

CANADA / JUDGMENT

Penko (Re)

2022 BCSC 2128

COURT

Supreme Court of British Columbia

DECIDED

6 December 2022

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2022 BCSC 2128 Penko (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Penko (Re),

2022 BCSC 2128

Date: 20221206

Docket: B210340

Registry: Vancouver

Estate No. 11-2506282

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of

Renee Michelle Penko (aka Lady Renee Michelle Penko,

Renee Michelle Friessen-Penko)

Before: Master Bilawich

(As Registrar)

Reasons for Decision

Appearing for the Trustee,

Grant Thornton Ltd.:

M. Wentzell

Counsel for the Bankrupt, Renee Michelle Penko:

C. Reedman

F. Merritt-Neill (A/S)

Counsel for the Creditor, British Columbia Securities Commission:

L. Bevan

K. Coady

Place and Date of Hearing:

Vancouver, B.C.

October 18, 2022

Place and Date of Judgment:

Vancouver, B.C.

December 6, 2022

Introduction

- [1] Ms. Penko applies for a discharge from bankruptcy, suspended for 1 day or alternatively a conditional order, on such terms and conditions as the court deems appropriate. Her application is opposed by the Trustee and her primary creditor, British Columbia Securities Commission (the "Commission"), both of whom ask that her application be dismissed.
- [2] Ms. Penko's debt to the Commission arose out of her involvement in a Ponzi scheme. The Commission imposed sanctions on her and registered its decision with this court for enforcement. Ms. Penko actively resisted collection efforts by engaging in 'Organized Pseudolegal Commercial Argument' ("OPCA") tactics in an effort to frustrate collection efforts. This movement is described in *Meads v. Meads*, 2012 ABQB 571. In *Anderson (Re)*, 2022 ABQB 35 at para. 1, Rooke, A.C.J. commented that employing pseudolaw is always an abuse of court processes and warrants court response.
- [3] Among the issues on this application is what impact Ms. Penko's pre-and post-bankruptcy conduct ought to have when assessing the merits of her application for discharge.

Background

- [4] Ms. Penko is 61 years of age. She assigned herself into bankruptcy on May 2, 2019. This is her second bankruptcy; the first was on May 31, 2005.
- [5] In 2014, Ms. Penko was a respondent in proceedings before the Commission. The Executive Director allege that she and others, without being registered under the Securities Act, R.S.B.C. 1996, c. 418 (the "Securities Act" or the "Act") and without having filed a prospectus, traded in securities, contrary to ss. 34 and 61 of the Act.

- [6] On January 14, 2016, a panel found Ms. Penko liable for these contraventions, for illegal distributions to 22 investors and 31 investments with a value of \$1,171,003. The panel's reasons are indexed as Williams (Re), 2016 BCSECCOM 18.
- [7] The reasons describe a Ponzi scheme carried out principally by Thomas Williams. Mr. Williams used associates, including Ms. Penko, to find investors and act as intermediaries with them. She received a commission for bringing in new investors. Funds advanced by investors were used to make payments to earlier investors and pay commissions to Mr. Williams and associates, rather than being invested.
- [8] Ms. Penko says Mr. Williams showed her a legal opinion which indicated the investments were not subject to registration and prospectus requirements under the Securities Act. She was not a central player in the Ponzi scheme and there was no finding of fraud on her part. She later joined a committee of associates who gathered documents and information, which were provided to the Commission. It is not clear how helpful those efforts were.
- [9] On August 17, 2016, the Commission issued a sanctions decision, indexed as Re Williams, 2016 BCSECCOM 283 (the "Sanctions Decision"). Ms. Penko was ordered to pay the Commission:
- a) \$155,000 under s. 161(1)(g) of the Act. This represents estimated commissions she received while participating in the scheme; and
 - b) \$40,000 as an administrative penalty, under s. 162 of the Act.
- [10] With interest, the total owing was about \$207,000. Ms. Penko also received a market prohibition order for a four-year period. Two exceptions incorporated in the prohibition were that she could trade securities through her own account through a broker and she could remain a registrant, but subject to certain conditions, employed with a registered dealer.
- [11] Ms. Penko says she began experiencing unparticularized health problems. In 2016 she resigned from her then job with London Life. She says her marriage suffered due to her problems with the Commission and her daughter was struggling with depression. She has been unemployed ever since she left London Life, save for a three month position with her church. She says she has applied for a wide range of positions but was not able to find new employment. She did not provide particulars of her job search.
- [12] On September 22, 2016, the Commission registered the Sanctions Decision with this court, pursuant to s. 163 of the Act, in Vancouver action L160324.
- [13] On December 27, 2017, the Commission obtained a writ of seizure and sale and retained a bailiff to seize and sell Ms. Penko's assets.
- [14] On January 7, 2018, Ms. Penko sent a letter to the Commission and the bailiff which indicated it was from the "Tree of Life Foundation". The subject line is "Notice of Interest". She took the position that assets the Commission and bailiff sought to attach were in a trust

