SUPREME COURT OF YUKON

Citation: *Yen Ngoc Tran (Re)*, 2016 YKSC 70

Date: 20161214
S.C. No. 15-A0174
Registry: Whitehorse

IN THE MATTER OF BANKRUPTCY OF

YEN NGOC TRAN (AKA KATHY TRAN)

Before Mr. Justice L.F. Gower

Appearances:

Geneviève Chabot	Counsel for Canada Revenue Agency
Melody Desmarais	Agent for the Trustee
Yen Ngoc Tran	Representing herself

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application for a discharge under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as amended (the "*B.I.A.*"). The application was filed by John S. Beverley and Associates Inc., the Trustee in Bankruptcy (the "Trustee") for the Estate of Yen Ngoc Tran (also known as Kathy Tran), the bankrupt. Technically, the application is made by the Trustee on behalf of the bankrupt. The Canada Revenue Agency ("CRA") appeared on the application through counsel. CRA's counsel seeks a conditional discharge on terms which are not opposed by the Trustee. Although the application purports to be under s. 172 of the *B.I.A.*, because Ms. Tran falls within the definition of a personal income tax debtor under s. 172.1 of the *B.I.A.*, it is that section which must govern this tax-driven bankruptcy.

BACKGROUND

[2] The bankrupt is 52 years old and has three adult daughters, Christina Wong, Kaili Wong and Cara Wong. The bankrupt's previous common-law partner, Sau Non Wong, died of cancer in 2011.

[3] During the period from March 2011 until March 2013, the CRA audited the bankrupt for the taxation years 2007 to 2009, inclusive. The CRA documented major discrepancies between the income reported by the bankrupt and her actual net worth, and made adjustments to the bankrupt's income tax calculations for that period. The Audit Report has not been challenged by the bankrupt. Accordingly, the results of the audit are deemed to be valid and binding pursuant to s. 152(8) of the *Income Tax Act*, R.S.C., 1985, c. 1 (5th Supp).

[4] The discrepancies noted by the audit are summarized as follows:

Taxation Year	Total taxable income reported	Unaccounted for personal expenditures	Unreported income	Net worth discrepancy
2007	$34,759.00	$768,932.63	$1,181,726.27	$1,440,075.27
2008	$34,674.00	$476,373.39	$465,730.91	$465,990.44
2009	$14,939.00	$371,043.83	$413,254.19	$413,254.19

[5] The audit detected large amounts of funds and considerable assets moving through the bankrupt's accounts, despite her reported income of less than $35,000 in each of the three years audited.

[6] The bankrupt owned a residence at 208 Falcon Drive, in Whitehorse, which was involved in an illegal marijuana grow operation. She sold the residence in 2006 for an undisclosed sale price, and denied earning any income from the illegal activity.

[7] On October 1, 2007, the Bonanza Inn, in Whitehorse, was sold for $776,891.20. At that time, the bankrupt was a 75% shareholder of the corporation which owned the Inn. On the day of the sale, the bankrupt received and deposited cheques from the corporation amounting to $540,850.05. Of that amount, $258,349 was never reported by the bankrupt as income.

[8] Also in 2007, the bankrupt acquired a rental property in Whitehorse at 312 Alexander Street for $273,001.20.The bankrupt admits she was a 100% owner of that property. The property was sold on December 9, 2011 resulting in a payout of $173,711.89 to the bankrupt. This amount was then deposited into the account of her daughter, Cara Wong. Before the end of December 2011, there was a cash withdrawal from Cara Wong's account in the amount of $20,000 and $153,000 transfer out of that account. The bankrupt asserts that these funds were used to pay debts she owed to gambling bookies after placing bets on basketball and football. However, she has provided no independent evidence of this gambling.

[9] In 2008, the bankrupt purchased property at 11 Klondike Road, in Whitehorse. In November 2012, Christina Wong took over the $150,000 mortgage on the property and the remaining value of the property, $215,000, was gifted to Christina from the bankrupt.

[10] During the audit period, the bankrupt was also a 100% owner of a numbered Yukon company which operated a gas bar at a restaurant. The restaurant was sold in 2009, however the Audit Report does not reveal what the sale price was.

