SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *Fafard* (Re), 2017 NSSC 286

Date: October 27, 2017
Docket: *Halifax*, No. 41340
Estate No. 51-2132812

In the Matter of Charles Eugene Fafard

LIBRARY HEADING

Registrar:	The Honourable Registrar A. David MacAdam, Q.C.
Heard:	October 27, 2017, in Halifax, Nova Scotia
Decided:	November 3, 2017
Counsel:	Tim Hill, Q.C., for Charles Eugene Fafard Robert Mroz on behalf of McInnes Cooper and The Facility Association Daniel Rozon, Trustee for Grant Thornton
Subject:	Bankruptcy; discharge
Summary:	Prior to bankruptcy, the bankrupt had been involved in an accident as an uninsured motorist, and the facility association was required to fulfil the resulting judgment. The facility association obtained an execution order, after which he filed the assignment in bankruptcy. The trustee recommended absolute discharge, but the facility association objected, requesting that the bankruptcy be annulled, or, alternatively, that there should be a substantial conditional order.
Issues:	Should the bankrupt receive an absolute discharge?
Result:	There was no evidence of fraud or abuse of process that would justify annulling the bankruptcy. However, the accident could be described as tortious, so that a conditional discharge order was ordered, notwithstanding the bankrupt's financial circumstances.

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Decision

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By the Court:

Re: Charles Eugene Fafard

[1] The bankrupt, Charles Eugene Fafard, [herein ”Fafard” or “the bankrupt”] while driving uninsured, was involved in a motor vehicle accident that resulted in injury to D’Arcy Robert Sparks. Mr. Sparks obtained judgment and was reimbursed by The Facility Association, [herein “Association” or “TFA”]. The TFA administers a fund designed, among other things, to provide compensation to persons suffering bodily injury or property damage caused by uninsured drivers. After compensating Mr. Sparks the TFA obtained an assignment of his judgment against Fafard.

[2] The TFA obtained an execution order, and on or about May 11, 2016, sent the order to the sheriff, together with instructions to commence garnishments of Fafard’s wages. On June 9, 2016, Fafard filed an assignment in bankruptcy.

[3] Grant Thornton Limited, [herein “the trustee”], administered the bankruptcy and has filed a section 170 report recommending an absolute discharge for the bankrupt. TFA has filed a notice of objection maintaining that the bankruptcy

should be annulled, or, alternatively, that there should be a conditional order for virtually the entire amount of the judgment it holds as a condition of discharge.

[4] The bankrupt's statement of affairs listed assets totaling $1002 with creditors in excess of $25,000, of which, apart from one creditor of $200, the indebtedness was owed to the TFA. His net income, after deduction of child support payments, was $2090 per month, updated by the trustee at the hearing to $1955 per month. The Superintendent of Bankruptcy standard for a single person was $2121 and therefore his income fell below the superintendent's guidelines.

Issue 1: Annulment for abuse of process

[5] TFA's motion is made pursuant to section 181(1) of the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3, ("BIA") which reads:

> 181(1) Power of court to annul bankruptcy
>
> If, in the opinion of the court, a bankruptcy order ought not to have been made or an assignment ought not to have been filed, the court may by order annul the bankruptcy.

[6] In respect to applications for annulment of bankruptcy Justice O'Connor of the Ontario Court of Justice (Gen. Division), in *Re Wale*, [1996] O.J. No. 4489, stated, at paragraphs 17, 24, 25 and 26 as follows:

17 An annulment will be granted only where it is shown either the debtor was not an insolvent person when he made the assignment or where it is shown that the debtor abused the process of the court or committed a fraud on his creditors.

…

24 Numerous cases conclude that the debtor's motive in making an assignment is not generally relevant. There is nothing unlawful in declaring bankruptcy for the sole purpose of defeating the claims of one's creditors. *Irving Oil Co. v. Murphy* (1962), 5 C.B.R. (N.S.) 203 (P.E.I. S.C.). One of the objectives of bankruptcy legislation is to permit the debtor, in the words of Evershed M.R. "to protect himself from the evils which he might otherwise suffer". *Re Dunn*, [1949] 2 All E.R. 388 (C.A.). However, this general principle must always be tempered by the caveat that fraud or abuse of the process will permit a court to annul the assignment. In *Bankruptcy and Insolvency Law of Canada*, by Holden and Morawetz, Third Edition, Vol 2, at page 6-107, the learned authors say:

> The court must consider the rights not only of the debtor and of the creditors but also the rights of the public. A bankrupt should not be permitted to benefit from his own turpitude.

