
CANADA / JUDGMENT

Olson (Re)

2014 BCSC 2340

COURT

Supreme Court of British Columbia

DECIDED

11 December 2014

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2014 BCSC 2340 Olson (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Olson (Re),

2014 BCSC 2340

Date: 20141211

Docket: B51694

Registry: Vernon

In the matter of the Bankruptcy of Stephen James Olson

(aka Steve Olson)

Before: Master Young

Reasons for Judgment

Stephen James Olson appeared on his own behalf

Counsel for the Trustee, D. Thode & Associates Inc. :

D.J. Thode

Counsel for Her Majesty the Queen in Right of Canada:

K. Khalsa

Place and Date of Hearing:

Vernon, B.C.

September 10, 2014

Place and Date of Judgment:

Vernon, B.C.

December 11, 2014

- [1] This is the application of Stephen James Olson (the "Bankrupt") for the discharge from his first bankruptcy. Mr. Olson assigned himself into bankruptcy on August 27, 2013.

Opposition

- [2] His discharge is opposed by her Majesty the Queen as represented by the Minister of National Revenue, a creditor in this bankruptcy. The total amount of Her Majesty's claim, as set out in the Notice of Opposition to the Bankrupt's discharge, was \$182,706.02 for outstanding personal income tax debt for the years 2007, 2008, 2009 and 2010. The tax years 2011 and 2012 are included in this bankruptcy, but at the time the opposition was filed, the amounts owing for 2011 and 2012 were unknown. Interest and penalties are included in that figure. The tax debt owing by the Bankrupt comprises 93% of the total proven claim as at January 21, 2014.
- [3] I was advised at this hearing that the 2011 and 2012 income tax debt is now known and, by adding this additional income tax debt, the Bankrupt's total personal income tax debt is \$191,289.54.
- [4] The Bankrupt is also indebted to Her Majesty in the amount of \$175,000 under a Notice of Assessment issued April 6, 2013. This debt is pursuant to s. 160(1) of the Income Tax Act, R.S.C. 1985, c. 1 (5th Supp) [ITA] and it relates to the transfer of money in dividends from the Desert Crete Ltd. to the Bankrupt during the timeframe from October 2007 to October 2009 (the "Derivative Claim").
- [5] The Derivative Claim is not added to the personal income tax debt and, therefore, does not place the Bankrupts' personal income tax debt over the \$200,000 limit, which would have made it a tax driven bankruptcy pursuant to s. 172.1 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3.
- [6] Her Majesty's grounds for objection are that the assets of the Bankrupt are not of a value equal to \$.50 on the dollar in the amount of the Bankrupt's unsecured liabilities and the Bankrupt is justly responsible for the shortfall.
- [7] Prior to the bankruptcy, the Canada Revenue Agency ("CRA") only received \$700 in voluntary payments toward tax arrears from the Bankrupt. CRA issued a requirement to pay and some income was garnished.

The Bankrupt

- [8] The Bankrupt operated a concrete foundation proprietorship under the name Desert Crete from April 2001 to October 2005. Desert Crete Ltd. was incorporated in October 2005 and is currently in the process of being dissolved. The Bankrupt is a 50% shareholder and sole director of Desert Crete Ltd. Desert Crete Ltd. owes Her Majesty \$224,935 for unpaid corporate taxes, unpaid goods and services tax and unpaid source deductions.
- [9] The Bankrupt is currently employed by 092-7500 BC Ltd. doing business as Desert Crete. This company was incorporated on December 13, 2011 and Leah Dorothy Seabrook is the sole director and shareholder of this company. Ms. Seabrook is the Bankrupt's mother.

The Bankrupt's Evidence

- [10] The Bankrupt is very forthright in giving his evidence in admitting his responsibility. He and his former common-law spouse operated Desert Crete Ltd., but did not keep proper paperwork to claim their business expenses. They fell behind in paying their accountant so could not get their books professionally prepared.
- [11] Looking at the taxes owing for years covered by this bankruptcy, the Bankrupt says he did not have that high an income, but they did not properly claim expenses. He understands we cannot look behind those reassessments now given that no effort was made to challenge the tax debts through the appeal process.
- [12] The Bankrupt had family and friends working for him and, during the economic downturn, he did not lay them off. He now realizes that that was a business mistake. He continued to pay some employees \$35 an hour when the company could not afford that wage expense. He was working long days to keep the business going. He worked in the field and his common-law spouse, Maureen, took care of the invoicing.
- [13] The Bankrupt openly admits that he did bury his head in the sand and then he started using substances to control the stress.
- [14] The Bankrupt's evidence is that his family sold his boat to get money to send him to a residential alcohol rehabilitation centre. He shut down Desert Crete and his mother incorporated 092-7500 BC Ltd. so that he could continue working. He is employed by the numbered company and he has the assistance of his mother and bookkeeper to keep the appropriate paperwork and pay taxes as they come due. The numbered company fell behind in its taxes, but has been diligently working to pay them down, and the income tax debt owed by the numbered company has been reduced from \$40,000 to about \$9,000.
- [15] The Bankrupt admits that he had a bad reputation in the Okanagan because he would take two or three days off and go drinking and disappear from his customers. He is trying to start over by looking for work out-of-province. The numbered company has been doing work in Saskatchewan charging reduced rates to get its foot in the door. He says they have had a good response and have done some jobs at cost in order to develop a reputation. He will not

