SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY
Citation: *Burns (Re)*, 2019 NSSC 155

Date: 20190510
Docket: No. 40686
Registry: Sydney
Estate Number: 51-2197594

In the Matter of: The bankruptcy of Henry Richard Burns

Judge: Raffi A. Balmanoukian, Registrar

Heard: April 29, 2019, in Sydney, Nova Scotia

Counsel: Joe Wilkie, for the Trustee, MNP Ltd.
Henry Richard Burns, appearing personally

Balmanoukian, Registrar:

[1] Henry Richard Burns, 74, is a sick and infirm man. He is also a fourth-time bankrupt.

[2] On October 15, 2018, on the recommendation of the Trustee, I adjourned this matter *sine die*. The trustee sought to monitor Mr. Burns' income for an additional fourteen months, for a total of three years (a period equal to that of a second time summary administration bankrupt with s. 68 surplus income).

[3] Mr. Burns' 2017 net income, for a one-person household, was $36,188; 2018 was nearly identical, $36,590. Mr. Burns has paid $3,000 into his estate out of this income. There were other minor receipts for tax refunds and the like.

[4] Depending on the course of events, the amount of Mr. Burns' medical expenses, and the status from time to time of various pension and income support programs, his income will for the foreseeable future be below the Superintendent's standards for "surplus income" within the meaning of Section 68 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended ("BIA").

[5] Mr. Burns' handwritten submission needs only be quoted in part to give a flavour of the challenge he faces (and which was backed up with a brief doctor's note); the quotes are verbatim.

> "To who it may consurn
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> "As you know I have cancer in my lung & kidney an the stress I am going through trying to get discharged from my bankruptcy. I am paid up to October an not missed any payments & have supplied MNP of any requests even providing items that was against the Privacy Act.
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> "My cancer doctor undue stress affects the healing process an I know everything goes south when I had to go to court and it would take a week to settle down.
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> "Cancer is not a cheap disease to have. They pay for kemo pills only. They do not pay for other perscriptions that are required
>
> ….
>
> "I know that the Court is trying to penalise me because I filed bankruptcy 4 time but this action is very stressful by it self."

[6] He went on to describe various out-of-pocket medical expenses ancillary to his metastatic illness and treatment. Some of these would likely qualify as medical expenses for the purposes of calculating s. 68 "surplus income," bringing down the balance he would be called upon to pay under that standard. Even if that is incorporated, he is still likely not however fully "paid up to October." I have the discretion, which I rarely exercise, to deviate from the calculated s. 68 amount.

[7] Mr. Burns had made other written submissions to the Court in February 2019 and provided a "doctor's note" in March 2019. He was advised that the

matter would have to return to Court. The Trustee filed a proper application on April 11, 2019, which was duly served on the interested parties.

[8] Against this material, I must take into account that this is in fact a fourth assignment, and consider the circumstances surrounding this insolvency and its antecedents.

[9] A fourth bankruptcy strains the quality of mercy.

[10] Mr. Burns' prior bankruptcies were in 1982, 2003, and 2008. His 2016 iteration cites "reduction in income due to retirement" as his reason for filing. He declared just under $31,000 in debt, consisting almost entirely of a significantly "under water" car loan. His Form 65 budget at the time of filing (December 5, 2016) shows $200 per month for smoking.

[11] At the October 2018 appearance, I asked Mr. Burns about the nature of his prior bankruptcies. While he had limited recollection, the thrust of his evidence is that they were the same kind of thing. He would "roll over" or otherwise accumulate auto loan debt on successive vehicles until it became untenable, and then file for bankruptcy.

[12] While the Court recognizes that this type of marketplace activity takes place, it does not make it commercially responsible for anyone, especially on a repeat

basis. I have long found it incongruous that one must (generally) have a "real" down payment (and in high-ratio cases, mortgage default insurance) for a real estate purchase that may be expected to appreciate or at least hold value, while one can easily 100% finance rapidly depreciating personalty (including taxes) and even roll a shortfall into a successor loan. This Court is powerless to stop that, but it can sound the tocsin that when used irresponsibly and repeatedly, and with little regard to serviceability, both creditor and debtor will suffer.