and they did not have authority or jurisdiction to pursue them. Any further action from them would be dealt with appropriately. She signed the letter: "Managing Director: Lady Renee Michelle, Penko UCC 1-308". Her approach and sign off are consistent with OPCA conduct.

- [15] On August 16, 2018, Ms. Penko sent a similar letter to Commission counsel.
- [16] On October 23, 2018, Ms. Penko sent letter to the court, care of the Chief Justice. She again asserts the assets the Commission seeks to execute against are in a trust and that it does not have authority or jurisdiction to pursue them. She asks that the court correct the "mistake" by returning trust property to her.
- [17] On November 6, 2018, Ms. Penko failed to appear at a subpoena to debtor hearing the Commission had scheduled. Master Cameron issued an Examiner's Report which included a term ordering her to appear before the court on December 4, 2018.
- [18] On or about November 14, 2018, Commission counsel arranged to serve Ms. Penko with a letter enclosing the filed Examiner's Report. Ms. Penko returned a copy of counsel's cover letter, on which she hand-wrote "I dishonour the above presentment under the Uniform Commercial Code, in particular UCC 3-503, 3-504, 3-505 (Notice of Dishonour)." She signed as "Managing Director: Lady Renee Michelle, Penko UCC 1-308".
- [19] Ms. Penko failed to appear at the December 4, 2018 hearing. Justice Grauer issued a warrant and ordered that a peace officer apprehend her and bring her before a judge of the court.
- [20] On December 31, 2018, Ms. Penko came before Justice G.C. Weatherill. She argued that the Commission was coming after her name, which was trust property belonging to her Tree of Life Foundation. She questioned Justice Weatherill's authority to preside over the matter. Justice Weatherill found that Ms. Penko was in contempt of court and ordered that she be imprisoned for 30 days. It is not clear on the record whether she actually served all of those days.
- [21] The Commission re-set the subpoena to debtor hearing for February 15, 2019. On February 11, 2019, Ms. Penko sent a letter to the court which included the following:

I conditionally accept action number L-160324, contingent upon my receipt of a certification in writing from BCSC counsel [name redacted] issued under her full personal commercial liability, acknowledging my right of subrogation to discharge the action/bill in the instant matter, in the amount of \$206,626.72, plus interest, all court costs and other related costs.

I am unable to proceed until I am in receipt of the said written confirmation, from either BCSC counsel [name redacted] or the Supreme Court of British Columbia, that the terms of my conditional acceptance for the discharge of action number L-160324 have been accepted.

Any failure to respond with your acknowledgement of my right or subrogation in written form, prior to the above-mentioned hearing set forth for Friday, February 15, 2019 at 10:00 a.m. shall constitute your agreement that this matter has been discharged and dismissed with prejudice, and any further action in this regard shall constitute a tort actionable against all parties, in their private capacity.

Be advised that in the absence of any notice from you of a cancellation of the above-mentioned hearing, it will be my intention to attend the said hearing on Friday, in order to reserve and enforce my rights.

