SUPREME COURT OF YUKON

Citation: *Kielb (Re)*
2023 YKSC 36

Date: 20230619
S.C. No. 18-A0098
Registry: Whitehorse

IN THE MATTER OF THE BANKRUPTCY OF

BENJAMIN ANDREW KIELB

Before Chief Justice S.M. Duncan

Counsel for the Applicant — Cody Reedman (by videoconference)

Counsel for the Respondent, Attorney General of Canada — Keith Cruz

REASONS FOR DECISION

Introduction

[1] Benjamin Andrew Kielb, who is bankrupt, applies for a variation of a court order conditionally discharging him from bankruptcy made April 28, 2010 (the "2010 Order") and varied on April 19, 2013, and February 11, 2014. He has complied with the debts owing to all of his creditors, except for the Canada Revenue Agency ("CRA"), to whom he still owes $257,623 plus $19,636 Goods and Services Tax ("GST") not including fresh liabilities. The 2010 Order contained a post-bankruptcy compliance clause to ensure no new tax debt was incurred. The variations to that Order in 2013 and 2014 reduced the amount owing to creditors but did not reduce the amounts owing to the CRA.

[2] Mr. Kielb now seeks to be relieved of that tax compliance and also seeks a one-day suspended discharge. He argues he has no reasonable probability of complying

with the order. He applies under s. 172(3) and s.187(5) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985 c. B-3 ("*BIA*").

[3] The Attorney General of Canada on behalf of His Majesty the King in Right of Canada as represented by the Minister of National Revenue ("AGC"), opposes the application.

[4] The trustee in bankruptcy, Westgeest & Associates Inc., takes no position on this application as all conditions for the benefit of bankruptcy creditors have been met. All creditors were served with the application and none appeared.

[5] The issue is whether Mr. Kielb meets the applicable legal test for varying the conditional discharge order.

Background

[6] Mr. Kielb is divorced with no dependents. He was born on November 11, 1970, and at the time of this hearing was 52 years old.

[7] Mr. Kielb made a voluntary assignment into bankruptcy on May 15, 2009, in Vancouver, British Columbia.

[8] Mr. Kielb was a licenced real estate agent in British Columbia, beginning in the fall of 2000. The causes of his bankruptcy were failures in his real estate business when the market fell in 2008 and his loss of $80,000 in deposits for two condominiums, the purchase of which he was unable to complete.

[9] At the time of his assignment into bankruptcy, Mr. Kielb had an outstanding income tax debt for 2007, 2008, and 2009 of $97,989.09, and an outstanding debt for unremitted GST for 2003, 2004, 2005, 2006, 2007, and 2009 of $63,113.02.

[10] The total proved claims filed in this bankruptcy were $604,542.14.

[11] Mr. Kielb consented to the 2010 Order requiring him to pay $126,226 to the trustee for the general benefit of his creditors at the rate of a minimum of $4,000 per month. The Order also required him to file his income tax and GST returns for 2009, 2010, and 2011 and pay all amounts owing before a discharge would be granted.

[12] Mr. Kielb made the required payments of $4,000 per month through to May 2011, but he did not remit income tax or GST for 2009, 2010, and 2011. Nor did he make any voluntary payments on this post-bankruptcy debt. After the CRA assessed him for unremitted GST for 2009 and 2010 based on his gross business income, Mr. Kielb filed GST returns for those years but did not pay the GST.

[13] CRA then issued a garnishment notice in November 2011 to attach 35% of Mr. Kielb's commissions. CRA received one payment as a result of the garnishment in the amount of $5,697.08.

[14] After being denied a variation of the 2010 Order in 2011 because he had not made the requisite payments owing to the CRA and other creditors, Mr. Kielb came to an installment agreement with CRA. In 2012, he paid $7,300 on his post-bankruptcy GST arrears and $35,697.08 on his post-bankruptcy income tax arrears. However, by December 31, 2012, Mr. Kielb still owed $34,904.67 for the GST arrears and $136,736.75 for the income tax arrears, inclusive of interest and penalties.