[13] Mr. Burns appears to have engaged in this for at least 34 years. I do not accept that the proximate cause of his 2016 filing was "reduction in income due to retirement," but instead is due to a failure to plan for that part of his life. Perhaps it was not unnatural to do so, when he had been through the process three times before.

[14] Its acceptability under the BIA, however, is a different story.

[15] Even now, I was unimpressed that the insolvency process has brought Mr. Burns' actions home to him. His submissions were about his health limitations, not his financial rehabilitation or reform – a shortcoming which is alarming and unhelpful.

[16] I wrote in *Re Donaldson*, 2019 NSSC 33, and incorporated my recent comments in *Re Ongo*, 2018 NSSC 326, as follows:

> [18] Last month, I released my decision in *Re Ongo*, 2018 NSSC 326 (CanLII), a case involving a 54 year old fifth time bankrupt. Most of my analysis in that case, given the rarity of fifth-time bankruptcies, involved reported fourth time filings.
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> [19] The Donaldsons are much closer to the cases I discuss in *Ongo*, than was Mr. Ongo himself. In particular, their filings were over a period of almost 40 years. They are seniors. Their prospects are limited, by age and health.
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> [20] I said in *Ongo*, supra:
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> > [9] In *Re Boivin*, 2008 BCSC 221 (CanLII), Registrar Blok, while recognizing as do I that "each case....turns on its own facts," summarized the caselaw as follows:
> >
> > > A fourth bankruptcy is a very serious matter. Indeed, even for applications involving third-time bankrupts the courts have expressed reluctance in ordering a bankrupt's discharge, at least not without a lengthy suspension or similarly onerous terms. The reasons for this are aptly captured in ***Re Willier*** (2005), 14 C.B.R. (5th) 130, 2005 BCSC 1138 (CanLII), at paras. 12 and 13:
> > >
> > > > By the time an individual has entered a third bankruptcy, the purpose and intent of the ***Act*** shifts from its remedial purpose of assisting well-intentioned but unfortunate debtors to one of protecting society, and in particular unsuspecting potential creditors. <u>The best intentions and hopes of such bankrupts become subordinated to the need to protect others from the bankrupt's demonstrated financial incompetence, negligence, and carelessness.</u> If there can be a concept of debtors' recidivism, it is demonstrated in stark relief by a third-time bankrupt.
> > > >
> > > > To even consider a discharge for a third time bankrupt the court must be satisfied that the bankrupt has gained sufficient insight and made sufficient changes in his or her life that it is not reasonably possible that further bankruptcy will occur.
> > >
> > > To similar effect is the following, found in ***Re Hardy*** (1979), 30 C.B.R. (N.S.) 95 (Ont. S.C.) at para. 3:

> In my view, a third bankruptcy is one too many. The well-recognized principle underlying bankruptcy law is that a debtor may, in proper circumstances, be relieved of his obligations and enabled to re-establish himself financially. I do not consider that he should be enabled to do so on a recurring basis. The process of the Act and of the court should not be considered to bestow a licence to incur debts and be purged of them at periodic intervals.
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> I am aware of only two other recent cases in this province involving fourth-time bankrupts, both decided by Master Young. In ***Re Kusch*** (2007), 33 C.B.R. (5th) 208, 2007 BCSC 618 (CanLII), the bankrupt was refused a discharge and was denied leave to reapply for a discharge for a period of two years. The learned master commented that on a reapplication she expected that there would still not be an unconditional discharge granted. In ***Re Mulligan***, 2007 BCSC 1784 (CanLII), the bankrupt's discharge was suspended for 15 years, the master emphasizing that society needed to be protected from the bankrupt's incompetent use of credit.
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> [emphasis added]

[10] In bankruptcy freemasonry, this is usually called the "clearing house for debt."

