

SUPREME COURT OF YUKON

Citation: *Anh Thi Dinh (Re)*, 2017 YKSC 24

Date: 20170331
S.C. No. 16-A0071
Registry: Whitehorse

**IN THE MATTER OF BANKRUPTCY OF
ANH THI DINH**

Before Mr. Justice L.F. Gower

Appearances:

Geneviève Chabot
Melody Desmarais
Anh Thi Dinh

Counsel for Canada Revenue Agency
Agent for the Trustee
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 Anh Thi Dinh, 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. The total tax debt owing to the CRA is \$982,827.07 (inclusive of personal tax, Goods and Services Tax (“GST”), interest and penalties), which constitutes 91.54% of the bankrupt’s total debts. This means that she falls within the definition of a personal income tax debtor under s. 172.1 of the *B.I.A.*

[2] Thus, although the application purports to be under s. 172 of the *B.I.A.*, because Ms. Dinh is a personal income tax debtor under s. 172.1, it is that section which must govern this tax-driven bankruptcy. Section 172.1(3) provides that on the hearing of an application for discharge, the court shall, after taking into account the factors in s. 172.1(4), which I will come to shortly:

- 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 her discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[3] The principal condition which the CRA seeks to attach to the discharge is that the bankrupt repay 20%, or \$196,565.41, of the total tax debt, before the discharge becomes effective. The CRA is content that the bankrupt repay this sum by monthly payments of as little as \$200, or such other lump sums as she may be able to make, without any penalty. The CRA also asks for a condition that the bankrupt receive treatment and counselling for her gambling addiction before the discharge becomes effective. The Trustee does not oppose either request.

[4] The four factors which the court must take into account in this application are set out in s. 172.1(4):

- 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.

[5] These, in effect, are the issues on this application.

AUDIT REPORT

[6] 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 and GST calculations for that period. The audit report was sent to the bankrupt for review in January 2012. She has not challenged the report. 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).

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

Taxation Year	Total taxable income reported	Unaccounted for personal expenditures	Unreported business income	Net worth discrepancy
2007	\$16,118.00	\$73,536.73	\$57,664.45	\$54,400.00
2008	\$13,320.00	\$172,117.52	\$167,711.92	\$159,726.00
2009	\$24,480.00	\$1,019,706.68	\$949,025.91	\$903,834.00

[8] The bankrupt stated that all of her income in 2007 was from employment insurance ("EI") and that \$13,840 of her income in 2009 was from EI.

[9] The audit detected large amounts of funds and considerable assets moving through the bankrupt's accounts, despite her reported income of less than \$25,000 in each of the three years audited.

[10] As I understand it, because the CRA could not find any other source of income for the bankrupt other than her employment, to the extent that it has determined that the bankrupt received unreported income, this has been deemed to be "business" income, for which the bankrupt not only owes personal income tax, but also GST.

[11] The audit report outlines that the unreported business income during the 3 year period was apparent from cash advances, wire transfers, casino transactions, and bank account withdrawals and transactions from both known and unknown sources.

[12] For example, during the period between 2007 and 2009, the bankrupt incurred non-automotive travel costs (including airfare) totalling:

- \$4,718.19 (2007);
- \$3,246.13 (2008); and
- \$7,265.75 (2009)

[13] Also during this period, the bankrupt made various net withdrawals in cash advances totalling:

- \$12,348.40 (2007);
- \$25,659.09 (2008); and
- \$71,660.19 (2009)

[14] The audit report also documented that during this period the bankrupt made various substantial cash purchases of casino chips. In 2007, for example, she made one large cash transaction to purchase chips in the amount of \$10,000. In 2008, the

bankrupt made cash purchases of casino chips totalling \$79,780. In 2009, the bankrupt's casino transactions totalled \$930,480.

[15] Despite these large unreported personal expenditures by the bankrupt, she nevertheless received various government payments over this period, totalling \$58,494.96, in the form of income tax refunds, child tax benefits, GST refunds, and EI.

BANKRUPT'S CIRCUMSTANCES

[16] The bankrupt is 58 years old. She is single and has one 17 year old dependant. The bankrupt is presently employed as a deli/produce clerk at a grocery store in Whitehorse. She filed her assignment into bankruptcy with the Trustee on November 19, 2015. At that time, she claimed to be earning a net monthly income of \$1,340, as well as receiving child support payments of \$200 per month. The bankrupt claimed that her only assets were \$200 worth of clothing. She also reported that she sold a 2008 Toyota Highlander motor vehicle in August 2015 for \$10,000, but used \$6,000 of that sum to pay back a debt that she owed to a friend, and spent the remaining amount on clothing and gambling. Finally, the bankrupt claimed under oath, in a supporting document dated November 16, 2015, that the reasons for her financial difficulties were "Costs associated with health challenges".