25 In *Blaxland v. Fuller* (1990), 2 C.B.R. (3d) 125 (B.C. S.C.), Donald J. of the B.C. S.C. [In Bankruptcy], said at page 127: "If, however, the conduct is tainted by bad motives, then the Court remains able to annul a bankruptcy under s. 181 of the *Bankruptcy Act*".

26 Under s. 181 the Court has a wide discretion when considering an annulment application. An exhaustive review of the circumstances surrounding the assignment should be made by the Court. There is no single test or principle to be applied. The test is flexible and fact specific. The debtor's motive is the primary consideration is determining abuse of process or fraud. After considering whether the debtor is an insolvent person some of the questions the court might pose to ascertain the debtor's motive are:

> (1) Is the debtor's financial situation genuinely overwhelming or could it have been managed?
>
> (2) Was the timing of the assignment related to another agenda or was bankruptcy inevitable in the near or relatively near future?
>
> (3) Was the debtor forthcoming in revealing his situation to his creditors or did he hide assets or prefer some creditors over others?
>
> (4) Did the debtor convert money or assets to himself which would otherwise have been assets in the bankruptcy?
>
> (5) What had been the debtor's relationship with his creditors, particularly his major ones? Was it such that they might have assisted him, if he had approached them, by granting time or terms of repayment or had any goodwill been destroyed by past unfulfilled promises?

> (6) Are there other relationships — business partnerships, shareholder arrangements, spousal, competitors for an asset, or simply personal associations which could cast light on a possible bad faith motive for making an assignment?

[7] In view of his Statement of Affairs, it is evident that Fafard met the definition of an "insolvent person" in s. 2 of the *BIA*:

> insolvent person means a person who is not bankrupt and who resides, carries on business or has property in Canada, whose liabilities to creditors provable as claims under this Act amount to one thousand dollars, and
>
> (a) who is for any reason unable to meet his obligations as they generally become due,
>
> (b) who has ceased paying his current obligations in the ordinary course of business as they generally become due, or
>
> (c) the aggregate of whose property is not, at a fair valuation, sufficient, or, if disposed of at a fairly conducted sale under legal process, would not be sufficient to enable payment of all his obligations, due and accruing due; (*personne insolvable*)

[8] Justice Steele of the Manitoba Court of Queen's Bench in *Re Moss* (1999), 12 C.B.R. (4th) 62, [1999] M.J. No. 261, affirmed at 2000 MBCA 84, application for leave to appeal dismissed, [2000] S.C.C.A. No. 556, at paragraphs 34 and 35, made the following comments in respect to a motion to annul a bankruptcy:

> 34 There are a number of grounds upon which courts have annulled an assignment including mistake, fraud, a clear sufficiency of assets to pay all creditors' claims and abuse of process. (See *609940 Ontario Inc. (Five Star Auto), Re* (1985), 57 C.B.R. (N.S.) 137(Ont. S.C.).) If an abuse of process exists, the court may exercise its discretion to annul even where the bankrupt meets the criteria of an insolvent person.
>
> 35 The term "abuse of process" is not easily susceptible to precise definition. In *Shaw v. Trudel* (1988), 53 Man. R. (2d) 10 (Man. Q.B.), Kennedy J. defines it in the following terms:

> ...a term used to describe an improper use of the judicial proceedings and may arise if jurisdiction were exceeded. It arises when a legal process with some legitimacy is used for some ulterior motive, other than that for which it was intended. It is invoked to protect against harassment, or the perversion of the process to accomplish an improper result. (p. 12)

[9] Although the court granted the annulment after a detailed review of the conduct of the bankrupt and her husband, the circumstances indicated a pattern of activity, and an agenda to defeat creditors that is not present on this application. There is no evidence to suggest that similar conduct or ulterior motive exists in respect to Fafard. In concluding his reasons in *Re Moss*, Justice Steele stated, at paragraph 93:

> 93 A factor that the court should consider in deciding whether to annul an assignment in bankruptcy based on an abuse of process is the integrity of the bankruptcy process itself. One of the prime purposes of the *Bankruptcy and Insolvency Act* is to assist an honest but unfortunate debtor. I do not believe Rochelle Moss falls into that category. I believe that her husband, in her name and with her permission, so ordered their affairs as to shelter large sums of money from their creditors. You should not be able to use the *Bankruptcy and Insolvency Act* as a tool to manipulate the system.