[15] On April 19, 2013, Mr. Kielb was granted a variation on the 2010 Order to the extent that the amount payable to his creditors was reduced to $50,000, with no payment terms, a 60% debt reduction. The CRA also agreed to forbear on enforcing its remedies to collect the tax arrears for six months. The requirement to file returns and pay taxes remained. Mr. Kielb had argued that he could no longer afford to operate his

business due to CRA garnishing his commissions and serving a requirement to pay on his brokerage.

[16] After this variation of the Order in 2013, Mr. Kielb made no payments to the trustee and paid a minimal amount towards his tax arrears.

[17] At the third application to vary the 2010 Order on February 11, 2014, Master Tokarek issued a consent order reflecting the agreement of Mr. Kielb, the trustee, and the CRA:

i) Mr. Kielb would make minimum monthly payments of $300 to the trustee towards the outstanding $50,000 owing to general creditors;

ii) Mr. Kielb would make minimum monthly payments of $1,200 to CRA until the post-bankruptcy arrears were paid in full;

iii) CRA and the trustee would not enforce the remedies available to them if the varied conditional discharge order was complied with; and

iv) Mr. Kielb was required to file his income tax and GST returns and remit all payments when due for each taxation year until the conditional order was satisfied.

[18] This 2014 Order is the order currently in effect.

[19] Mr. Kielb paid the $300 per month to the trustee as required and, in April 2016, he paid $6,500, the balance of the $50,000 required by the 2014 Order. Mr. Kielb's obligations to the general creditors have now been met.

[20] Mr. Kielb continued to make payments of $1,200 per month to CRA in accordance with the 2014 Order during 2014, 2015, 2016, and 2017. In addition, he made voluntary payments of further amounts in 2016 and 2017. He made his last

voluntary payment in November 2017. CRA applied these payments to the outstanding tax debt in the post-bankruptcy period.

[21] Mr. Kielb applied unsuccessfully twice to vary the 2014 Order in April 2016 and June 2017. He sought an absolute discharge. Both applications were dismissed with costs to CRA.

[22] In or around 2018, Mr. Kielb deposed he was "tired of being unable to generate sufficient income to deal with my tax obligations and fearful that CRA would begin garnishing me" and decided to relocate to Whitehorse, Yukon, at the suggestion of a friend who lived here.

[23] In Whitehorse, Mr. Kielb became involved with a cannabis company, earning a monthly salary of $5,000. He was also promised 6,000,000 Class A voting shares in the company in return for sweat equity. However, management changed, and the relationship between him and the new management of the company deteriorated. Mr. Kielb never received the shares and is no longer employed by the company. He was living in a cabin on the property belonging to the company and was evicted. He became unemployed and homeless. Since approximately September 2021, he has been receiving social assistance. There is no evidence about his current living arrangements, although he is still in the Yukon. His 2022 income and expense statement notes rental payments.

[24] Mr. Kielb believes he has credible legal actions against the company (wrongful dismissal and shareholder oppression) but does not have the funds to pursue them. CRA and the trustee have declined his offer to assign the actions to them.

[25] Mr. Kielb deposes he has considered becoming a licenced realtor in the Yukon but is concerned that CRA would immediately garnish his earnings, thereby limiting his ability to obtain further employment. As a result, he deposes he is reduced to advertising in the local newspaper for odd jobs.

[26] The evidence of Mr. Kielb's income since declaring bankruptcy is as follows:

Year	Gross income	Net income
2009	(post-bankruptcy) $292,466.00	$186,339.00
2010	$252,536.00	174,743.00
2011	$135,024.00	$69,409.00
2012	$200,674.00	$128,041.00
2013	$112,128.00	$15,306.00
2014	$69,418.00	$7,518.00
2015	$385,993.12	$263,477.00
2016	$320,492.00	$177,907.00
2017	$76,512.00	$61,083.00
2018	$79,360.00	$64,226.00
2019	$35,000.00	$28,184.00
2020	$39,665.00	$31,565.00
2021	$7,815.00	$5,923.00

Issue

[27] Has Mr. Kielb satisfied the Court that there is no reasonable probability of complying with the terms of the 2014 Order and if so, should the Court modify its terms and in what way?