BANKRUPT'S TESTIMONY

[17] CRA's counsel summoned the bankrupt to testify at this discharge hearing. This was because, in response to a follow-up request for further information from the CRA, the bankrupt provided a letter dated January 4, 2017 which included new and contradictory information.

[18] Firstly, the CRA had suggested to the bankrupt that she made large cash purchases of casino chips from 2007 to 2009 exceeding \$1,000,000. The bankrupt denied this, even though she had failed to raise this issue when she received the audit report for her review in 2012. In her response, the bankrupt claimed:

...in the casino, I had purchased chips for other people. The people would give me money and ask me to purchase the chips for them and I would give it back to them.

[19] Secondly, contrary to her sworn statement of November 16, 2015 that the reasons for her financial difficulties were “Costs associated with health challenges”, the bankrupt said in her letter:

In response to the cause of my financial difficulty, it is the result of my gambling addiction, not health issues as stated [earlier]. My gambling habits was [as written] the main cause of my financial difficulty. (bankrupt’s emphasis)

[20] The bankrupt testified about the first point as follows. She said that when she went to the casinos in Edmonton, she liked to stay until they closed, even if she had lost all her money. The bankrupt said that she would become familiar with people playing at her table by talking to them or by going for a coffee. Although these people were not her friends, she said that they would often loan her various sums of money such as \$2,000, \$3,000, \$5,000, or even \$10,000, often in cash, to buy gambling chips and then to go and gamble elsewhere in the casino for these people. The bankrupt testified that if she won, she would give the money back to the lenders, but said nothing about what the consequences were if she lost. She said there was never any written record of these short-term loans.

[21] The bankrupt provided no independent evidence to support this testimony.

[22] I find that the bankrupt is not credible on this point. I am unable to accept that virtual strangers would loan her sums of several thousand dollars at a time, without any written record whatsoever, to allow her to gamble on the lenders' behalf. The lenders would not necessarily know how much the bankrupt had won or lost (of their money) and thus would have no way of knowing whether she was being honest when she repaid winnings to them. It would also have been very easy for the bankrupt to simply walk out of the casino with the lenders' money, seemingly without any consequence.

[23] I find that the bankrupt's attempt to introduce this evidence at the eleventh hour is to somehow try to minimize her personal tax responsibility for the income that has been attributed to her by the CRA. Yet, the bankrupt had no explanation for why she failed to provide this evidence when she initially received the draft audit report in 2012. As I stated above, the results of that report are now deemed to be valid and binding upon her.

[24] The bankrupt also testified about the second point dealing with the reasons for her financial difficulties. Again, she had no explanation for why she claimed under oath at the time of her assignment into bankruptcy that these reasons were "Costs associated with health challenges". Rather, she confirmed in her testimony that her problems arose from her gambling addiction. Even though she has never received any counselling for this addiction, she did say that she stopped gambling one or two years ago. When asked if she had the opportunity to gamble in the future, she indicated that she would, but "not too much...five dollars or two dollars...for fun".

[25] On this point, I accept that the bankrupt is a gambling addict and that she should receive treatment for her addiction as a condition of this discharge. Nevertheless, this unexplained change in her evidence further reflects poorly on her credibility.

[26] Before leaving this discussion of the bankrupt's credibility, I also note that when the bankrupt assigned herself into bankruptcy in November 2015, she reported a net monthly income of only \$1,540, \$200 of which was child support. However, it is apparent from the actual monthly reports that she submitted to the Trustee following the assignment that her average income over the following 10 months was \$2,366.05. Furthermore, at the time of the assignment, the Trustee's agent said that the bankrupt did not initially report any child support, but later, acknowledged receiving \$200 per month, when in fact it was determined that the bankrupt was receiving \$300 per month.

ANALYSIS

[27] 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;
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.

[28] Master Keighley, in *Bowen (Re)*, 2015 BCSC 502, at para. 32, reframed these principles 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)

[29] 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)

[30] 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”.

