

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: Yould (Re), 2010 NSSC 351

Date: September 22, 2010

Docket: B 26796

Registry: Halifax

District of Nova Scotia
Division No. 02 - Truro-Pictou
Court No. 26796
Estate No. 51-733124

In the Matter of the Bankruptcy of David Albert Yould

DECISION

Registrar: Richard W. Cregan, Q.C.

Heard: July 23, 2010

Present: David Curtis, Q.C., representing the bankrupt,
David Albert Yould.

Francyne Hunter and Mike Chisholm representing the
Office of the Superintendent of Bankruptcy.

Paul Goodman representing the Trustee, BDO Canada
Limited.

- [1] The bankrupt, David Albert Yould, made an assignment in bankruptcy on March 19, 2004. He now asks the court to grant him his discharge. He is 78 years of age. He lives with his wife at Shortts Lake near Truro.

- [2] In 1951 he commenced employment in his father's business, Yould's Book Store & Stationery Store, in Truro. He took over the business on the death of his father in 1976. The business was well established but with time faced more and more competition as other businesses such as drug stores started to have similar product lines. The competition became even more intensive when a "box store" carrying stationery products opened in Truro. Mr. Yould's efforts to meet this competition were not successful. With the support of his bank, the Royal Bank of Canada, he proceeded to wind up the business. This left him with significant unpaid debts. He realized that he could not earn income to address these debts, so he made an assignment in bankruptcy.

- [3] Goodman Rosen Inc. was appointed as his trustee. Paul Goodman was the trustee personally responsible. BDO Goodman Rosen Inc. was substituted as trustee. It was discharged on March 2, 2009.

- [4] An application had been made on January 14, 2005 for his discharge but was adjourned *sine die*. The application was renewed on May 22, 2008, but was again adjourned *sine die* and remained adjourned until this hearing.
- [5] The reason for these adjournments has been that Mr. Yould has refused to make full disclosure to the trustee regarding the use of approximately \$132,000 of tax refunds received by him during the month prior to his assignment in bankruptcy. There was a criminal investigation respecting this money, charges laid, a plea of guilty to one and a probation order issued.
- [6] Mr. Goodman's account is that after becoming trustee he had a conversation with an officer of Revenue Canada who mentioned that Mr. Yould had recently received a tax refund of approximately \$132,000. This had not been reported to Mr. Goodman during his pre-assignment questioning of Mr. Yould. He says that, when he confronted Mr. Yould, Mr. Yould said that he had given the money to his wife. This did not ring true.
- [7] After further inquiry Mr. Yould admitted that he used the bulk of the money to pay off a substantial loan. He insisted that to reveal who the lender was

would put him and his family at great risk. He continues to refuse to disclose this person's identity. Simply put, it appears that he out of desperation had borrowed money from a loan shark. Out of fear he made a preference to this person and has believed that disclosure by him of the identity of this person would result in illegal enforcement procedures against him and his family.

- [8] The matter was referred to the RCMP commercial crime department. This resulted in him being charged on several counts. The resolution was that he pleaded guilty in Provincial Court to failing to give disclosure contrary to 198(2) (b) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*). A Probation Order was issued against him which directed among other things that he:

comply with all duties under section 158 of the *Bankruptcy and Insolvency Act* including disclosure of the facts relating to any transfer of money or property as required by the trustee, Paul Goodman.

- [9] The question before me is whether in the circumstances continued refusal to make this disclosure should be an impediment to his discharge from bankruptcy. I do not see that the status of his compliance or non compliance

with the Probation Order is of any consequence with respect to this question.

[10] Mr. Yould's counsel submits that I have authority to discharge him without him making this disclosure and that he should be discharged unconditionally.

[11] The Superintendent on the other hand insists that disclosure must be a condition of his discharge.

[12] Mr. Goodman does not make any recommendation.

[13] No creditor is opposing Mr. Yould's discharge. This is particularly significant in that of his total unsecured debts of \$648,695.47, \$523,966.89 is owed to the Royal Bank of Canada.

[14] Can Mr. Yould claim that he is justified in refusing to make disclosure because of his fear of what might happen to him or his family if he did?

[15] He has not provided the court with any detail as to the basis of his fear

except to say that he was dealing with an “unsavory character” whom he must assume operates with illegal enforcement procedures.

[16] Ms. Hunter said she was suspicious of Mr. Yould’s account of his situation. Well she may be, but she did not take the opportunity to cross examine him. I had expected she would put him to the test and have something before the court by which the soundness of his fear could be assessed. I made a comment early in the hearing that I was assuming she would be cross examining Mr. Yould. As he was not put to the test of cross examination, I must take Mr. Yould at his word and accept that his fear is well founded.

[17] No authority has been put to me nor have I found any which would require me to impose a condition of discharge on him which could endanger his life or that of the members of his family.

[18] In coming to this conclusion, I take some encouragement from the defense of necessity in criminal law. One may have this defense to a criminal charge where one is confronted with a choice between one thing and another and chooses the one that constitutes a criminal offence, e.g. stealing a loaf of

bread rather than starving. There are many qualifications to this defense. I need not go into any detail.

- [19] Mr. Yould has chosen to breach his responsibility under the *BIA* by not identifying the lender. He has an honest belief which I accept that, if he does otherwise, his safety and that of the members of his family are in danger. He is like one who decides to steal a loaf of bread rather than starve.
- [20] As such a defense may be available in the criminal law, I suggest that it may be available in answer to his refusal to perform his duty of disclosure.
- [21] There is an analogous relationship between the criminal law and the *BIA*. The defense of necessity in the criminal context is reviewed in Alan W. Mewett and Morris Manning: *Criminal Law*, 3rd edition, beginning at page 530.
- [22] I should point out that I am only invoking the criminal law to find out how it might deal with this problem and apply one of its defenses to what is properly before me by way of analogy.

- [23] Nothing I say should be taken as a commentary on or to the prejudice of the criminal sanctions which were imposed on Mr. Yould or to what may in the future be done about them.
- [24] One might ask the question of what will be gained for the benefit of the creditors, if he makes this disclosure. Mr. Goodman addressed the court on this point. His firm or another trustee will have to be appointed as trustee. An assessment will have to be made whether it will be cost effective to take action to reverse the preference payment. If no action is taken, it is open to a creditor to take over under Section 38 of the *BIA*. It is most unlikely that a creditor will do so. None of them appeared at this application. I do not see that this question has any bearing on what I must decide.
- [25] As said above, I accept that Mr. Yould's fear is genuine. His situation is analogous to one who raises necessity as a defense in a criminal matter. He balanced his and his family's safety against doing his duty for the benefit of his creditors. He should not be required to disclose this person's identity as a condition of his discharge.

[26] However, I am concerned that he was much less than honest with his trustee. He did not tell the trustee of this payment. When found out he tried to deceive the trustee. The truth made its way out. It would have been better had he made proper disclosure from the start, even if he refused to identify the lender.

[27] The integrity of the bankruptcy system presuppose that bankrupts be honest with their trustees in return for the benefits they receive. This lack of honesty on his part cannot be excused. I recognize that this matter has gone on for over six years and there have been criminal penalties imposed, but I think that it still falls to me to express disapproval of what happened.

[28] Mr. Yould is entitled to be discharged from bankruptcy without conditions, but this entitlement is suspended until September 1, 2011.

R.

Halifax, Nova Scotia
September 22, 2010