

SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Doucette (Re)* 2016 NSSC 288

Date: October 24, 2016

Docket: Hfx. No. 39862

Estate No. 51-2008290

Registry: Halifax

In the Matter of the Bankruptcy of Kent Drew Doucette

Decision on Motion for Discharge

Judge: The Honourable Justice Gerald R. P. Moir

Heard: May 6, 2016 in Halifax, Nova Scotia

Counsel: Mr. Kent Drew Doucette on his own
Brenda L. Wood, CIRP for BDO Canada Limited as trustee in
bankruptcy of Kent Drew Doucette
Marie-Paule Johnson for the Superintendent of Bankruptcy

Introduction:

[1] Mr. Doucette's trustee in bankruptcy, BDO Canada Limited, opposes his discharge. So does the Superintendent in Bankruptcy. They propose both a conditional discharge and a suspension.

[2] Mr. Doucette got a consolidation loan, paid off his Visa debt, then charged about \$16,600 to the credit card so his supposed girlfriend could cover a bounced cheque and buy a car. A week later, he went bankrupt. The car belongs to the supposed girlfriend. There were no assets available for distribution and Mr. Doucette does not earn enough to justify payments from surplus income. During bankruptcy he obtained another credit card.

[3] The primary reason for the opposition is abuse of credit.

Finding about Threshold

[4] When an objection is made to a discharge and the court makes one of the findings specified in s. 173(1) of the *Bankruptcy and Insolvency Act*, the court cannot discharge the bankrupt absolutely. We are restricted to refusing discharge, suspending discharge, or imposing conditions on discharge: s. 172(2). It is possible to combine suspension and conditions: s. 172(4).

[5] In Mr. Doucette's case, the trustee provided a draft order that would record findings under s. 173(1)(a) and 173(1)(i). The Superintendent proposes findings under s. 173(1)(e) and 173(1)(h). I will consider each because the threshold findings may affect the exercise of discretion to choose among refusal, suspension, and conditions and the discretion to fashion conditions.

[6] The finding specified by s. 173(1)(a) is the most common reason for automatically going to refusal, suspension, and conditions. It applies when "the assets of the bankrupt are not of a value equal to fifty cents on the dollar of... unsecured liabilities" and the bankrupt does not satisfy the court that he or she "cannot justify be held responsible" for that situation. A s. 173(1)(i)(a) finding is appropriate in Mr. Doucette's case.

[7] The finding specified by s. 173(1)(i) is the bankrupt incurred liabilities "in order to make the bankrupt's assets equal to fifty cents on the dollar" during a period immediately before the bankruptcy. The provision calls for deliberate action, "in order to". The finding is not made merely on proof that the ratio depleted to fifty cents on the dollar during the pre-bankruptcy period. The bankrupt must have intended that effect. The evidence does not satisfy me that Mr. Doucette incurred debts in order to deplete the ratio of his assets to his unsecured

liabilities. I will discuss his motives and intentions when determining how to exercise the discretions.

[8] The finding under s. 173(1)(e) is “the bankrupt has brought on, or contributed to, the bankruptcy by rash and hazardous speculations, by unjustifiable extravagance in living, by gambling or by culpable neglect of the bankrupt’s business affairs”. The Superintendent submits the evidence of the following facts grounds one of the s. 173(1)(e) findings:

Mr. Doucette stated that in the period of October 2014 to the end of May 2015 he used his credit and gave Vanessa Reid between \$20,000.00 and \$24,000.00. He said he was helping her out with her 7 year old son. Then in June 2015, he cleared his CIBC Visa card by acquiring a consolidation loan and paying it in full to then use the Visa card to purchase a 2011 Nissan Altima (\$14,500.00) and cover an NSF (\$1,100.00), both for Vanessa Reid. The above took place the first and second week of June, one and two weeks prior to filing for bankruptcy. Vanessa Reid did not pay him back and refuses to return the vehicle. The vehicle is under her name.

[9] The facts recited by the Superintendent have nothing to do with “speculations”. Mr. Doucette has never lived extravagantly. He did not gamble. And, he had no business. There is no basis for a finding under s. 173(1)(e).

[10] The finding specified by s. 173(1)(h) is “the bankrupt has... given an undue preference to any of the bankrupt’s creditors” during the period immediately before bankruptcy. The Superintendent relies on the following facts:

Mr. Doucette obtained a consolidation loan from CIBC 3435446506 (listed as no. 4 on the statement of affairs) in the first week of June 2015 (about 3 weeks prior to bankruptcy). The consolidation loan consisted of paying CIBC Visa 4500600110793027 for the amount of \$20,000.00, his line of credit for 11,200.00 and Capital One for \$3,900.00. Mr. Doucette advised that once the CIBC Visa was paid in full he proceeded to purchase the 2011 Nissan Altima and cover an NSF cheque for Vanessa Reid.