Sincerely,

Renee-Michelle, Penko

subrogee

- [22] On February 15, 2019, Ms. Penko appeared at a subpoena to debtor hearing, before Registrar Nielsen. He ordered Ms. Penko to pay the Commission \$75 per month, until the amount owing was paid or until further order.
- [23] Ms. Penko sent the Commission two post-dated cheques for \$75 each, for the months of March and April 2019. The March cheque included a memo "issued under duress, threat, & coercion". The Commission successfully negotiated the March cheque. Ms. Penko stopped payment on the April cheque.
- [24] On May 22, 2019, Ms. Penko assigned herself into bankruptcy. The Commission filed a Notice of Opposition to Discharge, citing ss. 173 (a), (b), (d), (e), (h), (k), (l) and (o) of the BIA.
- [25] Ms. Penko's original discharge application was set for August 18, 2021 before Master Vos, but was adjourned generally. The Trustee also opposed the application, citing the following factors:
- a) Ms. Penko being a second-time bankrupt;
 - b) Ms. Penko having failed to respond and confirm whether a corporation's assets were seized;
 - c) Ms. Penko having failed to inform the trustee of an inheritance she had received; and
 - d) Ms. Penko having failed to pay the trustee for life insurance policies and a TFSA she transferred before her insolvency.
- [26] The inheritance was from her late father's estate and involved roughly \$126,000, which she received in 2016. She subsequently transferred about \$95,000 of that to her husband. Ms. Penko was also owner and beneficiary of two life insurance policies with a cash surrender value of \$8,060, which she transferred to her husband. She also withdrew \$5,500 from her TFSA and deposited them into an account held jointly with her husband. The funds were used for living expenses. The reference to shares refers to her 50% interest in Impala Transport Inc., co-owned with her husband. Her shares were seized in the course of the

Commission's collection proceedings.

- [27] This application was filed on September 8, 2022. It is notable that Ms. Penko's signature on her affidavit sworn on July 13, 2022 includes "UCC 1-308" at the end.
- [28] On October 17, 2022, the day before the hearing, Mr. Penko swore a reply affidavit in which she denied the Commission's allegation that she was unwilling to be bound by court orders and was denying both the court's and Commission's authority. She says she was at a low point when she engaged in the behaviour highlighted in the Commission's affidavit material. I understand this to refer to her OPCA conduct. She says she was under stress and suffered from anxiety and depression, while also being the main caregiver to elderly parents. Her father passed away and she was mourning his death. She was later diagnosed with cancer, had to give up her job, combined with negative press concerning the Commission's proceedings against Mr. Williams and herself. She also says her youngest daughter was having serious issues and she was incurring significant expense for legal counsel to assist her with proceedings before the Commission.
- [29] Ms. Penko's evidence regarding her various medical issues is vague and is not supported by any medical opinion evidence or treatment records.
- [30] Ms. Penko goes on to say she was introduced to unnamed individuals who influenced her and proposed the common law solution based on the Magna Carta. This sounded convincing to her and she thought it would be a good option, considering her debt to the Commission. By April 2019, she realized the common law solution had not worked, so she changed course and opted to pursue bankruptcy. She says she has not engaged in "any of these actions as outlined by the Commission" [OPCA conduct] since assigning herself into bankruptcy.
- [31] As for her incorporation of "UCC 1-308" in her signature on the July 13, 2022 affidavit, Ms. Penko explains that she has used this "handle" on other occasions, but did not intend to do so on this occasion. She did so out of habit and understands the gravity of swearing documents under oath.
- [32] Ms. Penko declares that she intends to comply with the rules of all proceedings related to her bankruptcy discharge and court proceedings. She recognizes the Commission's and this court's authority and jurisdiction and was prepared to state that under oath in open court, if required to do so.

Applicable Law and Analysis

- [33] Sections 168 to 192 of the BIA govern the discharge of bankrupts.
- [34] Section 172 of the BIA allows the court to grant or refuse discharges. Sub-sections (1) and (2) are as follows:

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.

