

# SUPREME COURT OF YUKON

Citation: *Cromarty (Re)*, 2015 YKSC 28

Date: 20150609  
S.C. No. 15-A0001  
Registry: Whitehorse

## IN THE MATTER OF THE BANKRUPTCY OF LAWRENCE DAYLE CROMARTY

Before: Mr. Justice R.S. Veale

Appearances:

Leah Drewcock  
Lawrence Cromarty  
Geneviève Chabot

Appearing for the trustee BDO Canada Ltd.  
Appearing on his own behalf  
Counsel for Canada Revenue Agency

### REASONS FOR JUDGMENT

[1] Lawrence Cromarty made an assignment in bankruptcy on July 18, 2014. Mr. Cromarty's proven debt totals \$248,984.37, of which \$245,170.74 is owed to the Canada Revenue Agency ("CRA"). The cause of the bankruptcy is noted by the trustee, BDO Canada Ltd., to be "a lack of managerial experience". Since the time of his bankruptcy, Mr. Cromarty has been making voluntary monthly payments of \$200.00, based on a monthly net employment income of \$3,209.76, on which he supports his spouse and another dependent.

**Background and positions of the parties**

[2] This is Mr. Cromarty's first bankruptcy. The trustee requested this matter be set down for hearing and had initially opposed Mr. Cromarty's automatic discharge on the basis that he is a personal income tax debtor under s. 172.1 of the *Bankruptcy and Insolvency Act*, R.S.C. 1973, c. B-3, as amended ("the *BIA*"). A personal income tax debtor is someone who has \$200,000 or more of personal income tax debt and that debt is 75% or more of his total unsecured proven claims (s. 172.1). Where this is the case, a court is not able to absolutely discharge the bankrupt (s. 172.3). However at the hearing, and on the basis of the submissions of counsel for CRA, the trustee acknowledged that Mr. Cromarty's personal income tax debt is not actually greater than \$200,000.00, once contributions of \$37,511.10 owed to the Canada Pension Plan ("CPP") and \$34,673.44 owed in Goods and Services Tax ("GST") are subtracted.

[3] The CRA, who also filed a Notice of Opposition, opposes Mr. Cromarty's discharge on the basis of s. 173(1)(a) of the *BIA*, i.e. it takes the position that his assets "are not of a value equal to fifty cents on the dollar on the amount of [his] unsecured liabilities" and that he is justly responsible for the shortfall. Mr. Cromarty's Statement of Affairs indicates that as of July 9, 2014, his only assets were a half-interest in \$400.00 of household goods and \$500.00 worth of tools of trade, both of which are exempt from seizure.

[4] There was no oral evidence given at this hearing. All findings of fact are based on the information contained in the affidavit of Bonita Wilson, Collections Officer, and the material filed by the trustee, as well as two additional documents provided by counsel for

the CRA at the hearing, which related to the GST debt and the origins of Mr. Cromarty's employment income. Mr. Cromarty made brief submissions.

[5] In terms of his personal history, Mr. Cromarty is presently 55 years old, married, and with one dependent. Prior to his bankruptcy, he was self-employed in construction in both British Columbia and Yukon. His tax returns indicate gross annual incomes between 2003 and 2013 that range from a low of \$62,336 in 2009 to a high of \$109,640 in 2012. His average annual income for this period was around \$80,000. With the exception of some small credit card debt in the amount of \$3,813.63, his only debt is to CRA. Letters from CRA are attached to the affidavit of Bonita Wilson, indicating that Mr. Cromarty was repeatedly contacted about his outstanding CRA debts between 2001 and 2013.