Analysis

Legal principles – s. 172(3)

[28] Section 172(3) of the *BIA* provides:

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

[29] The onus is on the bankrupt to satisfy the Court there is no reasonable probability of his ability to comply with the discharge order.

[30] A hearing under s. 172(3) is not an appeal from a discharge order.

[31] The Court is to assume the original order was a proper one. The determination is not whether the Court would or would not have made the order in the first instance; instead, the issue is whether at the time of the application the bankrupt genuinely has no ability to comply with its terms (*Re Whyte* (1980), 35 CBR (NS) 194 (Ont H Ct J) (*Re Whyte*) at paras. 13-14).

[32] Courts have developed factors to be assessed in determining this issue. This is because, as the court in *Re Whyte* noted, if a bankrupt does nothing, waits for a year, and then makes an application to vary, he is "in effect asking the court to take a second look at the suitability of the original order, and such an exercise in effect constitutes an abuse of the court's process" (para. 15).

[33] The factors to be assessed in an application under s. 172(3) set out in the jurisprudence are:

i) Are there changes in circumstances that have occurred since the order was made and, if so, do they represent circumstances which the bankrupt could have controlled, such as the assumption of additional obligations?

ii) Is there material in addition to the statement of income and expenses or other material filed on the discharge application that supports an inability to comply with the order?

iii) Is the bankrupt credible – i.e. are they likely to comply?

iv) Has the bankrupt made a *bona fide* effort to comply with the terms of the discharge order?

[34] There is conflict in the jurisprudence as to whether these factors are conjunctive or guidelines. Cases in Ontario and British Columbia treat the factors as conjunctive, meaning that if an adverse finding is made on one factor, then the application fails (*Re Appleby* (2001), 27 CBR (4th) 1 (Ont Sup Ct); *Re Besner*, 2015 BCSC 27 ("*Re Besner*"); *Re Kielb*, 2016 BCSC 1760). By contrast, decisions from Alberta, Saskatchewan, and Nova Scotia (*Re Estrin*, 2005 ABQB 234; *Re Hagerman*, 2021 SKQB 60 *(Hagerman (Re)*; *Re Knowles*, 2023 NSSC 94 ("*Re Knowles*")) view the factors as guidelines to assist courts and applicants.

[35] I agree with the conclusion of the Registrar in *Re Knowles*. These factors are all to be assessed to assist the court in exercising its discretion in considering all the circumstances. Parliament chose not to mandate specific factors when it created s. 172(3), but instead set out the test in general terms (no reasonable probability of being in a position to comply with the terms of the order). As a result, no one factor is determinative; a conclusion should be arrived at after assessing all of the circumstances

in the case using the four factors. The same facts may relate to more than one factor. The order to be complied with in this case is the 2014 Order.

Application of the four factors

a) Material changes outside the bankrupt's control

[36] Mr. Kielb argues that his situation of unemployment, temporary homelessness, and reliance on social assistance are material changes in circumstances beyond his control.

[37] Up to and including 2017, Mr. Kielb carried on a relatively financially successful business as a realtor in British Columbia. He admitted that he decided to move to the Yukon to get a "fresh start" because he feared the CRA garnishing his wages and was tired of not generating enough income to pay his debts. This was a choice.

[38] Once in the Yukon, he could have become a realtor. Like British Columbia, the Yukon does not prevent undischarged bankrupts from becoming licenced realtors. However, he chose not to do so. Instead, he became involved in a start-up cannabis business and appeared to have staked his entire future on it – his employment, his living arrangements, and his investments (through shares). This was also a choice. The fact that it soon became clear he had no future with the company was not entirely unforeseeable, given the risky and uncertain nature of the cannabis business. While I do not suggest that Mr. Kielb deliberately chose his present circumstances, I find that this outcome was reasonably predictable as a consequence of his previous choices.