[35] If any facts set out in s. 173 are found to be present, the court will not grant an absolute discharge. In *Poonian (Re)*, 2020 BCSC 547 at paras. 40-41, Master Elwood (as he then was) noted:

[40] If the court finds that any of the circumstances in s. 173 are proven, then an absolute discharge may not be granted: s. 172(1).

[41] Madam Justice Fitzpatrick explained the combined effect of these provisions further in *Re Montalban*:

[25] Many bankrupts are what can be described as the "honest but unfortunate debtor" who is most certainly entitled to the benefit of the discharge provisions under the BIA. Generally speaking, for a first-time bankrupt whose insolvency arose from circumstances for which he cannot be held responsible and who has complied with his duties under the BIA, the BIA provides for an automatic discharge after nine months, subject to any other objections being raised by the Trustee or the creditors: ss. 168.1 and 168.2.

[26] For others, such as rogues who are clearly guilty of transgressions before the bankruptcy or who have clearly not complied with their duties under the BIA, their discharge may be refused even when they bother to attempt to have an application heard by the court in the first place. In those cases, the court will be reluctant to release the bankrupt from this "financial purgatory" where either the rehabilitation of the bankrupt and the protection of the public remain issues or where the trustee still requires the bankrupt's assistance in investigating transactions and potential assets. Bankrupts who are guilty of fraudulent

activities, either before or after the bankruptcy, or both, certainly fall within this category.

[27] Somewhere between these two extremes are bankrupts whose actions have attracted the opposition of the trustee, the creditors, or both, arising from a lesser degree of blameworthiness relating to their activities before the bankruptcy or their performance of their duties under the BIA. In that case, a conditional order or a suspended discharge order, or both, may be appropriate: s. 172.

[36] Relevant sub-sections for purposes of this application are:

Facts for which discharge may be refused, suspended or granted conditionally

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;
- (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 three years before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included;
- (d) the bankrupt has failed to account satisfactorily for any loss of assets or for any deficiency of assets to meet the bankrupt's liabilities;
- (e) the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt's business affairs;
- (h) the bankrupt has, within the period beginning on the day that is three months before the date of the initial bankruptcy event and ending on the date of the bankruptcy, both dates included, when unable to pay debts as they became due, given an undue preference to any of the bankrupt's creditors;
- (i) the bankrupt has on any previous occasion been bankrupt or made a proposal to creditors;
- (k) the bankrupt has been guilty of any fraud or fraudulent breach of trust;
- (o) the bankrupt has failed to perform the duties imposed on the bankrupt under this Act or to comply with any order of the court.

[37] In *Gwizd (Re)*, 2017 BCSC 1975 at paras. 23-24, Master Taylor summarized the purpose of bankruptcy and factors to be balanced when exercising discretion to discharge a bankrupt:

[23] As per the Supreme Court of Canada in *Alberta (Attorney General) v. Moloney*, 2015 SCC 51, the purpose of bankruptcy is twofold; first, the equitable and efficient distribution of a bankrupt's assets to the bankrupt's creditors; and second, the financial rehabilitation of the debtor through a discharge of debts.

[24] It is well established, as per *Nelson (Re)*, [1995] S.J. No. 384 (Q.B.), subject to the constraints of s.172 of the BIA, that the order crafted by the court at a discharge hearing is a matter of discretion. In exercising that discretion, the court must look at the whole matter before it in "the light of reason, common sense and humanity" and must seek to balance three things:

- a) The interest of the rehabilitation of the bankrupt;
- b) The interest of the creditors in being paid; and
- c) The integrity of the bankruptcy process and the public's perception of it.