know if the business is successful until his work has survived a cold Saskatchewan winter and frost heaving. If his work holds up, he expects that the business may be successful.

- [16] The Bankrupt is fairly uncertain what his income is.
- [17] Her Majesty filed the affidavit of Surjit Tung, insolvency officer, in support of their opposition to this discharge. Attached to that affidavit is a statement of transactions from Toronto Dominion Bank for the bank account held in the name of the numbered company for the period January 1, 2013 to August 31, 2013. The statement of transactions shows numerous cash advances. When asked about that, the Bankrupt said he withdrew cash to pay his bills because CRA was garnishing bank accounts and the numbered company had a bad experience with having their bank account shut down when he and his crew were out of town. After that, he made a point of ensuring that he had sufficient cash to pay for lodging, supplies and workers.
- [18] The second day of hearing the Bankrupt provided the court with financial statements for the numbered company, his 2013 income tax return and the notice of assessment showing his personal income.
- [19] The Bankrupt earned \$65,548 in 2013 and no income tax was paid on that amount. When asked why, the Bankrupt said he was being irresponsible. He had relapsed, was using alcohol and drugs and avoiding his responsibilities again. His income was so high because he was living in expensive housing that cost \$3,600 a month in mortgage payments. The company could not support that lifestyle and he had to let the house go into foreclosure and is now living in smaller accommodation. Because the mortgage payments were coming out of the company it was attributed to him as personal income. He now appreciates the fact that he cannot pull that kind of income out of the company and that he cannot hire a number of workers unless there is sufficient work.
- [20] The Bankrupt understands he mismanaged his business and decided it was time to pay the piper, so he declared bankruptcy and is trying to start over and be fiscally responsible.
- [21] In cross-examination he was asked if he was taking money out in cash in order to avoid his obligation to CRA. His response was, "No", he was taking out cash to pay his current bills so that he could keep his business afloat. He said that CRA garnished \$8,000 when it was not owing and he was out of town and could not pay for food or lodging because CRA kept on shutting down his accounts. He indicated happened this past summer on two occasions. Also, he said that CRA garnished contractors and he lost those contracts.

Summary of the Relevant Law

- [22] The Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] sets out at s. 172 the powers of the court at the hearing of a 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 moneys, consent to such judgments or comply with such other terms as the court may direct.
- [23] The relevant fact for which discharge may be refused, suspended or granted conditionally in this case is set out in s. 173(1) of the BIA:
173. (1) The facts referred to in section 172 are:
- (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, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
- [24] This is the only fact that CRA relies on to oppose the discharge.

Case Authorities

[25] I have reviewed the authorities relied on by Her Majesty:

1. Baker (Re) (27 May 2013), Vancouver B110530 (B.C.S.C);
2. Emmerton (Re) (1995), 163 A.R. 393 (Q.B.);
3. Kaleniuk (Re) (7 July 2004), Vancouver 220612 VA01 (B.C.S.C);
4. Katari (Re) (1989), 74 C.B.R. 178 (Ont. S.C.);
5. Lewoniuk (Re), 2001 ABQB 417;

6. Paine (Re), 2011 BCSC 309;
7. Pinc (Re), 2007 BCSC 380;
8. Powell (Re), 2005 BCSC 1107;
9. Redman (Re), 2012 BCSC 83;
10. Re Tjelta (Re), 2012 BCSC 984;
11. Toal (Re), [1993] A.J. No. 442 (QB);
12. Van Eeuwen (Re), 2013 BCSC 1113;
13. Zinkiew (Re), 2004 BCSC 1831

[26] As Master McNaughton succinctly stated in Re Baker at para. 36;

There are two underlying principles which govern the discharge of a bankrupt, the rehabilitation of the bankrupt to become a meaningful and contributing member of society and the integrity of the bankruptcy as a whole.

[27] In addition to considering the interests of the Bankrupt and his creditors, I must also consider the interest of the public, especially in bankruptcies where there is significant income tax debt, because the public are bearing that tax burden which the Bankrupt is attempting to avoid.