[39] As a result, I cannot accept that Mr. Kielb's situation stems from material changes outside of his control.

b) Material showing inability to comply with the order

[40] Mr. Kielb says beyond his most recent income and expense statements, he has provided evidence of his current unemployment status, reliance on social assistance, and living arrangements. He notes his age of 52 and his depressed state, which he says contribute to his inability to earn sufficient income to address his tax arrears. He is reduced to working at odd jobs obtained through advertising in one of the local newspapers, the *Whitehorse Star*. His counsel notes he has been unable to comply with payment of his arrears for 14 years. He fairly concedes he has had a problem with paying his taxes for some time, but notes that he now has an insurmountable amount to pay. Given his history and circumstances, he says he will never obtain a discharge from bankruptcy.

[41] Mr. Kielb's evidence on this factor is lacking. There is no medical evidence to support his claim that his health issues, including depression, were severe enough to prevent him from working; no evidence of his advertisement in the *Whitehorse Star*, the type of jobs he is doing, or his remuneration; and no evidence of any attempt to earn income in another way. This situation is similar to the court's assessment of the bankrupt's efforts to find work in *Re Besner*: his assertions are vague and self-limiting (para. 29). Further, Mr. Kielb does not explain why he has decided to remain in the Yukon instead of returning to British Columbia, where he appeared to have better earning prospects. For example, in 2015 he earned over $263,000 and in 2016 he earned over $177,000. Finally, there is no evidence about his current living arrangements.

[42] The consistent underlying reason for his current situation is his desire to avoid CRA garnishment or other CRA enforcement actions such as requirements to pay.

[43] I find that Mr. Kielb has not provided sufficient material to show his inability to comply with the order.

c) Credibility of Bankrupt

[44] The AGC references Mr. Kielb's statements at other variation hearings, wherein he promised to pay the CRA arrears, stating he had learned his lessons, and then proceeded to do nothing to address them, as evidence of his lack of credibility. The AGC also references his bank account, advising he does not account for deposits of over $30,000 between April and December 2021. There is also evidence in the bank account of a dividend payment of $1,892, suggesting investment assets of some kind that have not been disclosed.

[45] Counsel for Mr. Kielb observes his client was unrepresented at the earlier hearings and as a result less weight should be placed on statements made when he did not have the benefit of legal advice or representation. Counsel further notes Mr. Kielb has been suffering from stress and depression which may have contributed to his inability to follow through on the promises made at the earlier hearings. He says Mr. Kielb has been overwhelmed by his tax obligations. Counsel points out that Mr. Kielb was present in person in court at this hearing to answer any questions from the Court. He was not cross-examined by the AGC.

[46] I agree with the observation of counsel for Mr. Kielb that Mr. Kielb's testimony at earlier hearings may not be determinative because it was provided without the assistance of counsel. Moreover, it would be improper to base findings of credibility at

this hearing on evidence provided at earlier hearings. Here, he was not cross-examined nor did he choose to give *viva voce* evidence.

[47] Mr. Kielb has been forthright about his problems with tax compliance over the years and his reasons for continuing to be in arrears with his taxes.

[48] No explanation was provided for the additional monies deposited into his bank account in 2021 noted by the AGC. This is concerning. It is not clear that Mr. Kielb is reporting accurately all sources of income. The absence of an explanation negatively affects my assessment of his credibility.

[49] On balance, however, I do not find Mr. Kielb's credibility to be a significant determinative factor. However, the absence of evidence about and explanation of his sources of income causes concern.

d) *Bona fide* efforts to comply with order

[50] Since 2017, Mr Kielb has not made efforts to comply with the terms of the 2014 Order related to tax arrears. He has breached the 2014 Order in three ways:

i) he did not file his income tax returns for 2017, 2018, 2019, and 2020 until July 2, 2021, instead of when they were due;

ii) he has not paid his personal income taxes and has accumulated a post-bankruptcy tax liability of $257,623.16, including interest and penalties; and

iii) he has not paid his GST since 2015, accumulating a debt of $19,636.30.