[10] And finally, former Nova Scotia Registrar Cregan in *Re Byrne*, 2012 NSSC 23, [2012] N.S.J. No. 31, at paragraphs 14, 15, and 16, in denying an annulment application in respect to a debtor who was 15 years old at the time of an accident, while driving an uninsured “four wheeler”, causing injuries to a friend that resulted in damages in excess of $200,000, concluded the following:

> 14 Mr. Byrne was insolvent at the time of his assignment. There was a judgment in excess of $200,000 against him which he could not pay. What started it all was a negligent act in his past, resulting in this judgment. What could he do about it? He could have worked with the Association as it requested him. He chose not to communicate with it most likely because of fear of impecuniosity, or just plain not knowing what to do with his predicament and having no close person to help him. So he eventually did the right thing, he consulted a trustee in bankruptcy whose advise was to make an assignment in bankruptcy. Bankruptcy is not an escape from responsibility, rather it is a procedure for persons in circumstances as Mr. Byrne was in to deal with their obligations in a controlled way. To give such assistance is what trustees are for. I cannot see how in these circumstances Mr. Byrne was engaging in any fraud or abuse of process.
>
> 15 I do not see that the provisions for annulment are applicable to him. There are people who for various devious or manipulative reasons become bankrupt whose bankruptcy should well be annulled. Mr. Byrne is not one of them.
>
> 16 His circumstances are similar to many others who have become bankrupt because of accidents for which there was no indemnity through insurance. Their bankruptcies are not annulled, rather the courts have worked to provide conditions of discharge which recognize the special circumstances. This will be discussed as I consider Mr. Byrne's discharge application.

[11] Counsel for Fafard disputes the suggestion by TFA that *Re Byrne* is distinguishable from the present case, noting, in his brief:

> In 2002 Byrne, who was then a minor, was involved in a motor vehicle accident in which another person was injured. The vehicle was uninsured. Ultimately TFA obtained a judgment against Byrne in the amount of $180,000.
>
> In 2009 Byrne contacted TFA's solicitor seeking to have his driver's license restored. That came to nothing. After an execution order was issued against Byrne in July 2010 he made an assignment in bankruptcy. Similar to the case at bar, almost all Byrne's debt was made up of that owed to TFA. The total debt was some $214,000, of which some $211,000 was owed to TFA.
>
> …
>
> Although TFA valiantly attempts to distinguish the case at bar from *Re Byrne* there is no appreciable difference.
>
> Firstly, in *Re Byrne* the TFA debt represented 98.6% of the total debt. In the case at bar the TFA debt represents 99.2% of the total debt. There is little difference. Although TFA states that it was willing to work with the Bankrupt "based upon his ability to pay", it is clear that his income falls short of the Superintendent's Standards, and he has no ability to pay.

> Secondly, the timing of the assignment is not "suspect". Clearly it came about as a result of the garnishment of the Bankrupt's wages. Faced with the choice of making his child support payments or paying TFA the Bankrupt really had no choice."

[12] Notwithstanding the assertion by TFA that *Re Byrne* can be distinguished, I am satisfied that, as in the case before Registrar Cregan, the circumstances giving rise to the debt are matters to be assessed in determining whether there should be an absolute discharge or a conditional discharge rather than grounds to annul the bankruptcy.

[13] The fact that the debtor was driving without insurance is a matter to be dealt with by the criminal law. In respect to the bankruptcy there is no evidence of fraud or abuse of process. In fact, many of the authorities cited in respect to the issue of the discharge relate to single, or principally single, creditor bankruptcies, some of them involving motor vehicle accidents resulting in injuries as well; as for example, the Supreme Court of Canada's decision in *Kozack v. Richter*, [1974] S.C.R. 832. There was no suggestion of annulment in the decision. Rather the circumstances were addressed in the context of whether the amount the bankrupt was to pay in order to be discharged should be increased from the amount directed by the Saskatchewan Court of Appeal.

[14] There is nothing to justify or warrant the annulment of the bankruptcy.

Issue 2. Opposition to the absolute discharge of the bankrupt.

