

CANADA / JUDGMENT

Smith (Re)

2022 BCSC 1497

COURT

Supreme Court of British Columbia

DECIDED

30 June 2022

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2022 BCSC 1497 Smith (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Smith (Re),

2022 BCSC 1497

Date: 20220630

Docket: B-190221

Registry: Vancouver

In the Bankruptcy and Insolvency

In the Matter of the Bankruptcy of Elton Laurice Smith

Before: Master Robertson

Oral Reasons for Judgment

In Chambers

Appearing on behalf of the Trustee:

D. Gurney

Counsel for the Bankrupt:

C.G. Reedman

Place and Date of Trial/Hearing:

Vancouver, B.C.

June 30, 2022

Place and Date of Judgment:

Vancouver, B.C.

June 30, 2022

- [1] THE COURT: These are my oral reasons for judgment. I reserve the right to edit them as to background, citation and the grammar should a transcript be ordered. However, I will ensure that the final disposition does not change in any way.
- [2] The application before this Court today is for an absolute discharge in bankruptcy. The trustee opposes an absolute discharge on the basis that the amounts required to be paid under the Bankruptcy and Insolvency Act, R.S.C. 1985 c. B-3 [BIA], representing surplus income and property that otherwise vested to the trustee, namely a Dodge Caliber, ought to be paid as a minimum.

Background

- [3] By way of a very brief background, the bankrupt, Mr. Smith (the "Bankrupt"), is currently 59 years old.
- [4] He made an assignment in bankruptcy on July 6, 2018, that being his first filing under the BIA, with E. Sands & Associates being appointed as trustee (the "Trustee").
- [5] Since his assignment was made, there have been various issues that have arisen in terms of the bankrupt's compliance with his duties as required under the BIA, in particular:
- a) he failed to attend a second counselling session;
 - b) he failed to complete and provide all of his required statements of income and expenses; and
 - c) he failed to make the payments that were required of him, specifically with respect to a non-exempt asset, that being (i) a second vehicle assessed to be valued in the amount of \$1,150 I believe, (ii) trustee's fees that were due and owing in the amount of \$1,800, although I do note that a couple of payments were made in that respect by way of cheque that were returned due to insufficient funds and (iii), ultimately, unpaid surplus income determined to be owing later in these proceedings, as described further below.
- [6] As a result of the failure to comply with the duties, the Trustee applied for an adjournment of the Bankrupt's discharge after a nine-month period, given that it was not expected that there would be surplus income based on the information that had been provided by the Bankrupt, and a discharge would have otherwise been available on that basis. In this respect, the Bankrupt had disclosed significant non-discretionary expenses that reduced his monthly income to below the threshold for surplus payment to be payable. On that basis, the adjournment order was made and, subsequently, on application by the Trustee an order was pronounced for the Trustee's discharged.

- [7] The Bankrupt has now come back before this Court seeking to obtain his discharge in accordance with s. 172 of the BIA.
- [8] In the course of doing so, he has now complied with most of his duties. In particular, he attended the second counselling session and provided the various statements of income and expenses which were missing, as well as further income tax records. The Bankrupt has also now provided a current income and expense statement to satisfy the Court today as to his current financial circumstances and in support of his argument that he ought to receive an absolute discharge.
- [9] However, in the course of reviewing the complete statements of income and expenses, the Trustee has determined that there are discrepancies with what had been disclosed at the initial assignment in terms of these non-discretionary expenses, and as revealed from the income tax returns, discrepancies in the income as disclosed.
- [10] I do note that the discrepancies in terms of his income show that his best year of earning was 2018, the year in which he made his assignment, and averaging his annual income, would suggest a monthly income of about \$7,000 per month until March of 2020, at which point it decreased to an average of \$4,500 per month.
- [11] Those amounts appear to be in keeping with what the Bankrupt's current earning capacity has been. For example, in February 2022 he made \$5,900, and in November 2021 it was close to \$6,500.
- [12] In others words, there has not been a significant fluctuation in his income in terms of what has been revealed through a review of his income tax returns compared to what he is now making as disclosed on his current statement of income and expenses as attached to his affidavit filed in support of this application.