When asked at the discharge hearing, the Superintendent explained that the alleged preference consists in monies paid to the CIBC out of the CIBC consolidation loan. It is impossible to find a preference on the facts recited by the Superintendent. The money came from the creditor alleged to have been preferred. No preference was given.

[11] I will impose refusal, suspension, or conditions, but only on the basis of s. 173(1)(a).

Facts Relevant to Discretions

[12] Mr. Doucette is a fifty two year old single man. He works as a janitor at a hospital and makes \$1,980 a month. He rents a room in a house near Fairview, where he pays \$520 a month in rent. He has been there for almost a decade. He does not own a car. He has no valuable assets. He owed over \$50,000 when he went bankrupt.

[13] The Superintendent of Bankruptcy has a program to monitor credit card abuse. The program is described by Registrar Cregan at para. 6 to 15 of *Re. Spencer* 2009 NSSC 34. A computer selects bankrupts who may have abused credit cards. The bankrupt is examined under s. 161(1). A summary of the evidence and a report under s. 170(3) may be prepared and filed for the discharge application.

[14] In 2015, Mr. Doucette met a woman and her nine year old son. He wrote on the Superintendent's summary of his examination, "At the time, I was under the impression we were in a relationship. She was not."

[15] In April 2015, he guaranteed the lease of an apartment for her and her son. She needed to drive her son to school. So, in June 2015 he used his CIBC Visa card to buy her a \$14,500 vehicle. She had a job and told him she would make the payments, but she never did. Also in June, he used his Visa card to cover \$1,100 in NSF cheques for her.

[16] Mr. Doucette said that "looking back, he was taken in by his ex-girlfriend." He took responsibility for his insolvency, saying he had been "very stupid". "She used his good heartedness. He did a lot of the stuff for her son so he would not suffer."

[17] The Superintendent also takes issue with Mr. Doucette's use of credit after bankruptcy. He obtained an Amazon Rewards Visa with a \$5000 limit. However, he disclosed his bankrupt status. He also continued to use credit on the card freed up by the consolidation loan.

Disposition

[18] The trustee and the Superintendent propose both a suspension and a conditional discharge . The condition would be that Mr. Doucette pay into the estate the value of the vehicle he helped his illusionary girlfriend purchase, at \$300 a month for four years.

[19] Mr. Doucette did not engage in the kinds of blameworthy misconduct, bordering on fraud, contemplated by some of the threshold findings advocated by the trustee and the Superintendent.

[20] I find the CIBC consolidation loan freed up the CIBC Visa. The creditor did not require surrender. The creditor left the debtor free to use the additional credit.

[21] I find Mr. Doucette used the additional credit for unrequited love. I find he believed he had a source of repayment in the illusionary girlfriend's promise to make payments. He went bankrupt when she recanted. That was when he realized

he could not pay his debts as they came due, not a few days earlier when he used his credit to help the illusionary girlfriend and her child.

[22] Mr. Doucette's situation is not at all like those in *Re. Gordon* [1991] O.J. 2635 (Registrar) or *Re. Pitre* 2009 SKQB 280 (Registrar). It may be analogous to *Re. Holder* 2008 NBQB 366 (Registrar), where "poor business decisions" and "using personal credit" lead to a twelve month suspension.

[23] Credit card abuse should not automatically lead to punitive conditions. There is a dimension beyond debtor misconduct that is often relevant. As Registrar Cregan observed at para. 12 of *Spencer*, "Credit Cards are freely available."

[24] Sophisticated calculations of the returns on freely, even indiscriminately, disseminated credit permit large financial institutions to grant credit to those who cannot pay. Mr. Doucette makes just \$560 above the low income cut off calculated by Statistics Canada for single people in medium sized urban areas. His Visa statements are in evidence. He was permitted \$20,000 in credit at 22.99 % interest. Extending those terms to an unsophisticated, even vulnerable, person like Mr. Doucette entails a substantial risk of tempting him to the poverty line.

[25] The temptation is created by a financial institution for its financial gain. An unsophisticated debtor who gives into the temptation of using credit he cannot afford is not justly punished for it in the circumstances of a case like this one.

[26] Professor Wood writes at p. 304 and 305 of Roderick J. Wood, *Bankruptcy and Insolvency Law 2nd ed.* (Toronto: Irwin Law, 2015):

In general a conditional discharge is preferred where there is a real prospect that the debtor will have the assets available to satisfy the condition. However, where this is not the case, the court may wish to show its disapproval of the debtor's misconduct by suspending the order for a period of time.

In my view, suspension alone is the appropriate disposition when conditions cannot realistically be imposed and refusing to discharge is disproportionate to the misconduct.

[27] If I were to impose the conditions proposed by the trustee and the Superintendent, Mr. Doucette would either default or live at the poverty line for the next four years. I will impose a suspension without conditions for the year starting May 6, 2016.

Moir, J.