[38] In *Westmore v. McAfee*, 1988 CarswellBC 512; [1988] B.C.J. No. 329 (C.A.) at paras. 22-23, the court of appeal summarized the principles of discharge:

22 I would wish to adopt, without referring to the authorities other than *Re Posner* (1960), 67 Man. R. 288, 3 C.B.R. (N.S.) 49, a statement of Anderson J. in *Re Raftis* (1984), 53 C.B.R. (N.S.) 19 (Ont. S.C.), where he gave a compendious expression of the sometimes conflicting principles of discharge extracted from the cases [pp. 22-23]:

1. In considering the question of discharge, the Court must have regard not only to the interests of the bankrupt and his creditors, but also to the interests of the public ...
2. The Legislature has always recognized the interest that the State has in a debtor being released from the overwhelming pressure of his debts, and that it undesirable that a citizen should be so weighed down by his debts as to be incapable of performing the ordinary duties of citizenship ...
3. One of the objects of the Bankruptcy Act was to enable an honest debtor, who had been unfortunate in business, to secure a discharge so he might make a new start ...
4. The bankruptcy courts should not be converted into a sort of clearing-house for the liquidation of debts irrespective of the circumstances under which they were created ...
5. The success or failure of any bankruptcy system depends upon the administration of the discharge provisions of the Act ...
6. The Court is not to be regarded as a sort of charitable institution ...
7. It is incumbent upon the Court to guard against laxity in granting discharges so as not to offend against commercial morality. It is nevertheless the duty of the Court to administer the Bankruptcy Act in such a way as to assist honest debtors who have been unfortunate ...
8. The discharge is not a matter of right ...

23 These principles impose upon a judge the obligation of considering and balancing the interests of the bankrupt, of the creditors and of the public.

[39] In *Poonian (Re)*, supra at paras. 53-54, Master Elwood noted that a discharge should only be refused outright in extreme cases or where the conduct of a bankrupt has been particularly reprehensible:

53 In *Industrial Acceptance Corp. v. Lalonde*, [1952] 2 S.C.R. 109, the Supreme Court of Canada held that a discharge should only be refused outright in extreme cases or where the conduct of the debtor has been particularly reprehensible, saying at p. 120:

...The purpose and object of the Bankruptcy Act is to equitably distribute the assets of the debtor and to permit of his rehabilitation as a citizen, unfettered by past debts. The discharge, however, is not a matter of right and the provisions of ss. 142 and 143 [now 172 and 173] plainly indicate that in certain cases the debtor should suffer a period of probation. The penalty involved in the absolute refusal of discharge ought to be imposed only in cases where the conduct of the debtor has been particularly reprehensible, or in what have been described as extreme cases. (emphasis added)

54 Where neither an absolute discharge nor an outright refusal is appropriate, the courts will usually impose conditional orders requiring payment of a certain sum, which may be substantial: *Re. Montalban*, at para. 126, citing *Kozack, In Re Buell* (1954), 35 C.B.R. 53, [1954] O.J. No. 446 (S.C.); *Crowley* at 308 and 311-312.

[40] Section 173 facts are present in this case. This is Ms. Penko's second bankruptcy. Her assets are also not of a value equal to fifty cents on the dollar on the amount of her unsecured liabilities. The trustee's report dated July 16, 2021 puts the value of her assets at \$27,961 and proven unsecured liabilities at \$288,185.

[41] Regarding whether her unsecured liabilities arose from circumstances from which Ms. Penko cannot justly be held responsible, her counsel did not directly address this point. He did address more broadly whether she is an honest but unfortunate debtor, emphasizing that she relied on statements made by Mr. Williams and a legal opinion he showed her. She points to her participation in a committee which helped gather documents. Counsel argued her participation in the Ponzi scheme as misguided and her efforts on the committee as being analogous to whistle-blowing.

[42] Ms. Penko was not a party to the central fraud as found against Mr. Williams. Her involvement in the committee and her remorse for her role in the scheme were addressed in the Decision, at paras. 43 and 46-48:

[43] Penko submits that we view her current period of registration under the Act, without any prior history of regulatory misconduct, as a mitigating factor. She also submits that her role on the Associate Coordinating Committee (ACC), which she says helped collect documents for subsequent delivery to regulators and which also provided information to investors following the collapse of the Ponzi scheme, should be viewed as a mitigating factor. She also

submits that she worked a significant number of hours on behalf of the Global Entities and that her compensation for that work was reasonable, that she has had to pay tax on the amounts received by her as commissions and that she was herself an investor in the securities of the Global Entities. All of these things, she says, should be mitigating factors in any financial sanctions we determine. Finally, she says that she has provided approximately \$2,000 from her personal resources to two of her former clients who suffered significant losses in the scheme.