[6] Since declaring bankruptcy, Mr. Cromarty has been working cooperatively with his BDO trustee. He has been making monthly payments of \$200.00 and the trustee indicated at the outset that, but for her (as it turns out, erroneous) view that Mr. Cromarty was precluded from an absolute discharge by s. 172.1, this would have been her recommendation. Her position was modified by the end of the hearing, however, mostly in response to the CRA's filing of a Registration Report from Yukon Government's Corporate Affairs office, which indicates that Mr. Cromarty's current employment income is derived from a company, S&D Mechanical Services, registered under the *Partnership and Business Names Act* by his spouse two months prior to his assignment into bankruptcy. In the submission of CRA counsel, Mr. Cromarty has used this business as a vehicle to tailor his salary to minimize his monthly voluntary payments. While that is not clearly established, Mr. Cromarty did not reply to the allegation, and it is the case that the

circumstances of his employment were not made known to the trustee. At the very least, this, coupled with Mr. Cromarty's declaration that he is the sole breadwinner in the family, raise concerns about his forthrightness. At the end of the hearing, the trustee joined counsel for CRA in the submission that a conditional discharge is appropriate given the information before the court.

[7] In his submissions, Mr. Cromarty indicated that he and his family were in the process of relocating to Vancouver, British Columbia. They had given notice on their rented accommodation and his wife had already departed. He stated that he is no longer employed.

### **Analysis**

[8] As a first time bankrupt, who is not caught by s. 172.1 of the *BIA*, Mr. Cromarty becomes entitled to an absolute discharge nine months after the date of bankruptcy, subject to an opposition being filed (s. 168.1). In this case, the main opposition was filed by the CRA, who, as outlined above, is Mr. Cromarty's primary creditor. Counsel for the CRA relies on a 'fact', which, if proven, precludes Mr. Cromarty's absolute discharge (ss. 172(2) and 173).

[9] I find that CRA has met its onus to prove the s. 173(1) fact that the value of Mr. Cromarty's assets fall below \$0.50 on the dollar of unsecured liabilities. Mr. Cromarty has offered no reason for this deficiency. Although the trustee pointed out that Mr. Cromarty has not divested himself of any assets in the past five years, as is the case with some debtors trying to evade their creditors, this does not provide a reason for the discrepancy.

[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.

[11] At the end of the hearing, both the trustee and counsel for the CRA supported a conditional discharge requiring the repayment of some of the tax debt. Although Mr. Cromarty said that he was currently unemployed and had no money and no way to pay the debt, this is not a barrier to imposing a conditional order of payment. In *Zinkiew (Re)*, 2004 BCSC 1831 at para. 63 (and quoted in *McRudden* at para. 34), it was observed that the bankrupt’s historical earnings can be sufficient evidence of his ability to make payments. Mr. Cromarty obviously made significant income working in both B.C. and the Yukon for the past decade, and there is no reason to think that that will not continue.

[12] In terms of the quantum to be repaid, counsel for the CRA advocated \$50,000, which is roughly 20% of the total tax debt, or close to 30% of the principal amount. The trustee did not provide a figure.

[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.

[14] Mr. Cromarty is more than capable of earning an income, as demonstrated by the material filed with the Court. In these circumstances, while arguably on the high side, I think that the repayment figure advocated for by the CRA strikes the appropriate balance between the interests of the creditor, this first-time bankrupt and society.

[15] Accordingly, Mr. Cromarty will be discharged conditionally on the following terms:

1. The bankrupt shall pay into the estate the sum of \$50,000 for the benefit of the CRA;
2. The bankrupt shall continue to provide to the Trustee proof of income for a further 24 months, commencing June 2015 and ending May 2017, and shall pay into his estate any surplus income due as calculated pursuant to the Superintendent's Standards set out in Directive 11R2 of the *Bankruptcy and Insolvency Act*;
3. The bankrupt shall provide proof that he has filed with Canada Revenue Agency an Income Tax and Benefit Return for the taxation years 2015 and 2016 in accordance with the *Income Tax Act*, and further provide proof that payment has been made for any amount due to Canada Revenue Agency for the taxation years set out above within the time periods prescribed by the *Income Tax Act*.

[16] If the bankrupt complies with term 1 and pays the full \$50,000 into the estate before May 2017, he will be absolved from the requirement to provide proof of income to

the trustee pursuant to term 2. However, the requirement that he file income tax returns will remain.

[17] Upon satisfying the Court that these conditions are met, the bankrupt may apply for an absolute discharge.

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VEALE J.