Position of the Parties

- [13] As noted, the Trustee opposes a discharge other than on terms that the Bankrupt pay the amounts that he is statutorily obligated to pay under the BIA.
- [14] The Bankrupt does not dispute those obligations. Rather, the basis for the Bankrupt's seeking of an absolute discharge is based on his current personal circumstances and inability to pay.
- [15] In particular, the Bankrupt has experienced a number of health setbacks since he made his assignment in bankruptcy. He has had some gastric issues including surgery. He has suffered from prostate cancer and other issues with respect to his prostate requiring surgery, and more recently has been involved in two motor vehicle accidents, although the full extent of those injuries are not before the Court nor is any evidence as to whether or not claims have been made including for wages loss in that respect.

- [16] What is evident is that, as referenced previously, throughout this period of time, while there has been some variation in his income, there appears to be a relatively consistent ability to make income in the range of between \$5,000 and \$6,500, and in 2018, up to \$7,000.
- [17] The Trustee argues that, given that there has been a consistent ability to make an income and that currently, based on his 2022 or most recent statements of income and expense showing an income of \$6,000, which, if you were to calculate his surplus income on those amounts, would enable him to make a monthly payment, therefore there is no reason to grant an absolute discharge, or in other words, to forgive him from his statutory obligations under the BIA.
- [18] The Bankrupt, on the other hand, argues that there is a great deal of uncertainty with his future. Not only does he have these various health issues, but there has been a history of times where he has lost his employment. He points to the fact that he has had, I believe, approximately 18 jobs in the period of time since moving to Canada in 1997 and making his assignment. He deposes that this is because of legal issues involving a former spouse living in California who obtained an order in the United States for Child support prior to his move to BC in 1997, but which was later recognized here and is now being enforced by the Family Maintenance and Enforcement Program ("FMEP") under the Family Maintenance Enforcement Act, RSBC 1997, c. 127. The Bankrupt indicates that there is still approximately \$47,000 or \$48,000 still owing under that judgment being enforced by FMEP.
- [19] The Bankrupt deposes that, prior to the bankruptcy, although it is a bit speculative, there appeared to be coincidental loses of his job at the same time that his employer would receive garnishment orders from FMEP. The Bankrupt deposes that the continued enforcement efforts of FMEP created, and continue to create, significant uncertainty with his employment in that an employer may soon again find that the garnishment process is too cumbersome and choose to terminate his employment again.

Analysis

- [20] Turning then to the test on these applications, counsel has provided and relies upon the usual authorities in support of a discharge hearing.
- [21] I need not go into depth on those principles, but note that counsel for the Bankrupt has referenced (Re) Poonian, 2020 BCSC 547, in which the general fresh start principles are outlined, as well as (Re) Gwizd, 2017 BCSC 1975, at para. 24, which confirms that the discharge is a matter of discretion, where the court looks at the whole of the matter in "the light of reason, common sense and humanity", seeking 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.