[11] In April 2012, the Kluane Park Inn, in Haines Junction, was sold for a final payout figure of $521,165.82. At that time, the bankrupt was a 100% owner of the property and the Inn was mortgage free. The bankrupt asserts that these proceeds went firstly to pay

property taxes, and that the balance was distributed between her daughters. However, no accounting of this distribution has been provided by the bankrupt.

[12] In June 2012, the bankrupt jointly obtained title to a property located at 2871 Kitchener Street, in Vancouver, British Columbia with her daughter, Christina Wong, for $815,000. Payment was made entirely in cash. This property was transferred solely into the bankrupt's name on January 17, 2013, and then subsequently transferred to her three daughters on January 24, 2013.

[13] It is worth nothing that the two transactions in 2012 occurred during the period of time the audit was being conducted.

[14] In 2014, the bankrupt sold her 2009 Toyota Camry to her daughter, Cara Wong, for $8,000, allegedly to pay off a debt in that amount. Also in that year, the bankrupt sold a 2008 Toyota Highlander to her employer for $32,000, again allegedly to repay debts owing to him which totalled that amount.

[15] During the period between 2007 and 2009, the bankrupt also made several large miscellaneous transfers of funds. The totals of those transfers in each year are:

- 2007 - $250,859.50;
- 2008 - $186,847; and
- 2009 - $194,315.54.

[16] In addition, the Audit Report documented that the bankrupt incurred transportation costs of $12,649.61 in 2007, including air travel to China and Texas, and $14,677.83 in 2008, for air travel to China and elsewhere.

[17] The bankrupt filed her assignment into bankruptcy with the Official Receiver on July 31, 2015. At that time she reported a total of $800 worth of personal effects and net

employment income of $1,500 per month. Since the date of the assignment, the bankrupt began submitting income and expense reports indicating that, as of August, 2015, her income dropped to $827.15 per month. She has provided no explanation for this 45% drop in income. At the time of her assignment, the bankrupt was living and working as a housekeeper at the Lucky Dragon Restaurant in Haines Junction. She claimed in her assignment that the reason for her financial difficulties were "health issues and business losses". However, the bankrupt has provided no evidence of either of these concerns.

[18] On November 23, 2016, the CRA filed with the Trustee an amended proof of claim indicating that the debt owed by the bankrupt to the CRA amounts to $1,177,806.22 and comprises 94% of the total proven unsecured claims of all of the creditors[1]. It is this fact that triggers the application of s. 172.1(1) of the *B.I.A.* and makes this a tax driven bankruptcy. The $1,177,806.22 consists of unpaid income tax of $368,821.40 over the audit period of 2007 - 2009, plus a penalty and interest of $808,984.82.

ANALYSIS

[19] The relevant principles on an application for a discharge in a bankruptcy were helpfully summarized by Registrar Bouck in *Zinkiew (Re)*, 2004 BCSC 1831, at para. 55:

> 55 A summary of those principles is found in the decision of *Westmore v. McAfee* (1988) 67 C.B.R. (N.S.) 209 (B.C.C.A.) at 216:
>
> 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;

[1] There are seven other unsecured creditors who have filed proofs of claim.

> 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.

[20] Master Keighley, in *Bowen (Re)*, 2015 BCSC 502, at para. 32, reframed these principles somewhat as follows:

> (a) the purpose of the Act is remedial in nature, to assist well-intentioned but unfortunate debtors to discharge their debts and carry on as useful citizens;
> (b) a discharge is a privilege that is earned, not a right, and an application for discharge can be refused, issued conditionally, or suspended;

> (c) in exercising its discretion, the court should balance the interest of the creditors in being paid, the interest of rehabilitation of the bankrupt, and the integrity of the bankruptcy process and the public's perception of it;
>
> (d) the court looks to see that the bankrupt has learned from the bankruptcy process and has modified his behaviours to ensure that the same problems won't reoccur;
>
> (e) with repeat bankrupts or bankrupts who are ill-intentioned, dishonest, indifferent, or misleading, the purpose of the Act shifts toward the protection of society, the upholding of the integrity of the Act, and the sanctioning of inappropriate behaviour; and
>
> (f) depending on the circumstances, the conditions of discharge could involve the imposition of conditions for the payment of funds to the bankrupt's estate, even where there is no apparent ability to make payments. (my emphasis)

