

CANADA / JUDGMENT

Vitic (Re)

2022 BCSC 758

COURT

Supreme Court of British Columbia

DECIDED

22 April 2022

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2022 BCSC 758 Vitic (Re)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vitic (Re),

2022 BCSC 758

Date: 20220422

Docket: B180159

Estate No.: 11-2266806

Registry: Vancouver

In Bankruptcy and Insolvency

In the Matter of the Bankruptcy of

Joseph Vitic

Before: Master Harper

(As Registrar)

Oral Reasons for Judgment

In Chambers

Counsel for the Creditor, Her Majesty the Queen in Right of Canada as represented by the Minister of National Revenue, appearing by video conference:

N.S. Johnston

Appearing as representative for the Trustee, L.W. Murphy Ltd.:

D. Wood

The Bankrupt, appearing by telephone conference:

J. Vitic

Place and Date of Hearing:

Vancouver, B.C.

April 19, 2022

Place and Date of Judgment:

Vancouver, B.C.

April 22, 2022

- [1] THE COURT: The bankrupt, Joseph Vitic, seeks a discharge from bankruptcy. It is common ground that a conditional order is appropriate.
- [2] The bankrupt made a voluntary assignment into bankruptcy on June 27, 2017. Her Majesty the Queen in Right of Canada ("Her Majesty"), as represented by the Minister of National Revenue (the "Minister"), is an opposing creditor.
- [3] Her Majesty's claim is for the bankrupt's outstanding personal income tax debt, penalties, and interest totalling approximately \$233,170 for the 2004 to 2017 taxation years. Her Majesty's claim represents approximately 61 percent of the bankrupt's total proven unsecured liabilities. In addition, the bankrupt owes approximately \$130,693 in unremitted GST for reporting periods 2006 to 2017. Relevant to this debt, \$85,819 represents the tax owing. The bankrupt's total debt is approximately \$363,863.
- [4] The bankruptcy is not governed by s. 172.1 of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 (the "BIA"), but is still considered a tax-driven bankruptcy. On that basis, the bankrupt should receive a conditional discharge from bankruptcy.
- [5] The position of Her Majesty is that the bankrupt's discharge be made conditional on a payment of the sum of \$85,000 payable in monthly instalments of not less than \$500 commencing the 15th day of May, 2022, with the right to prepay either in whole or in part. In addition, Her Majesty seeks a standard income tax filing provision and a provision that, if the bankrupt misses an aggregate of three payments or fails to comply with the tax compliance clause, the trustee, L.W. Murphy Ltd. (the "Trustee") shall proceed to its discharge and the right of Her Majesty (as the creditor) to enforce payment will be reinstated upon the Trustee's discharge.

- [6] The representative of the Trustee appearing on this application, David Wood, had no direct involvement in the administration of the bankrupt's estate because his firm, Boale Wood & Company Ltd., operates as the Trustee's guardian trustee for reasons I take to be related to the Trustee's professional difficulties.
- [7] The bankrupt is a self-employed plumber. He is currently 66 years old, turning 67 next month. The bankrupt's debts arose because he failed to file his income tax returns and to pay his income tax. The Minister assessed the taxes owing notwithstanding that a return had not been filed. The bankrupt did not appeal those findings.
- [8] The bankrupt has a long history of non-compliance with respect to his personal taxes and GST obligations. He conceded that it was his own foolishness or recklessness that caused his failure to comply. He knew what his obligations were and deliberately failed to comply with them.
- [9] My understanding is that the Trustee has been able to obtain only \$5,792 for the estate.
- [10] The bankrupt is currently employed and indicates that he will remain employed for the foreseeable future. His income has fluctuated over the years. His 2015 to 2020 net income is as follows:

2015

\$51,987

2016

\$65,969

2017

\$26,425

2018

\$23,772

2019

\$17,630

2020

\$34,460

- [11] The bankrupt reports that he has arthritis. Her Majesty provided a doctor's note dated December 31, 2021, which states:

I certify that Mr. Vitic suffers from severe left medial knee arthritis, lumbar spinal stenosis, gout and hyperlipidemia.