[11] Rephrased for modernity, in *Re Legault*, 1994 CanLII 2996 (BCCA) at para. 31 Madam Justice Southin referred to this as the need to avoid using the insolvency process as a "fiscal carwash". While she was in dissent, the majority agreed with this sentiment at para. 51.

[12] So what of Mr. Ongo? There is no indication, despite the meaningful tax and public debts of his prior bankruptcies, to suggest he is a rogue or dishonest, characteristics which appear in many of the bankruptcy cases in which discharges are refused or subject to stringent conditions. I do note in passing, however, that his 2005 assignment was only discharged in 2011, presumably to pave the way for his fourth assignment the same year.

[13] I interpret the Trustee's assertion that "the other bankruptcies were commercial and this one is not" in a somewhat different fashion than does the Trustee. I interpret it to mean that not only is Mr. Ongo unable to operate within his business' means, but is also unable to operate within his own. The current bankruptcy, as I have said, consists entirely of consumer credit – credit cards, a payday lender, and a (secured) car loan.

[14] In this regard, I have considered the decision of Master Young in *Re Mulligan*, 2007 BCSC 1784 (CanLII), a decision which in turn applied *Willier*.

The Court was dealing with Ms. Mulligan's fourth bankruptcy, all of which were for comparatively modest amounts. She had health issues and at least some of her financial woes came from providing assistance to family members. Despite this lack of moral default, the Court, after quoting the same passage in *Willier* I have repeated above, stated:

> Society does need to be protected from Mrs. Mulligan's incompetent use of credit. I believe her bankruptcies have been for small amounts because it was all that was available to her. I know she does use the credit for family reasons and because of illnesses. I know that she has not lived an exotic lifestyle at all. She said in court before me that she had not had a vacation in recent memory. She has not been cavalier about her credit but still, in all likelihood, her expenses will exceed her meagre income.
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> She has repeatedly shown that she cannot budget within her means, and so I am accepting the recommendation of the Superintendent, and I am suspending the discharge for 15 years. This bankruptcy is unavailable to her now, and she will be forced to live within her financial means.

[15] I accept this reasoning as authority for the proposition that moral taint may be an aggravating factor in determining the circumstances of one's discharge, but the lack of such taint does not preclude the Court from its role in balancing creditor interests with those of the debtor.

[16] *Re Hiebert* 2008 SKQB 153 (CanLII) involved four bankruptcies over 31 years with a 67 year old "kind, generous, and well-intentioned man." Registrar Schwann said:

> As noted above, the test to be applied on a third or fourth bankruptcy shifts from rehabilitating a well-intentioned but unfortunate debtor to one of protecting society generally and unsuspecting creditors in particular. Can society be protected from this bankrupt? Has he gained any insight or committed to change sufficient to forestall a subsequent bankruptcy? Unfortunately, although a seemingly kind, generous and well intentioned man, Hiebert's attitude displayed no remorse, and more to the point, shed no light or insight gained concerning appropriate use of credit and financial management. Quite the contrary, I sense a measure of justification borne of necessity and desperation, that is, credit cards could and should be used to augment income regardless of ability to re-pay.
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> Having regard to the facts, I am not satisfied that Hiebert has gained sufficient insight into proper financial management, budgeting and use of credit, nor am I persuaded that he has made appropriate changes in his life to prevent another bankruptcy from occurring. Regrettably, I conclude that

> the protection of society and unsuspecting creditors can only be achieved by refusing his discharge application.
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> [21] I reiterate the conclusion that a fourth bankruptcy, *in and of itself*, is one to which the Court must pay careful attention in formulating an appropriate and bespoke remedy. This is not a Court of rote any more than it is Justice Southin's "fiscal carwash." The fact that the bankrupts are not rogues is, in itself, an insufficient reason upon which to grant a discharge. A fourth bankruptcy – and fifth insolvency – is a clarion call to systemic integrity and to the Court's role in it.