- [22] The Bankrupt has also referred to the various frequently cited decisions that confirm that the policy objectives of the BIA are to allow for the financial rehabilitation of the honest but unfortunate debtor. Although an absolute discharge is not an entitlement, a discharge is generally considered to be earned by a bankrupt by virtue of their compliance with their obligations under the BIA and, provided that they are an honest and unfortunate debtor, then an absolute discharge is something that is ordinarily provided by the court, given that the BIA is not intended to be penal in nature.
- [23] The concern that I have in this case is not strictly with whether or not the policy objectives of the BIA have been met in terms of the Bankrupt's rehabilitation and interests of the creditors being met - I note that no creditors are here today opposing - but rather the integrity of the bankruptcy process.
- [24] There has been noncompliance throughout the history of this matter, as well as issues with disclosure which, once made, fundamentally changed the obligations of the Bankrupt in terms of his surplus income obligations.
- [25] The lack of compliance could be chalked up to lack of understanding of the process or a misapprehension of what was required. In that regard the Bankrupt has deposed that he did not appreciate the obligation to pay for the value of the Dodge Caliber, believing that it was more of an either/or obligation, meaning that he thought he had to pay for that, or for the Trustee's fees.
- [26] Nonetheless, the amounts included on the statement of income and expenses include a number of expenses that appear on their face to be excessive when one is requesting the forgiveness of debt as provided for in the BIA, particularly where surplus income has been determined to be owed and has not been paid.
- [27] In this respect, and as examples:
- a) There are significant amounts being claimed for vehicle expenses notwithstanding that the Bankrupt has indicated that he is unable to afford to renew his driver's licence;
 - b) There is approximately \$400 in one particular month for clothing expenses;
 - c) The Bankrupt has not included in his statements of account the non-discretionary expenses that he stated were due and owing when he made the assignment into bankruptcy, suggesting that he has not been paying them; and
 - d) There have been lump sums that have come into his possession even after knowing that surplus income would be payable. While I do not fault the Bankrupt for the timing, he came into the sum of \$6,000 in February of this year for a safety bonus he received, and rather than use any of that amount to satisfy the obligations which he had to have known were owing under the BIA by then, even if just in respect of payment for the Dodge Caliber, they seemed to have been subsumed into his expenses including what is disclosed as a "miscellaneous expense" of \$4,000.

- [28] All of that is troubling from the court's perspective.
- [29] What it shows is that the Bankrupt fails to appreciate that while the bankruptcy regime is intended to provide an honest and unfortunate debtor a fresh start free of these financial encumbrances, the cost for that is to comply with the statutory obligations under the BIA, many of which are determined based on self reporting by the bankrupt. The integrity of the process depends upon full and frank self reporting. The Bankrupt cannot avoid under reporting income, or over reporting expenses, so as to give himself the privilege of enjoying the same standard of living that he enjoyed prior to the bankruptcy during his period of discharge, and then seek to be relieved of the statutory obligations that would have arose had proper disclosure been made. In short, a bankrupt is expected to feel some of the pain their unpaid creditors inevitably feel as a result of their debts being compromised.
- [30] In this case, the Bankrupt has not tightened his own belt in order to satisfy his obligations by payments of the Trustee's fees, the value of the vested asset, or the surplus income once that was known. While I do acknowledge that the failure to pay surplus income earlier was not necessarily the fault of the bankrupt as he did not know it was being calculated against him, his failure to provide proper information so that those calculations could be made timely does fall at his feet.
- [31] I agree with the Trustee that it is not appropriate to make an absolute order for discharge in these circumstances, given the creditors that remain unpaid and the amounts of the income that have been earned through the bankruptcy period.
- [32] At a minimum, the Bankrupt ought to meet his statutory obligations under the BIA as a term of his discharge.

Calculations of Surplus Income

- [33] That leads us to the question of whether or not the amounts calculated by the Trustee as surplus income are correct.
- [34] The Bankrupt argues that, notwithstanding that there will be some potential calculations for surplus income that will be owing, the amounts calculated by the Trustee are based on averaging out income tax returns, and while that would work for 2019, where he was bankrupt for the full 12 months, it does not necessarily do justice for the periods in 2018 and 2020 when he was not within the bankruptcy period for the purpose of these calculations for those full years. Given the fluctuations in his income, averaging the year may not properly illustrate what his precise income was during the relevant months. However, that is how the Trustee has calculated them.
- [35] In (Re) Cornell, 2021 ONSC 7427 the court noted as follows:
- [28] There is no dispute that the Trustee's discretion in determining surplus income may be reviewed at a discharge hearing: *Re Wilson*, 2012 ONSC 2034, 89 C.B.R. (5th) 67, at para. 19; *Re Schnare*, 2015 NSSC 219, 56 C.B.R. (6th) 276.