- [46] The role of the ACC as a mitigating factor is not clear from the evidence. Participation in that ACC's efforts might reflect remorse and concern for investor outcomes. However, it might also have had the effect of delaying regulatory efforts to investigate the nature of the misconduct committed by the respondents in this case. It may also have had the effect of delaying investor claims against the respondents. We have not taken Penko's role in the ACC into account in determining the appropriate sanctions in this case.
- [47] We do find that Penko, throughout the hearing, and in her written submissions displayed genuine remorse for her role in the scheme. The executive director also acknowledges this remorse. We have taken this remorse into account in determining what sanctions are necessary to accomplish the goal of specific deterrence in the case of Penko.
- [48] We have taken Penko's existing registration status into account in our sanctions. She is currently registered under the Act in a manner that requires strict supervision. This is her current livelihood. There have been no other securities regulatory concerns raised with respect to Penko arising from her current registration status. We are prepared to allow this arrangement to continue in order to allow her to keep her current job.
- [43] Ms. Penko was an active participant in the sales activities which contravened the Securities Act. She was found to have been involved in illegal distributions to 22 investors, involving 31 investments with a value of \$1,171,003. She received a 13% commission for her efforts. Ignorance of securities laws is not an excuse. This is a circumstance for which Ms. Penko can be (and was) held responsible.
- [44] An absolute discharge is accordingly not an option for Ms. Penko. She requests a discharge with a one-day suspension, or alternatively a conditional discharge, on such terms and conditions as the court deems fit.
- [45] Counsel for Ms. Penko argued she is an honest but unfortunate debtor who deserves an opportunity to make a new start. She has given honest, open disclosure, has taken steps towards rehabilitation and has now performed all duties imposed on her by the BIA. He also notes she has no ability to pay surplus income, so a suspended discharge is not appropriate, referring to *Jabs (Re)*, 2010 BCSC 1325 at para. 63:

63 If the bankrupt has no ability to pay surplus income, the courts typically order that the discharge be suspended. However, each case must be considered on its own particular facts. There is no presumption of a suspended order simply because Mr. Jabs is not engaging in remunerative employment or has not paid surplus income in the past.

[46] The Commission and trustee oppose any suspended or conditional discharge, saying either would undermine the twin principles of rehabilitation of the bankrupt and upholding the integrity of the bankruptcy system.

- a) First, Ms. Penko did not comply with her bankruptcy conditions, as indicated by the Trustee's opposition to her original application for discharge.
- b) Second, she did not make good faith efforts to contribute to the estate.
- c) Third, she continues to blame the Commission for being the cause of her insolvency rather than accepting responsibility for her actions.
- d) Fourth, she has demonstrated "wanton disrespect" for the jurisdiction and authority of the Commission and this court, through her obstruction of the Commission's collection efforts and her vexatious OPCA-related misconduct.

They argue that granting Ms. Penko a discharge would bring the administration of justice into disrepute and ask that her application be dismissed.

[47] Is Ms. Penko an honest but unfortunate debtor?

[48] Counsel for Ms. Penko characterized her involvement in the Ponzi scheme as misguided. In the Commission proceedings, she emphasized that she and certain family members she introduced to the scheme also lost money. She was subject to a substantial debt to CRA debt when certain charitable aspects of products she purchased were re-assessed. As she was not party to the fraud at the core of the scheme, her conduct is less egregious than that involved in cases such as Cook (Re) and Poonian (Re).

[49] Ms. Penko's pre-bankruptcy OPCA tactics seeking to frustrate the Commission's collection efforts are a concern. Her counsel argues the court should exercise caution and not punish her for her beliefs, relying on Master Muir's reasons in Hanlon (Re), 2021 BCSC 800 at para. 42:

42 That Mr. Hanlon does not accept the Dardi J.'s findings to this day is one factor to consider in his after bankruptcy conduct. I do accept, however, as noted above, that he has complied with the injunction and stopped making posts about Ms. Johnson. I agree that is the purpose of the process - it is not to control Mr. Hanlon's thoughts and beliefs.