[17] From this, I reiterate and summarize as follows:

- Each case turns on its own facts and calls for a bespoke disposition.

- Once one is in a third or subsequent bankruptcy, the presumptive emphasis shifts from debtor rehabilitation to creditor protection and system integrity.

- A fourth or subsequent bankruptcy is a "very serious matter" (*Boivin, supra*) and calls for detailed inquiry, including an inquiry into the etymology of the prior insolvencies.

- *Mala fides*, misconduct, or turpitude are relevant in determining a proper disposition, but the lack of such elements do not in themselves entitle a third or subsequent bankrupt to token or no conditions as a prerequisite to their discharge.

[18] I would add the following:

- Repeat insolvencies of the same general nature, particularly overextension of consumer credit, call for a disposition which brings home to the debtor the need for responsibility going forward.

- As a general principle, I do not believe a third or subsequent bankruptcy should be any shorter than a second summary bankruptcy that has surplus income (that is, 36 months), whether or not that third (or subsequent) bankruptcy is one that itself has or is expected to have surplus income.

- When there *is* surplus income, I believe a "3+" bankruptcy should generally have a longer period in which that surplus is paid into and for the benefit of the estate. I believe that absent exigent circumstances, a 36 month insolvency period sends an incorrect message that a third (or fourth, or fifth) bankruptcy is "just like a second except that it has to go to Court." It isn't.

- While retirement may not be inevitable in today's world, ageing is. It is incumbent upon the debtor to realize that it is more likely than not that one's senior income, even without medical difficulties, will be lower than in one's peak years and to look to those days proactively rather than reactively. While one may have empathy for those who do not do so, age in itself does

not get the debtor a "free pass" from the BIA's objects and principles, particularly in what *Willier, supra*, aptly termed a "recidivist" insolvency.

- That said, the debtor is not forgotten simply because s/he is a "third timer" or a "fourth timer." With their obligations still go rights, including the right to get on with their lives after performing the duties imposed by the Act and such additional obligations as may be appropriate to their particular fact situation.

- The statement by the debtor that "the Court is trying to penalise me because I filed bankruptcy 4 time" is wrong. Absent such misconduct as contained in certain (but not all) parts of s. 173(1), or culpable malfeasance under s. 168, 198, *etc.*, the BIA is not a penal statute, nor is it a punitive one; it is a commercial regime which sets out a regulatory framework for "the orderly liquidation of a bankrupt's estate and the distribution of the value of the assets of that estate to the bankrupt's creditors," and – to repeat the classic phrase – to permit "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community." Houlden, Morawetz, and Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act*, ss. A1 and A2.

- It is important that the Court, on a discharge application, has some indication of the debtor's path ahead (*Hiebert, supra*); either through evidence of the repeat debtor's recognition of her or his shortcomings and efforts to address them, or through the Court's own disposition, or a combination of both.

[19] I return to Mr. Burns. I cannot grant an absolute discharge (172(2) BIA) by virtue of Sections 173(1)(a) and especially 173(1)(j). I would not be inclined to do so if I had that jurisdiction, for the reasons set out above; as I have stated, I do not believe the seriousness of these multiple filings has impressed itself upon Mr. Burns' consciousness.

[20] I do not consider a nominal suspension, or other token, to be appropriate here. Mr. Burns demonstrated little to no insight into his financial habits, nor did he provide any basis upon which the Court could be satisfied that he would, as I said in *Ongo, supra*, "sin no more." This is particularly so when all of his bankruptcies (so far as he could recall) were of the same basic nature.

[21] Mr. Burns' application for discharge is based on – his words - "compassionate grounds" alone. However much weight one may put on his battle with the undoubted curse that is advanced cancer – a curse of which I can think of

no spared family and which has aptly been termed "the scourge of the 20th century" - the interests at stake in this case are not Mr. Burns' alone.