- [12] An additional background fact is that the bankrupt had a one-percent interest in his daughter's condominium in New Westminster. The property sold in 2019 for \$323,000. Nothing was recovered from this sale. Mr. Wood, however, speculates that the one-percent interest in the condo would have been below the exempt portion, and, further, that the value of the condo at the date of the bankruptcy may not have exceeded the amount owing on the mortgage. For these reasons, it is probably not material on this application that the bankrupt had that one-percent interest. At most it was worth about \$3,000. Complicating the matter, there was a judgment registered against title to the condo and that judgment was paid in the amount of \$10,000 upon the sale of the condo. It is very doubtful as to whether that was a permissible thing to do, but nothing in my judgment turns on this fact. Simply put, I think the pertinent point is that the bankrupt did prefer another creditor and he was most likely not permitted to do that.
- [13] A factor that is of significant importance on this application is that the bankrupt has exempt RRSPs valued at approximately \$103,000. During the period in which the tax debts arose, the bankrupt cashed in an additional \$30,362 in RRSPs in small amounts over time, indicating to me that the bankrupt is willing and able to use his RRSPs to fund his lifestyle as and when he sees fit.
- [14] During the years in which his tax debt arose, the bankrupt averaged income of approximately \$52,673 net. He was 49 years old when he stopped paying income tax. The factors that the court is required to take into account under s. 172.1(4) of the BIA direct the court to take into account the following:
- a) the circumstances of the bankrupt at the time the personal income tax debt was incurred;
 - b) the efforts, if any, made by the bankrupt to pay the personal income tax debt;
 - c) whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and
 - d) the bankrupt's financial prospects for the future.

The court will consider these factors relevant to a tax-driven bankruptcy even if it is not one defined by s. 172.1.

- [15] When a bankruptcy is tax-driven, the integrity of the bankruptcy system requires the court to take into account not only the interests of the debtor and the creditor, but also the public interest in ensuring that every taxpayer makes an equitable contribution to the costs of operating the public sector: *Re Kalenuik* (7 July 2004), Vancouver Registry, 220612 VA01 (B.C.S.C.) at para. 23, citing *Canada (Minister of National Revenue - M.N.R.) v. Dionne*, [1998] S.J. No. 791 (Ct. Q.B.).

- [16] Where the bankrupt has significant tax debts, rehabilitation is not the driving factor. Rather, the driving factor is deterrence. Self-earners who do not pay tax should not be able to avoid their liability by pursuing bankruptcy. Such a bankrupt is not an "honest but unfortunate debtor". Free riders who choose not to pay taxes should not be absolved of their duty simply by recourse to the bankruptcy process.
- [17] Balanced against this, however, is the principle of a fresh start. The bankrupt here is almost 67 years old and if he paid \$500 per month on a liability of \$85,000, he would not be free of his obligations until the age of 81.
- [18] The recent case, *Perrier v. Canada (Revenue Agency)*, 2021 BCCA 269, illustrates the balancing of these competing principles. At para. 22, the Court of Appeal refers to the chambers judge's reasons:
- [22] The judge then turned to the question whether the conditions imposed were unduly onerous. After summarizing the submissions of counsel, the judge set out a list of factors to be considered in setting the conditions on a discharge in the context of a tax-driven bankruptcy, quoting (at para. 51) from *Van Eeuwen*, which, in turn, quoted other authorities:
- [15] The registrar adopted the submissions of counsel for the Minister of National Revenue setting out the considerations applicable to the imposition of conditions to a discharge. Those submissions rely on *Bankruptcy of Pinc*, 2007 BCSC 380. At para. 14 of *Pinc*, Master Baker summarized the relevant considerations as follows:
- [14] Bennett on Bankruptcy summarizes how the courts have considered the appropriate conditions for tax-driven bankruptcies. The list of considerations (non-exhaustive, I assume) includes:
- 1) whether the bankruptcy arose as the result of an accident, or whether "there was a persistent ignoring of the tax obligation";
 - 2) whether the purpose of bankruptcy was to escape the tax obligation;
 - 3) the bankrupt's ability to contribute towards a conditional order;
 - 4) whether the bankrupt was maintaining a high standard of living at the expense of the creditors;
 - 5) whether the bankrupt has continued to ignore tax obligations since bankruptcy.
- [19] The Court of Appeal further states:
- [71] The question whether the registrar's discretionary decision was reasonable, however, is not answered simply by asking what considerations he took into account. The registrar was required to weigh the considerations, taking into account the various principles underlying the regime of the Bankruptcy and Insolvency Act, and to impose conditions that were not so onerous as to be unreasonable.

[72] The appellant contends the conditions imposed are now unlikely to be met. If they are not varied, they will be a millstone around his neck for so long as to preclude him from ever recovering from the tax debt accumulated between 1997 and 2007. The conditional order made has been stayed by his appeal. If the appeal is dismissed, and he starts making the 150 minimum payments of \$1,000 per month ordered by the registrar, he will remain in bankruptcy for 12 and one half years until he is 67 years old. . . .

