
CANADA / JUDGMENT

Perrier (Re)

2016 BCSC 912

COURT

Supreme Court of British Columbia

DECIDED

18 April 2016

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2016 BCSC 912 Perrier (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Perrier (Re),

2016 BCSC 912

Date: 20160418

Docket: B101007

Registry: Vancouver

In Bankruptcy

In the Matter of the Bankruptcy of

Michael Joseph Perrier

Before: District Registrar Nielsen

Oral Reasons for Decision

In Chambers

Appearing on his own behalf:

M. Perrier

Counsel for the Canada Revenue Agency, a creditor:

K.K. Khalsa

L.H. Chun

Place and Date of Hearing:

Vancouver, B.C.

April 18, 2016

Place and Date of Decision:

Vancouver, B.C.

April 18, 2016

- [1] THE COURT: These are oral reasons. If a transcript is requested, I reserve the right to edit them but the result will not change.
- [2] This is an application by the bankrupt for an absolute discharge from bankruptcy. As the bankrupt's assets do not equal 50 cents on the dollar pursuant to s. 173(1)(a) of the Bankruptcy and Insolvency Act, this application falls under s. 172(2) of the Bankruptcy and Insolvency Act, which provides:
- 172 (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.
- [3] I pause to note that this bankruptcy is not covered by s. 172.1 of the Bankruptcy and Insolvency Act, as it came into effect two days after the bankrupt made his assignment into bankruptcy.
- [4] The bankrupt's application is opposed by the Canada Revenue Agency (the "CRA"), who is owed unpaid income tax in the amount \$715,645.53 for 11 years between 1997 and 2007. The bankrupt also owes CRA unpaid GST in the amount of \$80,847.85, for the years 1999 and 2001 through 2004. The current account is itemized in Schedule A of the letter dated November 17, 2013, of B. Louie [phonetic].
- [5] The debts owing to CRA comprise 85% of the total unsecured liabilities of the bankrupt as of April 11, 2016.
- [6] The CRA submits the bankrupt's discharge be conditional upon the payment of the sum of \$150,000 payable in monthly instalments of not less than \$1,000, with the right to prepay in whole or in part. The amount sought by the CRA represents roughly 50% of the total income tax and GST debts, exclusive of penalties and interest.

Background

- [7] The bankrupt is 49 years old and has not been previously bankrupt. He is divorced without any dependants. He currently earns roughly \$72,000 a year as an employee of Masters Fire and Safety Ltd., and he has earned as much as \$76,500 in a year.
- [8] Previously, the bankrupt had been self-employed in both the business of installing and servicing fire protection equipment, and also in a bio-diesel venture. During his period of self-employment, he managed to incur substantial income tax liabilities. He has essentially kept up with his income tax payments as an employee.
- [9] The bankrupt's income tax liabilities comprised 85% of his unsecured liabilities as of April 11, 2016. He made his assignment into bankruptcy on September 16, 2009.
- [10] In his dispute with CRA, the bankrupt participated in an audit, appealed some assessments to an appeals officer, but did not appeal further to the Tax Court of Canada. I am advised there would have been a cost associated with filing fees of an appeal to the Tax Court of Canada in the amount of \$550.
- [11] The bankrupt's failure to appeal the assessments of CRA has consequences for him. An assessment of tax is deemed valid and binding pursuant to s. 152(8) of the Income Tax Act, which provides:

152 (8) An assessment shall, subject to being varied or vacated on an objection or appeal under this Part and subject to a reassessment, be deemed to be valid and binding notwithstanding any error, defect or omission in the assessment or in any proceeding under this Act relating thereto.