[22] Mr. Burns demonstrated no appreciation of that salient fact in October 2018, in his February and March 2019 communications with the Court, or now. I do not consider an absolute discharge at the two-and-a-half year mark to recognize fairly and proportionately the interests of the integrity of the financial and insolvency systems.

[23] However, I must again bear in mind that Mr. Burns is not someone for the Court to "punish," in these circumstances, but instead a person whose legitimate rehabilitative interests and well-being are to be balanced in a fourth bankruptcy against the legitimate interests and well being of his current and "unsuspecting potential creditors" (*Willier, supra*).

[24] I said in *Donaldson, supra,* at para. 27:

> However, that does not mean that I intend to impose a token wag of the finger and an admonition of "don't do it again." I agree with the comments of Hallett, J (as he then was) in *Re Crowley* (1984), 66 NSR (2d) 390 (SC,TD) at para. 69 that an order suspending a discharge, at least as a standalone sanction, "is always meaningless."

[25] This could be one of the *very rare* situations in which a standalone suspension is appropriate and not *completely* devoid of meaning.

[26] I can recall none in which I have issued a standalone suspension, except when an absolute discharge was appropriate but in which the BIA precluded me from so doing – in other words, when I did so out of mere technical compliance with the Act. I do not intend to do so as a substantive disposition on a regular basis, and have routinely refused "suspension alone" recommendations when they would have no more practical effect than an absolute discharge with an asterisked "tut tut."

[27] However, in this instance, I can think of at least two ways in which such a disposition, *on these constrained facts*, could properly balance interests:

- Mr. Burns' stress and health risks can be alleviated, in the sense that most of his BIA obligations, including reportage and possible s. 68 payments, are at an end, but

- Mr. Burns will remain subject to his s. 199 obligation to disclose his undischarged status to "unsuspecting potential creditors" during the suspension period; and that status will remain on his credit report to those making lawful inquiry of it.

[28] In saying this, I particularly bear in mind that the major and virtually only creditor here, an automotive lender, knows its industry. It is well aware that it is

likely unsecured for at least a portion of its advance the minute the key is turned, and takes the corresponding business risk. This is not an instance of a litany of hoodwinked lenders or mom-and-pop businesses being foiled by a reprobate.

[29] I considered whether to order a payment of a sum certain – something below the notional s. 68 balance estimated to be due – as an appropriate disposition. That would remove the uncertainty and reporting elements that cause Mr. Burns his stress and angst.

[30] With some reluctance, I do not do so. I bear in mind that any recovery from Mr. Burns would be limited and would be of proportionately much greater detriment – financially and psychologically – to him than would be the corresponding creditor benefit. While such a payment would not be an inappropriate exercise of my discretion, I strain the quality of mercy to the limit and am not making that part of my order.

[31] Further, I note that Mr. Burns declared no assets other than (exempt) basic household furniture, and the subject automobile. This does not appear to be a situation in which he "creditor proofed" himself with a stash of exempt property.

[32] Finally, I bear in mind that the first insolvency is some 34 years ago; indeed it is, by a couple months, older than our Charter of Rights. This situation is closer

to a "third time plus some history" for practical purposes than to its technical status as a fourth-time. While the BIA does not draw timeline distinctions between filings, I believe the Court can do so when exercising its discretion and determining an appropriate and equitable disposition.

[33] I am therefore – and I state again for emphasis that this is an "exception to prove the rule" – ordering that Mr. Burns' discharge shall be suspended for a period of three years from today's date, meaning that his exit from the bankruptcy process on May 10, 2022 will be approximately five and a half years after his 2016 filing. In these extenuating circumstances, and given the estate's receipts to date (enough to pay the administration fees with a minimal dividend), that is – barely - enough.

Conclusion

[34] The bankrupt's discharge is suspended to May 10, 2022 after which it shall be absolute. The Trustee shall prepare the relevant order for my review.

Balmanoukian, R.