[51] Mr. Kielb's actions over the years demonstrate his consistent failure to comply with his tax obligations. As the AGC notes, for 25 of the last 26 years, he has been non-compliant. While he made some attempts between 2014 and 2017 to address the

outstanding arrears, after 2017, he decided to act in a way that was inconsistent with compliance with the Order as varied. For example, his choices to move to the Yukon, cease his work as a realtor, and more recently, to earn less income and remain in the Yukon despite existing on social assistance seem to be motivated primarily by his desire to avoid garnishment or requests to pay from CRA.

[52] As noted above, further evidence to support Mr. Kielb's arguments may exist, but it was not provided at the hearing. Along with an absence of evidence on the issues noted above, (efforts to find other employment, reasons for remaining in the Yukon, medical evidence to support his assertion of health issues preventing him from seeking employment, current income from his "odd jobs" obtained through advertising), he has not detailed the commercial enterprises he intends or wishes to pursue clear of the burden of being an undischarged bankrupt, other than the housing development project in Maple Ridge, British Columbia, initiated in 2016 but not pursued. He has also not shown any effort to find counsel to pursue litigation against the cannabis company or to obtain advice to assist in self-representation.

[53] I find on the evidence presented he has not made a *bona fide* attempt to comply with the payment of outstanding tax arrears.

Conclusion on s. 172(3)

[54] On balance, assessing all of the circumstances against the four factors in the jurisprudence I find that Mr. Kielb does not meet the test of having no reasonable probability of complying with the order. He has provided insufficient evidence beyond his assertions that his circumstances are outside of his control, that he is unable to comply with the 2014 Order, or that he has made *bona fide* attempts to comply with the

2014 Order. His lack of explanation about all current sources of his income is concerning.

[55] In making this determination, I have also considered the need to balance the interests contemplated by the governing statute. In particular, as Mr. Kielb is requesting a discharge of his bankruptcy status, I have considered the principles applicable to the discharge provisions. Some of those principles are as follows:

i) The success or failure of the bankruptcy system depends on the administration of the discharge provisions of the *Act*. If a debtor can go into bankruptcy as a convenient means of evading payment of just obligations that he or she has incurred and obtain a discharge without difficulty, bankruptcy becomes an abuse. Bankruptcy is not a process to be used by a debtor to avoid his or her responsibilities to the maximum extent that he or she is able to do so.

ii) A bankrupt earns the right to a discharge by his or her forthrightness and by performing the duties imposed on him or her by the *BIA.*

iii) A discharge is not a matter of right. Every application for discharge must be determined on its own particular facts and by the due exercise of judicial discretion.

iv) Not only must the causes of bankruptcy be assessed, but also the attitudes and actions of the bankrupt before and after bankruptcy. The court must attempt to strike balance between the interests of the creditors in achieving the maximum possible realization of their claims and the interests of the bankrupt in being relieved of the burden of past debts.

(Houlden, L.W., G.B. Morawetz, and Janis Sarra*, Bankruptcy and Insolvency Law of Canada* (Toronto: Thomson Reuters, 2009) (loose-leaf updated 2009, release 5), at 6-92).

[56] In cases where income tax arrears are a large part of the bankrupt's debt, courts have generally imposed a conditional order on the bankrupt requiring him or her to comply with filings and make regular instalment payments towards the arrears. This is what has occurred here. Rarely have bankruptcy courts permitted an absolute discharge where there remain significant tax debts. As noted by the Supreme Court of British Columbia in *Re Pinc*, 2007 BCSC 380, where the CRA debt is the sole debt in the bankruptcy, it is reasonable to require the bankrupt to pay one-half of the tax debt as a condition of discharge, even where payment condition will not be satisfied for up to five years. A person who avoids paying taxes should not be able to use the bankruptcy system as a means to escape payment. *Re Pinc* is partially distinguishable from the case at bar because it was a tax-driven bankruptcy.