[21] In *Cromarty (Re)*, 2015 YKSC 28, Veale J. of this Court noted that it is an aggravating circumstance when a tax debtor's debt is virtually all tax-related, and that censure and deterrence should be considered, particularly if the debtor has ignored his or her income tax obligations for a long period of time:

> 10 While Mr. Cromarty is not a personal income tax debtor as that term is defined in s. 172.1(1), the fact that his debt is virtually all tax-related is nonetheless aggravating. As noted in *Van Eeuwen (Re),* 2013 BCSC 26, the failure to pay taxes while receiving an income is not a case of "cannot" but of "will not". His persistent failure to pay income tax while earning a significant income is conduct that deserves censure. Quite apart from the interests of the CRA creditor, there is a significant public interest in ensuring that everyone pulls their weight in the operation of public services. Also see *McRudden (Re),* 2014 BCSC 217.
>
> …
>
> 13 Deterrence is a significant consideration in a tax-driven bankruptcy, although each case should be determined on its own circumstances and with regard to the interests of the creditor, the public and the bankrupt. I accept the CRA's

> submission that Mr. Cromarty is not an "honest and unfortunate" debtor in the sense that he is not a victim of circumstance and he simply ignored his income tax obligations for at least a decade. Mr. Cromarty is the author of his own circumstances. But, given that this is his first bankruptcy, he should also be given the chance to rehabilitate himself. (my emphasis)

[22] Master Funduk, in *Emmerton (Re)*, (1995), 163 A.R. 393 (Q.B.) stated that the failure to pay income tax on income as it is earned is “misconduct”.

[23] CRA’s counsel submits that it should be a condition of this discharge that the bankrupt first be required to pay $235,000 into the Estate, which is approximately 20% of the overall debt owing. She further submits that this percentage approach is the one commonly applied in British Columbia, as opposed to the approach in Ontario which focuses on the bankrupt’s ability to pay. In this regard she referred to *Wagner (Re)*, unreported, Vernon B52887, a decision of Master Baker of the British Columbia Supreme Court, where he stated:

> [16] The argument is made that this court should follow, essentially, the Ontario line of cases which, if I have it right, basically look to a party’s ability to pay and fixes a condition in relation to their income or income-earning ability. Mr. Levine certainly takes a different tack and says those cases simply do not apply in British Columbia where the approach is to measure the tax debt itself and to factor a percentage and that there is a range, and I agree with him in this respect, that the B.C. cases reflect a range of 20 percent to 70 percent depending on the circumstances of the individual. (my emphasis)

[24] This approach was also followed by Veale J. in *Cromarty (Re)*, cited above.

[25] The Trustee notes that since August 2015, when the bankrupt’s monthly income dropped to $827.15, she has consistently been making payments of $200 per month to her Estate, which have been going towards payment of the Trustee’s fees.

[26] If I order a conditional discharge, the bankrupt's Estate will remain open, and the Trustee will still be responsible for administering it. Accordingly, the Trustee will continue to charge a fee for their services, which is based upon a tariff, but is not expected to exceed much over $8,000, at which point the fees will be capped.

[27] The Trustee and CRA's counsel are agreeable to the $235,000 being repaid at the rate of $200 a month, together with any G.S.T. or other tax refunds received by the bankrupt going forward. The bankruptcy will continue at this rate until the $235,000 is repaid or there is an application made to vary the conditions.

[28] As for the bankrupt's ability to pay, courts have previously recognized that a debtor's demonstrated past ability to earn significant income may be used as a predictor of their future earning capacity. Indeed, a conditional order of payment can be made even if the bankruptcy is deliberately under-employed or unemployed, if their historical earnings have been significant. In *Zinkiew (Re)*, cited above, Registrar Bouck stated:

> 63 Finally, a conditional order of payment can be made even if the bankrupt is unemployed. The bankrupt's historical earnings can be sufficient evidence of an ability to make the payments: *Re Janowsky,* supra. The registrar may also look to whether the bankrupt is deliberately underemployed but physically capable of earning a greater income: *Re Martens,* supra, and *Re Hedges* [1992] B.C.J. No. 2936 (Victoria Registry No. 12) (S.C.). (emphasis already added)

See also *Powell (Re)*, 2005 BCSC 1107, at para. 15; and *English (Re)*, 2016 YKSC 38, at para. 16.

