CANADA
PROVINCE OF NOVA SCOTIA
COURT NO: 23659
ESTATE NO: 087332

IN THE SUPREME COURT OF NOVA SCOTIA

IN BANKRUPTCY

IN THE MATTER OF THE BANKRUPTCY OF

ELIZABETH MARIE COLE

D E C I S I O N

Cite as Cole (Re), 2001 NSSC 204

HEARD BEFORE:	Tim Hill, Registrar in Bankruptcy
DATE HEARD:	June 4, 2001
DECISION:	August 27, 2001
COUNSEL:	D. Bruce Clarke representing the Trustee, Goodman Associates Inc. Siobhan Doyle representing the Bankrupt, Elizabeth Marie Cole Bob Morrison, representing Canada Customs and Revenue Agency

Introduction

On April 9th I rendered a decision in which I concluded that the discharge of this bankrupt would not prevent the trustee from applying for an order at a later date pursuant to section 68 of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3, as am: *Re Cole (Bankrupt)* (2001), 193 N.S.R. (2d) 242.

The trustee nevertheless has objected to the bankrupt's discharge.

Factual Background

Elizabeth Cole is a medical doctor. She is divorced and has two children, aged 15 and 13. One child is apparently quite a scholar, and has a full scholarship to a very respected private school. The other child has health problems which have contributed to a degree to the situation Dr. Cole now finds herself in.

Dr. Cole originally practised medicine as a family doctor in Newfoundland. Her difficulties appear to have begun in the mid 1990s. The illness of her son, coupled with the demands of her practice, necessitated her hiring someone to look after him for a good deal of the time. She testified that in one year she spent $30,000 for this purpose. The problem was further compounded when she herself was hospitalized and the son required 24 hour care. She was hospitalized as she was suffering from fibromyalgia, a connective tissue disorder. She was also suffering from a major depressive disorder. She had little support from her former husband. He was obliged to pay child support in the amount of $400 per month and was often behind in the payments. During this period, her brother died and this had a significant effect on her ability to cope. Her remaining family was small, and she got little assistance and essentially bore all these burdens on her own shoulders.

Doctor Cole got behind on her income tax. Between 1994 and 1999 she incurred an income tax debt of $250,000. About half of this was the actual debt, and the other half consisted of fines and penalties. She either did not file returns, or filed late. She pleaded guilty to a charge of failing to file. After she moved to Nova Scotia, in 1998, payments from Nova Scotia Medical Services Insurance were garnisheed by the Canada Customs & Revenue Agency ("CCRA").

Dr. Cole testified that she was attempting to address this debt by working extra hours whenever possible. Her income did increase when she came to Nova Scotia. She was in the process of attempting to make some arrangement with CCRA when the next

disaster overtook her.

On December 6, 1998, Dr. Cole was involved in a motor vehicle accident. As a result of this accident she has not been able to continue working, except for a very brief interlude. A number of people were hurt, and Dr. Cole may not recover her full entitlement of damages because of insurance limits. She has had eight surgical operations performed on her since the accident and more are scheduled. She may not work again. She is in constant pain and requires medication. She has nerve blocks performed regularly to help alleviate the pain. She has to have physiotherapy, aqua and massage therapy. From time to time she sees an occupational therapist. She sees her family physician regularly. Her ability to obtain all this treatment, and travel the distances necessary to keep appointments, is severely prejudiced by her lack of an adequate income. She has no automobile, and relies on public transport or friends. When she made her assignment, Dr. Cole agreed to contribute $1,602 to the estate to pay the trustee's "fees". She has only paid an initial amount of $300.

Dr. Cole lives in a state of constant deficit. She has applied for total disability benefits from the Canada Pension Plan but those benefits were denied. An application has been filed asking that the decision to deny be reconsidered. As yet there is no result from that application. For the present, Dr. Cole and her two children live on a total of some $1,350 per month. This is made up of $560 in no fault income replacement benefits from her automobile insurance policy, $387 in family benefit payments, and $400 in child support payments from her ex-husband. Her income is far below the standards established by the Superintendent of bankruptcy under section 68(1) of the *Bankruptcy and Insolvency Act*.

Dr. Cole has survived more trials and tribulations than most people will face in a lifetime. As a witness she impressed me as being frank and forthright. It is difficult not to sympathize with someone who has suffered such outrageous fortune.