[31] The submission of the CRA’s counsel that the bankrupt repay 20% of the overall tax debt is based upon the approach 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)

[32] This approach was also followed by Veale J. in *Cromarty (Re)*, cited above, and by me in *Yen Ngoc Tran (Re)*, 2016 YKSC 70.

[33] 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 the bankrupt a fee for their services, which is based upon a tariff.

[34] The Trustee and CRA’s counsel are agreeable to the \$196,565.41 being repaid at the rate of \$200 a month, together with any GST or other tax refunds received by the

bankrupt going forward. The bankruptcy will continue at this rate until the \$196,565.41 is repaid or there is an application made to vary the conditions.

[35] I will now turn to the four factors which I must consider under s. 172.1(4) of the *B.I.A.*

(a) *The circumstances of the bankrupt at the time the personal income tax debt was incurred.*

[36] The bankrupt's personal income tax debt was incurred over the period from 2007 to 2009. In 2007, the bankrupt reported total income of just over \$16,000, all of which was from EI. However, she also had unaccounted for personal expenditures of approximately \$73,500 that year, including just over \$4,700 in airfare alone. In 2008, she reported income of approximately \$13,300, but had unaccounted for personal expenditures of just over \$172,000. Finally, in 2009, she reported income of about \$24,500, including \$13,840 from EI. Yet, her unaccounted for personal expenditures that year exceeded \$1 million, including over \$7,200 in airfare. This indicates that the bankrupt was living a relatively lavish lifestyle, while failing to report her actual income by several orders of magnitude. What is even worse is that, all the while, the bankrupt was also receiving government benefits totalling about \$58,500 over the three years.

[37] Before leaving this point, I also want to observe that the audit report shows that the bankrupt purchased the 2008 Toyota Highlander in that year for about \$43,990. Approximately \$31,900 of that purchase price was financed, meaning that she must have made a down payment of just over \$12,000. However, this all occurred during a year in which the bankrupt claimed to have only earned about \$13,300 in total.

(b) *The efforts, if any, made by the bankrupt to pay the personal income tax debt.*

[38] There is no evidence that the bankrupt made any efforts whatsoever 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.*

[39] When the bankrupt completed her assignment into bankruptcy in November 2015, she was asked whether she had sold or disposed of any of her property in the previous 12 months. She answered yes to that question, by explaining that in August 2015, she sold the 2008 Toyota Highlander for \$10,000. Of that sum, she said that she paid \$6,000 to a friend to whom she owed a debt, and spent the remaining \$4,000 on clothing and gambling.

(d) *The bankrupt's financial prospects for future.*

[40] The bankrupt is 58 years old and, depending on when she decides to retire, it is reasonable to expect that she has at least 10 further working years in her future. She appears to be in good health and is presently employed on what I understand to be a full-time basis, where she earned an average of \$2,366.05 monthly, over the period from November 2015 to July 2016. According to the record, the bankrupt made payments to the Trustee over this same period averaging \$222.22 per month. It is also reasonable to expect that her 17 year old dependent may soon become an independent adult, which would reduce the bankrupt's monthly expenses.

[41] Therefore, it is reasonable to expect that the bankrupt will have the ability to make the sought-after \$200 monthly payments, or even more, for some time to come.

CONCLUSION

[42] Under-reporting of income falls in the same category as tax evasion or tax avoidance and general deterrence should be emphasized in deciding what conditions to impose for a discharge: See *Copp (Re)*, 2015 BCSC 558, at paras. 50 and 52; and *Cromarty (Re)*, cited above. Further, with bankrupts who are ill-intentioned, dishonest, indifferent, or misleading, the purpose of the *B.I.A.* shifts from being remedial toward the protection of society and the sanctioning of inappropriate behaviour: *Bowen (Re)*, cited above, at para. 32. For the reasons given above, I am satisfied that the bankrupt falls into this category and should be sanctioned by being required to repay \$196,565.41 to the Estate. I note here that the CRA has taken the position that the bankrupt should only be required to pay 20% of the total tax debt, which is at the bottom end of the range of 20% to 70% from the cases in British Columbia.

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

- 1) she will repay the Estate the sum of \$196,565.41 (the “debt”);
- 2) the debt will be repaid at the rate of \$200 per month, plus any GST or other tax refunds received by the bankrupt going forward, with all such payments be made to the Trustee;
- 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 \$196,565.41 is repaid in full;

- 5) during the continuation of the bankruptcy, the bankrupt is required to file her income tax returns annually and to pay any taxes due and to provide proof of all payments made to the CRA; 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.

GOWER J.