[50] It is apparent from Ms. Penko's affidavit of October 17, 2022 that she intentionally adopted OPCA tactics in an effort to avoid her debt to the Commission. While she did join a committee to gather documents which were sent to the Commission and expressed remorse during Commission proceedings, that did not extend to her making a genuine effort to make

payments towards her debt to the Commission. Her conduct played out in proceedings before this court, including various vexatious communications, refusal to appear at several hearings and questioning a judge's authority. After she was ordered to pay \$75 per month, she made only one payment under protest before stopping payment on a second cheque.

- [51] What impact should Ms. Penko's OPCA conduct have on the analysis?
- [52] Counsel for Ms. Penko relies on *Proteau (Re)*, 2006 SKQB 324, which involved a 62-year old, three-time bankrupt involved in a tax-driven bankruptcy. At paras. 5-6:
- [5] The bankrupt admitted to attending a seminar on the non-payment of income taxes but denied involvement in the "detax" movement. The bankrupt freely admits, however, his belief that he is a "natural person". Like many of the bankrupt's ilk he is prone to write nonsensical letters to the Minister's representatives invoking the Magna Carta, the Canadian Bill of Rights and the Universal Declaration of Human Rights as the reason for non-payment of income taxes. After carefully observing a number of these individuals over the last few years I can safely say that the "detax" movement attracts either the naive or opportunists searching for a faint thread of justification for their stand on the non-payment of taxes. I have no doubt that the bankrupt belongs to the latter group. He is too intelligent to be considered naive. He willingly latched onto this excuse to enforce his predisposition toward non-payment of his tax obligations. I wish to reiterate that it is an excuse and not a rational reason.
- [6] The circumstances of this bankruptcy are so egregious that any court could easily justify a refusal of a discharge. I believe, however, that more could be gained by the imposition of a fairly stringent discharge order. I make this statement based upon the age and health of the bankrupt as well as the bankrupt's assurance that he has changed his ways completely. This has been demonstrated by his payment of all his post-bankruptcy income tax debt and his commitment to collect and remit GST as required.
- [53] The bankrupt in that case was ordered to pay the trustee \$6,300 for the benefit of the unsecured creditor, to be paid in monthly payments of \$175 for a period of three years. There was also a suspended order for discharge for a period of three years to run concurrent with the conditional order for discharge.
- [54] In *Stancer (Re)*, 2012 BCSC 1533, Master McDiarmid considered an application for discharge in a lengthy bankruptcy made by a bankrupt who had been employing OPCA strategies. The bankruptcy arose in 2005 and several previous applications for discharge had been dismissed. The learned master concluded that in view of the length of the bankruptcy and the fact that the bankrupt was now a pensioner with no ability to make further payments and some creditors having dropped their initial opposition, among other issues, the time had come for the bankrupt to be discharged. That involved an absolute discharge granted after the passage of more than 11 years in bankruptcy.

[55] In *Ballantyne (Re)*, 2015 BCSC 1292, Master Bouck considered an application for discharge where the bankrupt had engaged in OPCA conduct. The bankrupt sought an absolute discharge, while the trustee and OSB sought a conditional order which would effectively require the bankrupt to pay his tax debt in full. In that case, the bankrupt had surplus income. Master Bouck concluded that the bankrupt had not been rehabilitated by the process and that a payment equal to a further 24 months of surplus income was appropriate. This would result in a first time bankrupt remaining undischarged for 48 months. At paras. 23-24:

23 The bankrupt's conduct to date demonstrates that he has not been rehabilitated by the process. In order to assist in that rehabilitation and promote public faith in the bankruptcy system, more than modest conditions need to be imposed. The conditions will be monetary in nature.

