

IN THE PROVINCIAL COURT OF NOVA SCOTIA
[Cite as: R. v. Henneberry, 2002NSPC20]

Date: 2002-05-30
Docket: 998806-998828

HER MAJESTY THE QUEEN

VERSUS

PAUL HENNEBERRY

DECISION

HEARD BEFORE: The Honourable Associate Chief Judge R. Brian Gibson

DATE HEARD: December 3, 2001

PLACE HEARD: Dartmouth, Nova Scotia

CHARGES: 12 counts under S.238(1) of the Income Tax Act.

COUNSEL: David Bright, for the Crown
Kent Clarke, for the Defence

- [1] Mr. Paul Henneberry has pled guilty to 12 counts of failing to comply with the provisions of subsection 153(1) of the *Income Tax Act* by failing to remit to the Receiver General of Canada, money deducted and withheld from salaries, wages or other remuneration paid to the employees of Halifax Regional Protection Services Limited (herein referred to H.R.P.S.). The total sum deducted and unpaid amounted to \$22,069.23. These offences occurred between the dates of February 16, 1999 and January 18, 2000.
- [2] I imposed the minimum fine of \$1000 for each of these offences pursuant to the provisions of subsection 238(1) of the *Income Tax Act*. As part of the sentence, the Crown also sought an order of compliance pursuant to the provisions of subsection 238(2) of the *Income Tax Act*, ordering Mr. Henneberry to make payment of the sum of \$22,069.23 to the Receiver General.
- [3] At the time the 12 guilty pleas were tendered and the fines imposed, there was a dispute between the Crown and Mr. Henneberry regarding the implication of outstanding bankruptcy proceedings in relation to the issuance of a subsection 238(2) compliance order. The matter was adjourned to receive further submissions from counsel for both parties.

- [4] Sixteen days following the tender of guilty pleas and the imposition of the fines in relation to these 12 offences, Mr. Henneberry received a Certificate of Discharge pursuant to the provisions of S.168.1 of the *Bankruptcy and Insolvency Act*, discharging and releasing him from all debts except matters referred to in subsection 178(1) of that Act. Mr. Henneberry, when making the assignment for the benefit of creditors on December 20, 2000 pursuant to the *Bankruptcy and Insolvency Act*, listed Canada Customs and Revenue Agency as one of his creditors and included therein the above-mentioned amount of \$22,069.23 as part of the indebtedness to Canada Customs and Revenue Agency.
- [5] The issue before me is whether I have jurisdiction to issue an order pursuant to subsection 238(2) of the *Income Tax Act* ordering payment of the amount of \$22,069.23 or some part thereof by Mr. Henneberry to the Receiver General and if I do, whether such an order should be made.
- [6] Mr. Henneberry was an officer and director of H.R.P.S. at all times material to these offences. He operated the company with another unnamed investor. The submissions made by defence counsel suggest that Mr. Henneberry was relying upon the accountant and the other investor of H.R.P.S. to meet the requirements of the *Income Tax Act* including the remittance to the Receiver

General of the money deducted and withheld from salaries, wages or other remuneration paid to the employees of H.R.P.S.. The implicit inference to be drawn from those submissions is that either of these two other individuals were at least equally, if not more responsible than Mr. Henneberry for these offences. The Crown did not contest this Defence submission relative to the facts and circumstances surrounding the offences. The evidence and submissions, however, did not reveal whether the accountant or investor were officers, directors or shareholders in H.R.P.S.

[7] It is the Crown's position that:

- 1) The authority of the Court to make a subsection 238(2) *Income Tax Act* compliance order is unaffected by the bankruptcy proceedings because these offences are quasi-criminal matters and the order sought is part of a sentence for these offences;
- 2) That the unremitted employee deductions represented money held in trust and thus were not an indebtedness as contemplated by the *Bankruptcy and Insolvency Act*;
- 3) That the ability of Mr. Henneberry to pay is irrelevant.

[8] The Defence position is that:

- 1) The amount of \$22,069.23 is an indebtedness to which the *Bankruptcy and Insolvency Act* proceedings were applicable;
- 2) That it is incumbent upon the Crown to establish that the amount sought by way of a compliance order is an indebtedness as defined in subsection 178(1) of the *Bankruptcy and Insolvency Act* and thereby unaffected by an order of discharge;
- 3) That the Crown has failed to establish any one of the three conditions or circumstances set out in subsection 227.1(2) of the *Income Tax Act* which, it is submitted, must be established prior to issuing a compliance order.