[29] In the present case, for the taxation years 2007 to 2009 the bankrupt earned significantly more than her reported income from 1999 to 2006 and from 2010 to 2014:

- 1999 - $7,200.00;
- 2000 - $9,000.00;

- 2001 - $9,000.00;
- 2002 - $15,594.00;
- 2003 - $20,828.00;
- 2004 - $19,866.00;
- 2005 - $23,694.00;
- 2006 - $28,080.00;
- 2010 - $20,957.00;
- 2011 - $18,575.00;
- 2012 - $12,940.00;
- 2013 - $14,250.00; and
- 2014 - $16,759.00.

[30] Further, the bankrupt has been involved as an owner and apparent manager of several significant businesses, including the former Bonanza Inn, the Kluane Park Inn and a gas station and restaurant. She also seems to have the ability to purchase and sell real estate quite profitably. The bankrupt is only 52 years old and would seem to have several productive working years ahead of her.

[31] Although she claims to have health problems, she has provided no independent evidence to prove that this is the case. The agent for the Trustee informed me that during an earlier insolvency counselling session, the bankrupt was noted to have some depression after the death of her common-law partner. However, there is no suggestion that the depression was chronic and the Trustee believes that the bankrupt's health issues have since been resolved.

[32] All this suggests to me that for several years, including the last five years in particular, the bankrupt has been deliberately under-employed.

[33] The bankrupt testified at this hearing. She admitted to being addicted to gambling, but stated that she has taken no steps to address that addiction. This is a concern for the Trustee, who also asks for a condition that the bankrupt attend some form of counselling for her gambling addiction before any discharge is granted.

[34] Pursuant to s. 172.1(4) of the *B.I.A.*, in making a decision on this application I must take into account:

> 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.

[35] At the time the personal income tax debt was incurred, the bankrupt was living an extremely lavish lifestyle, having unaccounted for personal expenditures of over $760,000 in 2007, over $475,000 in 2008, and over $370,000 in 2009.

[36] The bankrupt has made no efforts whatsoever to pay the personal income tax debt.

[37] The bankrupt made payments in respect of other debts, i.e. the vehicle sales to her daughter and her employer in 2014, while failing to make reasonable efforts to pay the personal income tax debt.

[38] Despite her apparently bleak present circumstances, I am satisfied that the bankrupt has the ability to earn significantly more than $827.15 per month. She has experience in business and real estate and I find that her financial prospects for the future are good.

[39] Finally, the sum of $235,000 represents only approximately 20 percent of the total debt of $1,177,806.22, which is at the lowest end of the range commonly considered by the courts in British Columbia, i.e. 20 percent to 70 percent, depending on the circumstances of the individual.

CONCLUSION

[40] For these reasons, I am satisfied that the bankrupt should be required to repay $235,000 to the Estate.

[41] Accordingly, pursuant to s. 172.1(3)(c) of the *B.I.A.*, Ms. Tran will be discharged conditionally, subject to the following terms:

1) she will repay the Estate the sum of $235,000 (the “debt”);
2) the debt will be repaid at the rate of $200 per month, plus any G.S.T. or other tax refunds received by the bankrupt going forward;
3) the bankrupt may repay the debt by making larger monthly payments, or by paying other lump sums, if she is able to do so, without any penalty;
4) the bankruptcy will continue until the $235,000 is repaid in full;
5) during the continuation of the bankruptcy, the bankrupt is required to file her income tax returns annually and to provide the Trustee with proof of all payments made into the Estate; and

6) before a discharge is granted, the bankrupt must provide proof satisfactory to the Trustee that she has attended for a professional assessment of her gambling addiction, and that she has followed any course of recommended treatment or counselling, including participation in Gamblers Anonymous.

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GOWER J.