[57] Here, I recognize that regardless of the reasons for Mr. Kielb's current personal circumstances, it will likely continue to be difficult for him to reduce the CRA debt. He has proven unable and perhaps unwilling to do so for the last 14 years. On average, the status of bankruptcy lasts 21 months. This was not a tax-driven bankruptcy, but the repayment provisions of these post-bankruptcy tax arrears were part of the 2014 Order consented to by Mr. Kielb.

[58] It is unfortunate that CRA and Mr. Kielb have not discussed a potential compromise. The AGC has a valid argument that any compromise given the history of this file is an affront to the integrity of the bankruptcy system and tax obligations.

However, there is also the practical reality of the length of time this situation should be allowed to continue, without resolution and without payment to CRA. At this point, some payment would be preferable to no payment.

[59] It is undisputed that even if Mr. Kielb were discharged from bankruptcy, the CRA debt would not be extinguished and other enforcement remedies would remain available to the CRA. Mr. Kielb acknowledges this reality and says he seeks the discharge so he can access other business opportunities that he says are not available to him now as an undischarged bankrupt. However, other than the past Maple Ridge initiative, he has not specified any opportunities. His counsel also acknowledged the realistic possibility that upon absolute discharge, he may choose to become bankrupt again to address his ongoing CRA debt. All this is to say that a compromise solution sought by CRA may result in even a partial satisfaction of the debt.

[60] Mr. Kielb cannot be rewarded for his choices, but unfortunately the imposed penalty is not having the desired effect. I am unable to grant Mr. Kielb's application because I have found on balance after assessing the four factors in all of the circumstances they do not support a variation of the 2014 Order. The inability of Mr. Kielb to comply with the 2014 Order is primarily a result of his choices and the absence of good faith attempts on his part to comply.

[61] I recommend that CRA and Mr. Kielb discuss a compromise consisting of a reduction of the outstanding tax liability, a monthly payment term, and a maximum time to pay.

Legal principles and conclusion on s. 187(5)

[62] This application is brought in the alternative on the basis of s. 187(5) of the *BIA*. That section provides:

> (5) Every court may review, rescind or vary any order made by it under its bankruptcy jurisdiction.

[63] It is conceded by counsel for Mr. Kielb that the Court's authority under this section "should be sparingly exercised. It is a matter of indulgence and must be carefully guarded" (*Campoli Electric Ltd v Georgian Clairlea Inc*, 2017 ONSC 2784 at para. 181) It is generally not an appropriate basis on which to bring an application to vary an order discharging a bankrupt. If a bankrupt is unable to comply with a conditional order by reason of financial hardship, the remedy is an application under s. 172(3) (*Hagerman Re* at para. 19*,* citing Lloyd W. Houlden, Geoffrey B. Morawetz & Janis P. Sarra, *The 2019-2020 Annotated Bankruptcy and Insolvency Act* (Toronto: Thomas Reuters, 2019) at 1033, which summarized the applicable principles). Section 172(3) addresses "a *change* in the bankrupt's circumstances from the date of the order, while s. 187(5) will be appropriate where the bankrupt wishes to adduce new evidence or advance a material argument that was *overlooked* at the initial hearing" (*Cornell (Re)*, 2021 ONSC 7427 at para. 17) [emphasis in original].

[64] Here, Mr. Kielb's arguments rest on the change in his circumstances, not on evidence or argument that was overlooked at the initial hearing. He does not suggest the initial hearing was incomplete. As a result, I will not exercise my discretion under s. 187(5) of the *BIA* in this application.

Order

[65] The application is dismissed. The conditional discharge order is not varied at this time and Mr. Kielb may reapply after one year on notice to the CRA and with the development and implementation of a sustainable plan to pay post-bankruptcy income tax and GST arrears.

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DUNCAN C.J.