[9] I conclude that a subsection 238(2) compliance order falls within the definition of “any fine, penalty, restitution order or other order similar in nature to a fine, penalty or restitution order imposed by a Court in respect of an offence...” as set out in subsection 178(1)(a) of the *Bankruptcy and Insolvency Act*. Such matters are unaffected by an order of discharge under that Act. Therefore, the court’s jurisdiction to make an order pursuant to subsection 238(2) of the *Income Tax Act* is unaffected by the bankruptcy proceedings and the certificate of discharge arising therefrom in respect of Mr. Henneberry.

[10] I am not persuaded that the unremitted deductions represented money held in trust by Mr. Henneberry. That money was held in trust by H.R.P.S. Mr. Henneberry's liability for the failure of H.R.P.S. to remit that money, and thus become a party to the offences as described in subsections 153(1) and 238(1) of the *Income Tax Act*, is found in Section 242 of the *Income Tax Act*. As an officer or director of H.R.P.S., and thus a directing mind of that corporate entity, Mr. Henneberry had a responsibility to ensure that the money deducted and held in trust by H.R.P.S. was remitted to the Receiver General.

[11] The primary purpose of subsection 227.1(1) of the *Income Tax Act* is to specifically make the directors of a corporation financially liable for the failure of the corporation to comply with Section 153 and other provisions of the *Income Tax Act*. Subsections 227.1(2) and (3) specify limitations upon and thereby by implication potential defences to such liability. I conclude that the limitations and defences to the liability as a director may also be raised by a director or officer of a corporation in relation to the offence liability provisions found in Section 242 of the *Income Tax Act*. However, the guilty pleas tendered by Mr. Henneberry to these 12 offences represent either a waiver or an acceptance that these defences and limitations did not apply to his liability under Section 242 of the *Income Tax Act* as

a party to these offences nor to the sentence to be imposed pursuant to the provisions of Section 238. These limitations or defences found in subsection 227.1(2) and (3) cannot now be raised in relation to the sentence. Expressed in another fashion, the Crown, in light of Mr. Henneberry's guilty pleas, need not establish the existence of the matters set out in subsection 227.1(2) of the *Income Tax Act*.

[12] I conclude that a subsection 238(2) order is discretionary. The issue therefore is whether I should exercise my discretion and direct a subsection 238(2) compliance order. In the course of determining the manner in which I should exercise that discretion, I conclude that the ability to pay by Mr. Henneberry is a relevant factor to consider.

[13] It has been submitted that Mr. Henneberry is currently a person of relatively limited financial means with limited employment prospects. However, in the submissions made by Defence counsel it was stated that Mr. Henneberry was relying upon an investor of H.R.P.S. and/or the accountant of that company to make the deductions and necessary remittances to the Receiver General. That suggests that Mr. Henneberry may have a right to seek recovery or contribution

from these two individuals. No submissions were made as to the identity of these individuals, the office, if any, that they held in H.R.P.S., their financial circumstances nor the prospect of recovery from them.

[14] In the course of further assessing the ability of Mr. Henneberry to pay, I have noted that he listed on the Assignment made to creditors in the bankruptcy proceedings, liabilities of \$250,053 and \$0 assets. The liability of \$250,053 includes an indebtedness of \$247,841 to the Canada Customs and Revenue Agency. No evidence or facts were presented as to how this amount of \$247,841 was expended or utilized rather than being remitted to Canada Customs and Revenue Agency. Such a large indebtedness to Canada Customs and Revenue Agency suggests that there was a significant stream of income flowing, in large part to Mr. Henneberry, for some undefined period of time. More information as to how that stream of income was expended may have been of some assistance in the course of exercising my discretion to not impose a subsection 238(2) compliance order.

[15] I note that the Information charging Mr. Henneberry with these 12 offences, lists his birth date as March 3, 1962. If that date of birth is correct, the accused

would be 40 years of age and I would infer in light of any evidence to the contrary that his future prospects for employment and to earn income are likely quite good. I believe that I require something more than a submission that Mr. Henneberry's current employment prospects are not good as the sole basis upon which to exercise my discretion to not grant the order sought by the Crown under subsection 238(2).

[16] In conclusion I order, pursuant to the provisions of subsection 238(2) of the *Income Tax Act* that Paul Henneberry comply with the provisions of Section 153 of the *Income Tax Act* and pay the sum of \$22,069.23 to the Receiver General on or before September 5, 2002. That date was the due date set for the payment of the fines. I am prepared to hear counsel, upon application, prior to that date to extend the due date of the foregoing payment.

R. Brian Gibson
Associate Chief Judge