24 Unless employment is obtained, the bankrupt's future income is predictable. The CPP payments may increase over time, but not likely in any significant way. Thus, it is reasonable to predict that if Mr. Ballantyne were to submit surplus income for another 12 months, the additional amount paid into the estate would be close to \$2,000; another 24 months of surplus income payments would equate to just over \$4,000. While it is atypical for a first time bankrupt to remain undischarged for up to 48 months, that outcome might well be appropriate in these exceptional circumstances. Accordingly, I order that the bankrupt be discharged upon providing the trustee with 24 consecutive monthly income and expense statements commencing May 1, 2015, and remitting any surplus income as determined by the trustee on a monthly basis, with liberty to pay the total sum of \$4,000 to the trustee on or before June 1, 2016. It is a further term of the order that the trustee may seek its discharge if the bankrupt fails to provide the statements and/or make payments as required for three consecutive months. As well, the bankrupt's discharge is suspended until June 1, 2016, regardless of whether the \$4,000 is fully paid before that date.

[56] In *Hanlon (Re)*, *supra*, Master Muir granted a conditional order on top of what she found to be a *de facto* lengthy suspension due to delay in the application coming on for hearing. At paras. 68-70:

68 All of the interests here must be balanced -- Mr. Hanlon's right to a discharge and his impecuniosity, the interests of creditors and the integrity of the bankruptcy system.

69 Although Mr. Hanlon has limited means, I have concluded that a conditional order is appropriate. The payment should be sufficient to acknowledge that his pre-bankruptcy conduct has been found deserving of censure, but not so large as to be completely beyond his reach.

70 I conclude that Mr. Hanlon should pay \$7,500 to the Trustee for the benefit of his creditors. I do appreciate that given his financial circumstances that this is a significant condition, being the equivalent of three years of his previous employment income. I also appreciate that Ms. Johnson is unlikely to consider this sufficient.

- [57] In the present case, Ms. Penko is a second-time bankrupt and had been in bankruptcy for approaching 3.5 years at the time of the hearing of the application before me. She reports having no excess income and there is no indication that her prospects are likely to improve in the foreseeable future. She accordingly has no ability to pay a significant amount for the benefit of her unsecured creditors if a conditional order were to be imposed.
- [58] She is 61 years of age. Her evidence regarding her past health issues is vague and not supported by objective medical evidence. Her evidence regarding her post-London Life job search efforts is also vague. While I can accept that the fall-out from the Commission's proceedings likely had a significant impact on her personally and professionally, the evidence tendered falls short of persuading me that she made reasonable efforts to secure employment after her position with London Life came to an end.
- [59] It frankly appears that Ms. Penko was, in part at least, stubbornly refusing to make voluntary payments towards the debt she owed to the Commission. She compounded this by engaging in OPCA-style tactics to resist and frustrate collection proceedings in this court. She continued to use an OPCA identifier in conjunction with her signature during these bankruptcy proceedings, including on her Statement of Affairs signed May 2, 2019, and on her affidavit sworn in July 2022. Her new-found desire to disavow her past conduct appears to coincide with her application for discharge.
- [60] As noted in *Westmore*, supra, the court must have regard not only to the interests of the bankrupt and her creditors, but also the interests of the public. The bankruptcy court is not a clearing-house for the liquidation of debts, irrespective of the circumstances under which they were created. In this case, this concern extends to the tactics Ms. Penko engaged in while resisting the Commission's collection efforts. I am not persuaded that Ms. Penko has been rehabilitated by this bankruptcy.
- [61] In this instance, a conditional order is not a realistic option given Ms. Penko's lack of surplus income and her inability to make a meaningful payment for the benefit of her unsecured creditors. I also do not consider that a suspended order is appropriate in these circumstances. In my view, Ms. Penko's post-Sanctions Decision OPCA-oriented conduct is sufficiently reprehensible to warrant dismissal of her application for discharge at this time, but I grant her leave to re-apply 2 years after the date of this order.

Order

- [62] Ms. Penko's application for discharge is dismissed, with leave to re-apply 2 years after the date of this order.

"Master Bilawich"

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