- [12] The court is not to look behind the notice of assessment at the bankrupt's application for a discharge. In *Drosdovech (Re)*, 2014 BCSC 1757, the court stated at paras. 8 through 10:
- [8] I am able to consider the circumstances of the bankrupt at the time the debt arose, but that does not give me the jurisdiction to look behind the tax debt itself. The Income Tax Act, R.S.C. 1985, c. 1 (5th Supp.), mandates that an assessment shall be deemed to be valid and binding subject to an objection or an appeal under the Income Tax Act pursuant to s. 152(8).
- [9] I have been referred to the case of *Baran (Re)*, 2001 ONSC 7501, which considers the effect of s. 152(8), and also in *Norris (Re)* (1989), 69 O.R. (2d) 285 (C.A.). These and other decisions were considered by this court by Madam Justice Griffin in *Jones (Re)*, 2012 B.C.J. No. 1605 (S.C.). At paras. 83 and 84 of that decision, Madam Justice Griffiths says:
- [83] In the case at bar, all of the statutory and court processes available to challenge the assessment have already been exhausted by the taxpayer/bankrupt, Mr. Jones. There are no further processes available that may be pursued by him, or standing in his shoes, by the trustee under the ITA. The debtor's assignment into bankruptcy based on this judgment debt, and then his position in the bankruptcy that the debt should be disallowed, especially where there are essentially no other creditors, fits the description of a collateral attack in *TeleZone*: an attempt by a party to circumvent the effect of a decision against it. Any attempt

by the trustee to challenge the assessment is a challenge to the jurisdiction and judgments of the Tax Court and Federal Court of Canada.

- [10] So the CRA debt I find is proven debt in this bankruptcy, and I will not look behind the notices of assessment.
- [13] I appreciate the bankrupt feels a sense of injustice arising out of the process by which the assessments were levied against him. He feels CRA hid information, altered documents, and lied concerning his willingness to provide documents. However, the time and place to make these submissions was before the internal appeal bodies constituted under the Income Tax Act, some of which he did avail himself of, and finally, before the Federal Tax Court. The bankrupt did not appeal to the Federal Tax court. Having failed to do so, the assessments are "valid and binding" to use the words of s. 152(8) of the Income Tax Act.
- [14] CRA has explained the alleged altering of documents. In fact, there were two different documents, one pertaining to an audit of income tax and the other pertaining to an audit of GST owed. The two audits were separate; however the documents appeared very similar at first glance. Although similar, the documents were slightly different, and pertained to separate audits. It is explainable.
- [15] The bankrupt refers to the assessments as being "totally arbitrary", and I appreciate his feelings in that regard. However, as CRA submits, they are notional based upon deposit information from the bankrupt's own financial institution. In any event, I am not able to go behind the assessment levied by the CRA, given s. 152(8) of the Income Tax Act, and the bankrupt's failure to exhaust his internal remedies. To do so would be an impermissible collateral attack. The place to make the arguments advanced by the bankrupt would be the Tax Court of Canada, on an appeal.

Legal principles

- [16] Given the fact that this matter is governed by s. 172(2) of the Bankruptcy and Insolvency Act, I must have regard to the principles that apply in these circumstances. Many of them are summarized in the argument of CRA.
- [17] The courts have identified two underlying principles governing the discharge of a bankrupt. They are the rehabilitation of the bankrupt, as well as the integrity of the bankruptcy system. The principles governing were summarized by the B.C. Court of Appeal in *Westmore v. McAfee* (1988), 67 C.B.R. (NS) 209 (BCCA), and they are quoted in *Zinkiew (Re)*, 2004 BCSC 1831 at para. 55:
1. In considering the question of discharge, the court must have regard not only to the interest of the bankrupt and his creditors, but also to the interests of the public;

2. The Legislature has always recognised the interest that the State has in a debtor being released from the overwhelming pressure of his debts, and that it is 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 has 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.

[18] When a bankruptcy is tax-driven, the integrity of the bankruptcy system requires that the court take into account not only the interests of the debtor and the creditors, but also the public in ensuring that every taxpayer makes an equitable contribution to the costs of operating the public sector. This point is made in *Re Kaleniuk*, 7 July 2004, Vancouver Registry Action No. 220612 (BCSC) at para. 23.