[15] In respect to the Bankrupt's discharge, the court considers ss. 172 and 173 of the BIA. Section 172 states, in part:

> 172 (1) On the hearing of an application of a bankrupt for a discharge, other than a bankrupt referred to in section 172.1, the court may
>
> (a) grant or refuse an absolute order of discharge;
>
> (b) suspend the operation of an absolute order of discharge for a specified time; or
>
> (c) grant an order of discharge subject to any terms or conditions with respect to any earnings or income that may afterwards become due to the bankrupt or with respect to the bankrupt's after-acquired property.
>
> Powers of court to refuse or suspend discharge or grant conditional discharge
>
> (2) The court shall, on proof of any of the facts referred to in section 173, which proof may be given orally under oath, by affidavit or otherwise,
>
> (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 his discharge, to perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct.

[16] As for section 173, counsel for the creditor cites ss. 173(1)(a) and (n), which state:

[17] Facts for which discharge may be refused, suspended or granted conditionally

[18]

> 173 (1) The facts referred to in section 172 are:
>
> > (a) the assets of the bankrupt are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities, unless the bankrupt satisfies the court that the fact that the assets are not of a value equal to fifty cents on the dollar on the amount of the bankrupt's unsecured liabilities has arisen from circumstances for which the bankrupt cannot justly be held responsible;
> >
> > ….
> >
> > (n) the bankrupt, if the bankrupt could have made a viable proposal, chose bankruptcy rather than a proposal to creditors as the means to resolve the indebtedness…

[19] Counsel for the creditor, in his brief, only refers to subsections (a) and (n). I infer that TFA is satisfied that none of the other subsections are applicable to the bankrupt on his application for discharge.

[20] In *Kozack v Richter* the debt in question of approximately $14,000, resulted from a motor vehicle accident caused by the "wilful and wanton misconduct" of the bankrupt. The majority of the court determined that it would be appropriate that the bankrupt pay approximately half the judgment before being discharged, notwithstanding he had a limited income. Justice Pigeon in delivering the judgment of the majority stated, at paragraph 6:

> 6 Counsel for the appellant has referred us to a number of cases dealing with analogous situations on applications for discharge. Among recent cases, the following may be noted: *Rice v. Copeland* (1965), 51 W.W.R. 227, 7 C.B.R. (N.S.) 288, 51 D.L.R. (2d) 147(Man.), in which the bankruptcy was similarly precipitated by a claim for damages arising out of a car accident which was said to be due to driving in an intoxicated condition. Dickson J. (as he then was) ordered the bankrupts to pay as a condition of their discharge 25 per cent of their unsecured liabilities. He said (at p. 232):

> In *Re McIntosh* (1958), 26 W.W.R. 541, 37 C.B.R. 212, 16 D.L.R. (2d) 207 (Man.), Williams C.J.Q.B. agreed with the judgment of Smily, J. in *Re Buell*, [1955] O.W.N. 421, 35 C.B.R. 53, [1955] 4 D.L.R. 137, that although the *Bankruptcy Act* [R.S.C. 1952, c. 14] is available to an insolvent not engaged in business, the Act was never intended to enable a judgment debtor to get rid of a judgment for damages and with no other purpose to serve than the convenience and comfort of the debtor.
>
> In *Sederoff v. Vigneault*, [1942] Que. K.B. 44, 23 C.B.R. 288 (C.A.), the debtor had gone into bankruptcy to escape payment of a judgment in damages arising out of an automobile collision. The bankruptcy judge, in the exercise of his discretion, suspended the discharge until the debtor had paid 50 cents in the dollar on the amount of his unsecured liabilities. The court of appeal refused to interfere.

[21] In *Re George*, 2008 NSSC 304, Registrar Cregan made the following observations at paragraphs 24 and 25:

