th) 179 (Ont. C.A.). In *Re Fields* (C.A.), Feldman J.A. on behalf of the Court described the issue relating to a car having a value of \$11,000 as follows:

From a policy point of view, the alternative argument that gives the most benefit to the judgment debtor is compelling. The purpose of the exemptions from execution is to allow a debtor to retain the basics of life while making the bulk of his or her assets available to satisfy judgment creditors. The legislature sets and revises from time to time both the type and the value of exempt assets with a view to allowing contemporary debtors to retain a modest and dignified lifestyle, while still making funds and assets available to pay legitimate judgment creditors.

While some people of modest means may own an old car that has depreciated in value down to \$5,000 or less, in today's society many people who are able to do so, rather choose to finance an inexpensive model vehicle by making monthly payments to a secured lender. The alternate approach recognizes this reality by allowing the secured creditor to repossess the car, sell it and return up to \$5,000 of the debtor's equity to the debtor on an exempt basis. The trustee's interpretation would require the secured lender, who repossesses a car worth over \$5,000, to remit any amount over and above what was owed to the lender not back to the debtor, but to the sheriff to satisfy a writ of execution, thereby denying the debtor any benefit from his or her equity in the car.

(at paras. 12-13)

In distinguishing the decision in *Re Pearson*, Feldman J.A. stated:

Although the same issue arose in the Alberta case of *Re Pearson* (1997), 203 A.R. 109 (Q.B.), respecting the interpretation of the comparable exemption provision in the Alberta Civil Enforcement Act (R.S.A. 1980, c. C-10.5) to s. 2.6, the wording of that Act is different from the Ontario Execution Act and therefore the analysis of the court in that case does not assist. After prescribing the exempt values in s. 88, s. 89(1) provides:

89(1) Where the enforcement debtor's equity in the property referred to in s. 88 exceeds the prescribed value of the exemption for that property, that property is subject to sale pursuant to writ proceedings.

Based on s. 89, the Alberta court was able to conclude that the exemption applied to the debtor's equity in the motor vehicle even if the value of the vehicle was higher than the prescribed value.

Although it would give the section the interpretation that makes the most common sense, would be most helpful to debtors and would fit with the intent and purpose of the philosophy of exemptions, the court cannot read into s. 4 a reference that is not there. Nor can it be justified either by implication or by analogy. Although it is likely that the failure of the legislature to amend s. 4 when it added s. 2.6 was an oversight, if it was, it is only the legislature and not the court that can make the correction.

Therefore, I conclude that reading the section as worded, because the value of the motor vehicle in this case is over \$5,000, it is not exempt under s. 2.6.

(at paras. 27-30)

The section of the Ontario Execution Act describing chattels that are exempt from seizure includes the following definition which closely parallels the description set out in s. 71(1)(c) of the Court Order Enforcement Act: "(a) motor vehicle not exceeding ... \$5,000 in value".

I am unable to distinguish the decision reached by the Ontario Court of Appeal when dealing with the question of whether the exemption provided by s. 71(1)(c) and Regulation 2(b) apply only if the value of a motor vehicle is less than \$5,000.

I come to this conclusion despite the fact that the purpose of the BIA and the Court Order Enforcement Act is to ensure the equitable distribution of the assets of a bankrupt or of a debtor while, at the same time, providing the "bare minimum" which an individual is entitled to maintain in order to facilitate his or her rehabilitation. I agree with the statement made by Feldman J.A. that the purpose of providing the exemptions from execution is to allow a debtor to retain the basics of life. The provisions of the BIA establish a similar purpose. However, in the absence of a provision similar to s. 89(1) of the Civil Enforcement Act of Alberta, I am satisfied that the \$5,000 exemption is not available to Mr. Thow as the net sale proceeds of \$15,000 indicates that the vehicle was worth at least that amount. While I would favour the common sense approach which would take into account what would be most helpful to debtors and bankrupts, and would better fit the intended purpose of the philosophy of exemptions, I am bound by the clear wording of s. 71(1)(c) of the Court Order Enforcement Act and the prescribed amount of the exemptions set out in s. 2(b) of the Court Order Enforcement Exemption Regulation. Accordingly, that part of the application of Mr. Thow requesting the delivery of \$5,000 is dismissed.