[29] As the deputy registrar summarized in *Re Wilson*, at paras. 20-21, in deciding whether to make a conditional discharge order,

...the court should balance the rehabilitation of the bankrupt, supported by sufficient income to provide the requirements of living for the bankrupt and his or her dependents in an appropriate manner, against the right of creditors to receive an additional dividend from the bankrupt.

...it is truly a case by case analysis on the merits of each case in order to achieve fairness and a proper balance between the rights of the bankrupt and the rights of the creditors. These same considerations apply to the surplus income requirements that must be determined by the Trustee under s. 68(3) of the BIA, or by the Court under s. 68(10). The Trustee has discretion when determining surplus income obligations and must use their professional judgement.

[30] Mr. Cornell submits that the Trustee's surplus income calculation is too high because the Trustee calculated surplus income based on a two-person rather than a three-person household and, instead of using Mr. Cornell's actual net monthly income for January to July 2020, the Trustee divided Mr. Cornell's total income by 12 to arrive at a monthly average income.

[31] Section 68(1) of the BIA provides that the Superintendent shall, by directive, establish the standards for determining the surplus income of an individual bankrupt and the amount that a bankrupt who has surplus income is required to pay to the estate of the bankrupt. Surplus income is defined as the portion of a bankrupt's total income that exceeds that which is necessary to enable the bankrupt to maintain a reasonable standard of living, having regard to the applicable standards: BIA, s. 68(2).

[32] The trustee is required to determine surplus income having regard to the applicable standards and to the personal and family situation of the bankrupt: BIA, s. 68(3).

[33] Directive No. 11R-2020, s. 7(2) (in the case of a bankrupt who is eligible for an automatic discharge) and s. 8(2) (in the case of a bankrupt who is not eligible for an automatic discharge) provide that when reviewing the bankrupt's financial circumstances to determine whether the bankrupt is required to make payments under s. 68 of the BIA, the trustee,

...shall calculate the bankrupt's average monthly income based on the income and expense statements. The average monthly income is to be used to determine the amount the bankrupt is required to pay to the bankrupt's estate.

[36] It is appropriate to review the calculations made by the Trustee with a critical eye, but some deference is to be given to the Trustee.

- [37] While both the Trustee in calculating the amounts, and the court in considering the appropriateness of those amounts, are to have regard to the bankrupt's personal and family situation, they must have regard to the integrity of the bankruptcy process. That is undermined if a bankrupt ignores their obligations throughout the process, only to be forgiven because at the time of discharge it is now financially more difficult to meet those statutory obligations due to the delay.
- [38] In this case, there is some question about how precise the calculations are since they have been made based on averaging. There is the issue that the calculations were not made until the end of the process, albeit as a result of disclosure issues. In addition, there are now some health concerns.
- [39] Taking those factors into account, along with the integrity of the bankruptcy process, I find that an appropriate term for the Bankrupt's discharge is one that will see him pay the sum of \$15,000 as a condition of his absolute discharge. That amount represents the amount of his statutory obligations, albeit with a small adjustment to reflect that the calculations were based on averages that may not truly reflect the bankrupt's personal circumstances.
- [40] I am inclined to make a minimum monthly payment obligation. The Trustee suggested that it be \$300 per month. The Bankrupt expressed concern about having a minimum amount in case he does find himself unemployed again. He does not want to inadvertently fall in default. However, I do note that, in so far as his recent pay periods have shown, the Bankrupt has consistently earned sufficient income that would enable him to make this payment, even if just from redirecting his miscellaneous expense or clothing expenses. He should be able to plan and make arrangements if there is any problem with his employment.
- [41] As such, I order that the Bankrupt shall be discharged on the condition that he pay to the trustee the sum of \$15,000 in minimum payments of \$300 per month with the ability to prepay the full amount in whole at any time.
- [42] CNSL C. REEDMAN: Can I have those payments starting July 31st?
- [43] THE COURT: Oh, yes, let's put a start date of July 31, 2022. Thank you.
- [44] CNSL C. REEDMAN: Thank you, Your Honour.
- [DISCUSSION]
- [45] I have signed the draft order on those terms, with changes made.
- "Master Robertson"

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