> [24] A number of cases have followed *Kozack*. *Phillips, Re*, 2002 NSSC 60 (CanLII), 32 C.B.R. (4th) 294 (N.S., Registrar Hill) concerned a bankrupt who was involved in an accident while driving without insurance. Judgment Recovery (N.S.) Limited paid the claim and took judgment against him. Two years later he was involved in an accident causing serious injury to a passenger. He then had neither license to drive nor insurance. Again Judgment Recovery paid the claim and took judgment against him.
>
> [25] In this decision Registrar Hill noted a decision of Goodfellow J. of this court, *Diamond, Re*, 2002 NSSC 31 (CanLII), which confirmed the applicability of *Kozack* in Nova Scotia for circumstances of this nature. Registrar Hill also referred to an earlier case he had decided, *Re Edwards*, [1992] N.S. J. No. 294 and quoted in paragraph 8 the following from his earlier case:
>
> > It seems that some of the cases state that where the bankrupt does not have the means to pay or some future prospects of meeting the terms of a conditional order such an order should not be made. The proposition is that the Court should not focus entirely on the bankrupt's tortuous conduct, but must consider his financial and other relevant circumstances. There are other cases that might be said to stand for the proposition that a conditional order should be made even absent the ability to pay where an assignment has been made to avoid payment of a judgment or debt arising from tortuous conduct.

and added in paragraph 9 the following:

> In my view, I should not allow the statute to be used as a mechanism to avoid responsibility for what clearly was irresponsible conduct. At the same time, it is appropriate to keep in mind the rehabilitative purpose of the legislation. No two cases will be identical, and the court will need to find a correct balance between these competing principles in each case.

[22] In his brief, counsel for Fafard, in respect to the quantum of any conditional order, references the decision of Registrar Cregan in *Byrne*, at paragraphs 28 and 29:

> 28 In *Kozack* the judgment was about $13,000. He was required to pay $7,200. In Phillips the judgment was $200,000. He was required to pay $24,000. In George the judgment was $1,931,290. He was required to pay $100,000.
>
> 29 There are two points I draw from these cases. The debtors each acted with obvious irresponsibility, and each was only required to pay as a condition of discharge a small fraction of the debt, yet it was for each a significant amount to pay which each would find difficult to pay.

[23] Counsel's submission continues:

> TFA argues that there should be a conditional order to pay 100% of the TFA debt, i.e. $20,000. Clearly this is not in accord with the case law.
>
> The Bankrupt will find any amount difficult to pay, as his income is below the Superintendent's Standards. Given this, in accord with the case law cited by TFA any conditional order should be for a small fraction of the debt, which will be a significant burden to the Bankrupt given his minimal income.

[24] Counsel for TFA also references *Re George*, specifically Registrar Cregan's remarks at paragraphs 42 and 43:

> [42] A suspension will not make any significant difference to him. I see nothing I can do to rehabilitate him. In keeping with the cases and considering his serious lack of responsibility, the integrity of the bankruptcy system requires that he not

> wholly escape responsibility for this debt. Mr. Cameron's being looked after by the WCB does not help Mr. George's situation. The loss is ultimately being born by the employers of Nova Scotia.
>
> [43] In his present situation being discharged or undischarged may not make much difference to him or to the WCB. What is important is that should he come into an amount of money, his estate should have reserved for it the right to take such money. This can be accomplished by him consenting to judgment. It must be for a significant amount.

[25] Registrar Cregan directed that as a condition of his discharge the bankrupt consent to judgment in favour of the trustee in the amount of $5000.

[26] Counsel for TFA submits that there are two major factors that influence the decision on the amount the bankrupt should be required to pay as a condition of discharge: first, the conduct of the bankrupt in the context of the integrity of the bankruptcy system, such that the bankrupt should not be allowed to escape all responsibility for what was irresponsible conduct; and second, the means of the bankrupt.

[27] In *Re Byrne* the judgment was for $180,000 while the bankrupt reported earnings of $1600 per month. He worked as a fisherman's helper and his wife suffered severely from Crohn's disease. Register Cregan noted that little more was learned of his circumstances.

[28] The TFA suggests that as a condition of discharge the bankrupt consent to judgment in favour of TFA in the sum of $20,000 or, alternatively, pay an amount

to be determined into the estate. I have two difficulties with this suggestion. The court does not order payments to creditors. Rather where there is a requirement to make payment, or to consent to judgment, it is to be in favour of the estate, not a particular creditor. Secondly, the amount being sought is unrealistic and not supported by the authorities.

Conclusion

[29] Although there is limited information about the accident and it therefore cannot be described as "willful and wanton misconduct", in view of the judgment, it certainly can be described as "tortious." The circumstances justify a conditional order. The bankrupt's present lack of financial means does not preclude the granting of such an order. The discharge of the bankrupt will be conditional upon paying the sum of $5000 to his estate.

_____

Registrar in Bankruptcy

Halifax, Nova Scotia

November 3, 2017