[19] In *Van Eeuwen (Re)*, 2013 BCSC 1113, the court considered the applicability of the principles set out in the case authorities regarding tax-driven bankruptcies to bankruptcies that do not fall within the parameters of s. 172.1 and stated, at paras. 21 through 23:

[21] It seems to me that the principle to be extracted from *Steward* is that income tax obligations should not automatically be placed in a different category from other obligations in determining what conditions should be imposed on the granting of a discharge. However, once the court determines that the bankrupt has deliberately ignored his or her tax obligations, it is appropriate to impose conditions that demonstrate the court's disapproval of such conduct. In so doing, the court is entitled to take into account the fact that the ignored obligations are taxes. In all cases, it is of course necessary to strike the correct balance between the objectives of rehabilitation of the bankrupt and of preserving the integrity of the bankruptcy regime.

- [22] In my view, the decision of the registrar is entirely consistent with Steward. In this case the appellant persistently and flagrantly ignored not only his income tax obligations but also his obligation to remit GST collected in connection with his business. The registrar committed no error in taking that conduct into account in determining what conditions should be imposed on the appellant's discharge.
- [23] In my opinion, the flaw in the appellant's argument is that it focuses on the nature of his debts, rather than on his conduct in accumulating them. The appellant's argument is based on the premise that the registrar based his decision on the fact that the bankrupt's debts were predominantly tax obligations. However, as I read the registrar's reasons, he took into account both the flagrant and persistent conduct of the appellant in refusing to pay his taxes and the policy reasons for treating tax obligations as a special category. Based on both considerations, he decided what discharge conditions should be imposed. He also took into account the settled principle that bankruptcy is not to be regarded as a clearing house for debts.
- [20] The courts have held that a bankrupt who does not pay his tax liabilities is not to be categorized as an honest or unfortunate debtor. In these circumstances the courts have held that the bankrupt is taking advantage of the fact that taxes are not collected by source deductions and that the failure to pay tax on income as it is earned is misconduct and cannot be classified as misfortune. This principle is stated in *Toal (Re)*, [1993] A.J. No. 442 (Q.B.) at para. 14:
- 14 Nobody likes paying income tax. But I resile from the position that a taxpayer should not pay income tax when he incurs it (when he makes the income) and when the liability reaches a large amount go into bankruptcy and piously say that he cannot now pay that large debt and it has caused his bankruptcy. Debts do not cause bankruptcy. In this case it was the unacceptable conduct of the bankrupt which created this situation.
- [21] The court has also held that where the bankrupt has significant tax debts, deterrence, not rehabilitation, is the factor of note. Deterrence is not only relevant to the bankrupt's case, but also to others who might be tempted to evade income tax liability by using bankruptcy as a financial planning tool. See *Re Gelpke*, 2012 BCSC 1770 at para. 23; and *Re Furlotte*, 2007 NBQB 37 at para. 37.
- [22] Most recently in *Re Robb*, 2015 ABQB 34, the Alberta Queen's Bench noted at para. 14:
- [14] Very often bankrupts are called upon to pay a percentage of their tax obligation or total unsecured debt as a condition of discharge. The percentage varies depending on the circumstances but seldom is it more than 40%. The Courts have referred to these conditional amounts as sufficient penalty to address the pre-bankruptcy behavior and often the improper conduct of the bankrupt during the course of the bankruptcy. The penalty is no penalty at all. The vast majority of Canadians file their returns and pay their taxes. If a dollar is owing that is what must be paid. However, if you totally disregard your legal obligations to file and pay taxes your "punishment" in bankruptcy is that you owe a dollar

but may only pay perhaps as [little] as 40 cents. I am unable to accept that as a rationale or logical consequence. The "punishment" amounts to a reward.