(at paras. 31-37)

[8] It is not often that a judge of the Supreme Court is called upon to review his or her own decision. The Applicant asks me to do so on the basis of the principles set out in *Re Hansard Spruce Mills Ltd.*, [1954] 4 D.L.R. 590 (B.C.S.C.), where Wilson J., as he then was, stated:

... I say this: I will only go against a judgment of another Judge of this Court if:

- (a) subsequent decisions have affected the validity of the impugned judgment;
- (b) it is demonstrated that some binding authority in case law, or some relevant statute was not considered;
- (c) the judgment was unconsidered, a *nisi prius* judgment given in circumstances familiar to all trial Judges, where the exigencies of the trial require an immediate decision without opportunity to fully consult authority.

If none of these situations exist I think a trial Judge should follow the decisions of his brother Judges.

(at paras. 4-5)

- [9] In Thow, supra, counsel did not bring to my attention s. 71.2 of the Act. It is on that basis that counsel for the Applicant submits that I should not be bound by my decision in Thow, supra, that I should apply s. 71.2 of the Act so that any value above \$5,000 is available for the creditors of the Applicant, and that the balance of the value under \$5,000 should be exempt from seizure and available to the Applicant. As is the common practice, the Vehicle can remain available to the Applicant if he pays to the Trustee that part of the value of the Vehicle in excess of \$5,000, being \$800.

DISCUSSION AND CASE AUTHORITIES

- [10] It is incumbent upon counsel to draw to the attention of the Court applicable decisions and statutory provisions. In Thow, supra, counsel did not do that. In the circumstances, it is appropriate to revisit the question which was raised in Thow and which is now raised by the Applicant. Having done so, I remain of the view that the \$5,000 exemption claimed by the Applicant is not available to him.
- [11] Pursuant to s. 67(1) of the BIA, the property of a bankrupt that is not "divisible among his [or her] creditors" includes that which is "... exempt from execution or seizure under any laws applicable in the province ...". In British Columbia, s. 71(1)(c) of the Act makes one vehicle having a value "not exceeding a prescribed amount" exempt from "forced seizure or sale by any process at law or in equity".
- [12] Pursuant to s. 71.2(1) of the Act, if the value of a motor vehicle is in excess of \$5,000, the motor vehicle is not only subject to seizure and sale under the Act but also subject to the provisions of s. 71.2(2) which requires "a sheriff or other officer" to distribute any of the proceeds of sale to pay "firstly to a secured creditor the amount owing by the debtor to the secured creditor ..." and secondly to the debtor an amount not exceeding the prescribed amount of the exemption". Pursuant to s. 71.2(3) of the Act, the amount received by the debtor under s. 71.2(2)(b) is exempt from attachment. However s. 71.2 of the Act deals with property which is "sold under the Act", and what a "sheriff or other officer" must do with the sale proceeds. While a motor vehicle is property to which s. 71.1 of the Act applies, s. 71.2(2) is clear that a motor vehicle having a value in excess of \$5,000 can be sold.
- [13] The only property that comes within s. 67(1) of the BIA is property which is exempt from "execution or seizure" and the only property that is exempt from execution or seizure is that property which is set out under s. 71(1) of the Act. What is exempt is one motor vehicle that is of a value "not exceeding a prescribed amount" and the prescribed amount is \$5,000.
- [14] I must also give some meaning to the words "If property ... is sold under this Act" as incorporated within s. 71.2(2) of the Act. In a bankruptcy, a judgment creditor is not in a position to have access to the provisions of the Act to seize and sell property as the actions of a judgment creditor are stayed by the provisions of the BIA. A trustee is required under the BIA to gather in and sell the property of a bankrupt in order that the proceeds can be divisible among the creditors of the bankrupt. That duty imposed upon a trustee is subject to

the provision that what is not "divisible" is that which is exempt from execution or seizure under the laws applicable in the province of a bankrupt. Because what is exempt is "one motor vehicle that is of a value not exceeding a prescribed amount" and because the prescribed amount is \$5,000, the only motor vehicle which remains exempt from execution is a motor vehicle having a value not exceeding \$5,000. Any sale by a trustee would not be a sale "under this Act ". Rather, it would be a sale in accordance with the statutory requirements set out under the BIA which require a trustee to get in and sell those assets of the bankrupt that are not exempt from execution or seizure.

- [15] While I am prepared to review the decision reached in *Re Thow*, supra, I have come to the same conclusion. The Vehicle is not exempt from execution or seizure and is the property of Mr. Atwal divisible among his creditors. All of the sale proceeds of the Vehicle are available to his creditors. The provisions of s. 71(1)(c) and s. 71.2(2) of the Act do not apply because the Vehicle has a value exceeding \$5,000.

— "Burnyeat J." —

Mr. Justice Burnyeat

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