[]

[75] As this Court noted in *Heinonen* (at 199), where the bankrupt is blameworthy it is not inappropriate to impose conditions that will be met over a period of five years; in an egregious case, where the bankrupt's culpability is particularly high, a longer period might not be found to be unreasonable.

[20] At paragraph 79, the Court of Appeal quotes a long passage from *Re McCamley* (1982), 43 C.B.R. (N.S.) 66 at 68 as an example of the analysis that should be undertaken when considering whether conditions are too onerous:

While I am bound to say that the court should scrutinize very carefully an application to relieve a discharged bankrupt of a judgment in favour of the trustee to which he has consented as a condition of his discharge, nevertheless the issue before the court on such an application is whether there is no reasonable probability of the bankrupt being able to fulfil his obligation. In my opinion, the debtor is not obliged to show that there is no possibility whatever that at some time in the future he cannot discharge the judgment debt or other terms of the order. The matter must be looked at in the light of reason, common sense and humanity, having regard to the fundamental policy of the Bankruptcy Act. The debtor, therefore, need not be in the position of showing that he will be impoverished and required to draw on welfare or to borrow funds to pay the debt or to find a second source of income from a second job for the purpose of enabling him to fulfil his obligation. If those factors apply, of course, his application would no doubt be soundly based. However, there is more to it than that. In my opinion the court must consider also the personality, the intelligence and perception, the determination and the health of the debtor; in other words, in my opinion it is the duty of the court to make a careful assessment of the debtor as an individual and determine whether he, in the circumstances in which he finds himself, on a reasonable assessment of those circumstances, will probably be in a position to comply with his obligation. I bear in mind the policy of the Bankruptcy Act, which is to relieve an honest debtor of an insupportable burden of debt. It is not the policy of the Act to return a bankrupt to society continuing to bear a burden of future payments as a term of his discharge that will, in effect, perpetuate the burden, or part of it, that he bore prior to his bankruptcy except in those circumstances where the bankrupt is abusing the facilities of the Act or is in receipt of continuing assured income that would enable him to make significant continuing payments to the trustee for distribution to the creditors in circumstances in which failure to do so would be viewed by reasonable people as an affront to the integrity of the Act.

- [21] The difficulty facing the court on this application is how to balance the deterrent effect which is required because this is a tax-driven bankruptcy against the principle of a fresh start given that the bankrupt will be in his retirement years at some point, probably within the next ten years.
- [22] The existence of the RRSPs is a significant one. The bankrupt says that he obtained a rollover--that is my interpretation--from his previous employment as a pipefitter. He says he received RRSPs in the amount of \$50,000. The RRSPs have grown over time, notwithstanding that the bankrupt has been dipping into them. As noted, the RRSPs are exempt, but there is case authority that supports the court taking them into account.
- [23] In *Re Fredette*, 2003 MBQB 167, the court considered whether the bankrupt has considerable exempt assets. The court found that, even though the bankrupts fit the general characterization of "honest but unfortunate debtors", to allow them to emerge from bankruptcy with exempt liquid cash assets of almost \$250,000 would challenge the integrity of the bankruptcy process. At para. 14, the registrar suggested that the bankrupts deregister their RRSPs over time to pay their conditional order. By deregistering over time, the bankrupts could minimize the effect of the taxation of the deregistered RRSPs.
- [24] In my view, the RRSPs in this case do justify an order that is greater than the five-year payment term suggested by the Trustee. The bankrupt in this case concedes that on his current income of about \$34,000 per year, he is able to pay \$500 per month. As a self-employed individual, he has the ability to structure his work. He can take more work as needed. He is really entirely in control of his income-earning potential. By holding exempt RRSPs, he has the advantage of the tax system. I can see that the bankrupt has some health issues, but he does intend to work for the indefinite future.
- [25] The RRSPs are available if needed to pay the liability under the order that I am going to impose.
- [26] Taking all of the factors required into account, in my view it is appropriate to order that the bankrupt's discharge be conditional on the payment of \$75,000 in accordance with the structure as set out in Her Majesty's materials. The payments will be a minimum of \$500 per month commencing May 15, 2022. I have no difficulty with the other orders sought.
- [27] The order will indicate that the signature of the bankrupt is dispensed with, and I think for the benefit of Madam Registrar's notes, I will just provide her with the written submissions. The orders are as set out in paragraph 7 of the written submissions, and the \$85,000 is changed to \$75,000.

"Master Harper"

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