application of the principles

- [23] Applying the principles to this case, there are a number of factors to note. The bankrupt is solely responsible for the accrual of the tax debts that compromise CRA's proofs of claim. There was a failure on the part of the bankrupt to file income tax returns, a failure to provide CRA with information necessary to determine the tax liability in a timely fashion and in the manner requested. There was also a failure to pursue the appeal processes provided under the legislation, and finally, a failure to make payments towards the bankrupt's tax debts.
- [24] The bankrupt has referred to his business failures. No doubt there were indeed business failures on his part. However, the bankrupt has presented it as a debt owing to CRA in the amount of \$800,000 on his statement of affairs, which comprises 88% of the total liabilities declared by him.
- [25] The bankrupt made extensive submissions concerning the validity of the assessments. However, as already stated, that is not something that I can look behind on this application for discharge. The time and place to make these submissions was before the internal appeal bodies, and ultimately the Tax Court of Canada, which is an independent body separate from the CRA.
- [26] The bankrupt submits he has no ability to pay a conditional order. The CRA submits the bankrupt does indeed have the ability to contribute to a conditional order. They cite the fact that the bankrupt is relatively young, has no dependants or support obligations, is currently an employee of Masters Fire and Safety Ltd., and earns a steady income, on average, of \$72,000 a year, and on one occasion, as much as \$76,500 a year.
- [27] The company he currently works for is in the same type of business as the bankrupt's prior sole proprietorship, and he is well accustomed with that industry and is as much of an expert as one can be within that industry. CRA submits that the bankrupt's income will likely increase over time, given his expertise and experience in the industry. I agree with these submissions.
- [28] I also note that there is no evidence of ill health on the part of the bankrupt.
- [29] CRA further submits that the bankrupt's alleged expenses are excessive in the circumstances. The bankrupt lists his expenses as including 1,200 per month for groceries relating to an organic diet, \$250 for restaurant meals, \$200 for entertainment, \$500 for gym and yoga memberships, and \$150 for "contributions", which I assume are charitable contributions. CRA also submits that, to the extent that the bankrupt has not paid his taxes assessed over the past 11 years, suggests he has had substantially more money available to him for the purchase of goods and services than if he had to live on his own income, net of tax. I am also in agreement with these submissions.

Disposition

- [30] CRA submits the bankrupt's discharge be conditional upon the payment of the sum of \$150,000 payable in monthly instalments of not less than \$1,000, with the right to pre-pay in whole or part at any time. They further suggest that if the bankrupt fails to make three consecutive monthly payments, then the trustee should be required to apply for its discharge immediately. The monetary conditions sought by CRA represent approximately 50% of the total income tax and GST debts, exclusive of the penalties and interest.
- [31] CRA submits that while each discharge application is unique and is to be decided on its own merits, they provide a list of cases at para. 27 of their application response at paragraphs (a) through (g) which provide examples of the various types of conditional orders made in circumstances which I find are comparable to those of the bankrupt in this case.
- [32] I am of the view that a conditional order is warranted in the circumstances. There will be an order that the bankrupt's discharge be conditional upon the payment of the sum of \$150,000, payable in monthly instalments of not less than \$1,000, with the right to pre-pay, in whole or in part at any time. Those payments are to commence May 1, 2016, and be payable on the 1st of each month thereafter.
- [33] Further, if the bankrupt fails to make three consecutive monthly payments, then the trustee shall be required to apply for its discharge immediately.
- [34] The CRA also seeks costs and has provided a bill of costs and an affidavit of disbursements. Pursuant to s. 197(6.1), I am awarding the CRA \$2,500 in costs, which is inclusive of disbursements, to be paid as a first charge on the amounts realized by the trustee pursuant to this order.
- [35] I am going to hang onto the binder, because I have marked it up. I am going to return your authorities, I am going to return your original affidavit that needs to be filed, I am going to return the examination for discovery of Denise Perrier to the CRA, and I am going to return Mr. Perrier's documents that he provided.
- [36] MS. KHALSA: Your Honour, if I may, may we have Mr. Perrier's signature with respect to the order dispensed with?
- [37] THE COURT: The signature of Mr. Perrier is dispensed with, but you are to provide him with a signed, filed copy of the order forthwith.
- [38] MS. KHALSA: Certainly.
- [39] THE COURT: All right, we are adjourned.

"District Registrar Nielsen"

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