[28] The case law goes on to say that a bankrupt who does not pay his tax liabilities is not an honest and unfortunate debtor: Toal (Re) and Zinkiew (Re) at para. 58-59.

[29] It is clear in this case that the Bankrupt's assets are not of a value equal to \$.50 on the dollar on the amount of the Bankrupt's unsecured liabilities, and the Bankrupt has not satisfied me that this is due to circumstances for which the Bankrupt cannot justly be held responsible. As a result, the Bankrupt is not entitled to an absolute discharge.

[30] I find that the Bankrupt did ignore his tax obligations, overspent and did pay some debts off in preference to this tax debt. He used cash to pay bills and avoid garnishing from CRA. He admits to being a poor business man and left the paperwork to his spouse. He does not think that excuses him which is refreshing.

[31] The Bankrupt had a bit of an epiphany with the help of a supportive family. He was overspending, over working, drinking to excess and burning out. His family sold his boat to raise money to send him to a residential rehabilitation centre. His mother incorporated a new company so he could continue to work. He had to let his house go into foreclosure because he realized that it was way beyond his financial means. He has a bookkeeper now and the new company is trying to keep up-to-date in its taxes. He is trying to make a new business start in Saskatchewan.

- [32] His recovery from his alcohol addiction has had some setbacks, but when he appeared before me on the first day of the hearing he had been clean and sober for six months. I do not think it is unusual for this to happen. Recovery is not always a linear process and it may take several relapses before new habits are firmly adopted. The important fact is that the Bankrupt keeps trying and, when he appeared before me, he had six months success behind him.
- [33] I believe that the Bankrupt is making his best efforts to rehabilitate himself physically and financially and he is willing to accept some financial conditions prior to his discharge. He has suggested a conditional payment of \$20,000 which would be a small fraction of what is owing.
- [34] I have to balance the interests of the creditor, the Bankrupt and the public. I find that a large conditional order could cause a complete collapse of Mr. Olson's newly established sobriety and effort to be financially responsible and too small an order would be offensive to the public. I was impressed with Mr. Olson's evidence on the witness stand. He did not excuse his behaviour and he is showing a real effort to rehabilitate himself. This distinguishes his situation from the many decisions I have read in preparing these reasons.
- [35] In this case, the facts tip the scale in favour of allowing the Bankrupt to rehabilitate himself and become a meaningful and contributing member of society. He is young enough to do so and expresses a willingness to do so and has shown concrete efforts in that direction.
- [36] For that reason, I am granting a conditional order which I think will not be paralytically onerous. I order that the Bankrupt pay \$35,000 to the benefit of his creditors. I have considered installments and, because of the nature of his business, I am aware that the Bankrupt's income will be very low in the winter months, so I am ordering that he pay annual installments of no less than \$10,000 so he can pay the amounts during the busier work periods. The repayment condition commences January 1, 2015 so he will have to pay a minimum of \$10,000 by December 31, 2015. The Bankrupt has the ability to prepay in part or in full at any time.
- [37] If the Bankrupt's new business venture is successful, then he will likely pay off this amount sooner than three and a half years. If it is not successful, then he has liberty to apply to modify these terms after one year under s. 172(3) of the BIA which says:

Court may modify after year

- (3) Where at any time after the expiration of one year after the date of any order made under this section the bankrupt satisfies the court that there is no reasonable probability of his being in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in such manner and on such conditions as it may think fit.

- [38] As Bennett on Bankruptcy, 15th Ed. 2013, page 564, explains, it is possible to apply to court for an order modifying the terms of the order after the expiration of one year. Such an application is not an appeal or an application to vary the terms of the original order, but rather a new application based on circumstances that have arisen since the earlier order that suggest that the Bankrupt is not able to comply with its terms.
- [39] The Trustee and the opposing creditor have requested tax compliance orders which I will make as well.
- [40] The Bankrupt will file income tax returns as required by the ITA and pay any post-bankruptcy taxes owing until the payment condition is satisfied.
- [41] The Bankrupt is to pay the amounts to the Trustee and the Bankrupt is to pay the Trustee an additional \$25.00 for administration costs for each and every non-negotiable or NSF payment.
- [42] If the Bankrupt misses an aggregate of two payments hereunder, the Trustee may proceed to its discharge and the creditors' rights to enforce payment will be reinstated upon the discharge of the Trustee
- [43] Upon failure of the Bankrupt to pay any amount required pursuant to this order, all income tax refunds and GST credits from CRA, which would normally be released to the Bankrupt are to be directed to D. Thode & Associates Inc. and the Trustee has liberty to apply all or any portion of such amounts toward the satisfaction of this order.
- [44] Upon the registrar being satisfied that the conditions set forth in this order have been complied with, the registrar shall grant the Bankrupt an absolute discharge.

"Master B. Young"

Master Young

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