Decision

As conceded by the trustee, the disposition of the potential damage award insofar as it relates to lost income has no relevance on this application. If necessary, the trustee will make a further application under section 68. Should Canada Pension Plan or other payments on account of income ultimately be approved, the same application may be necessary unless the trustee and the bankrupt can otherwise resolve upon what is required to be paid to the estate. Section 68 provides a mechanism to deal with

these issues which are not now before me. In *Re Laybolt* (July 16, 2001), File B23814 [Unreported] this court commented on the procedure under section 68 in circumstances where, as will likely be the case here, a bankrupt is in receipt of income attributable to both the pre-assignment and post-assignment periods. The trustee should follow the procedure set out in that decision when the issue arises.

The trustee in oral argument and in the brief filed relies as a justification for the imposition of a conditional order on the fact that Dr. Cole has substantial income tax debts, and that she has failed to live up to her agreement to pay the trustee "fees".

Trustee's "Fees"

As to the relevance of the fact that the trustee's "fees" have not been paid, I would repeat the following comment recently made by this Court in *Re Weatherbee* (April 9, 2001), File B23583 [Unreported], at p.4:

> This Court will not read into the BIA provisions which do not exist. Where the trustee is simply objecting for the purpose of obtaining a fee, the Court will, in appropriate cases, make a conditional order. However, those circumstances will only involve a situation where considering solely the need to leave the bankrupt with adequate income to sustain himself or herself a conditional order is justified. This does not mean that in every case where the bankrupt's income falls moderately below the Superintendent's Guidelines an order will not be made. Certainly in borderline cases the Court may well exercise its discretion and order conditional payments, as has occurred in the past. However, such orders should be the exception rather than the rule, and a trustee should not rely on the Court making orders in circumstances where the bankrupt's income clearly does not justify conditional payments.

Following the hearing of this matter the trustee brought to my attention the decision of Registrar Bray in New Brunswick in *Re Pelletter* (May 14, 2001), File N.B. 8637 [Unreported] where the Registrar approved a fee agreement entered into after bankruptcy with a trustee by the bankrupt, and refused to order repayment of monies

collected from the bankrupt by the trustee notwithstanding the bankrupt's income being below the Superintendent's guidelines. That decision in my view is not in accord with the approach of the Manitoba Court of Appeal in *Re Berthelette* (1999), 174 D.L.R. (4th) 577, 138 Man. R. (2d) 109, 202 W.A.C. 109, [1999] 11 W.W.R. 67, 11 C.B.R. (4th) 1, and the approach this court has taken in *Re Hynes* (2000), 187 N.S.R. (2d) 394, 20 C.B.R. (4th) 98 and *Re Weatherbee*. I decline to follow *Re Pelletter*.

This bankrupt's income taken alone is so low as to, in ordinary circumstances, dictate that no conditional order for payments be made. However, the trustee argues that in this case I should make a conditional order in at least the amount of the trustee's "fees". In the words of the trustee, such is necessary to "maintain the integrity of the bankruptcy system". I do not agree, and see nothing to distinguish this case from *Weatherbee.*

The Income Tax Debt

The trustee suggests that given the substantial income tax debt a conditional order is called for, or that I should adjourn the discharge to some date at which I would be better able to determine what income Dr. Cole will enjoy in the future.

Given all the arguments put forward by the trustee at the hearing, I think it necessary to address the following issues:

1. Is an adjournment appropriate so has to enable the Court to assess the bankrupt's income in light of circumstances as they may develop;
2. Should I consider the potential existence of an exempt asset in determining what if any payment to order as a condition of discharge;
3. Should I impose a conditional payment given the debt for income tax, and should such a condition be imposed not withstanding Dr. Cole's present inability to pay?

1. **Is an adjournment appropriate so has to enable the Court to assess the bankrupt's income in light of circumstances as they may develop?**

To my mind the simple answer is no. I see no benefit in delay where, as here, the

trustee has the ability to apply for an order under section 68 should circumstances warrant. This is not to categorically state that in no circumstances would delay be inappropriate. The Court will always be at liberty to exercise its discretion as appears just and proper. Here I see no merit in delay. A mechanism exists to deal with any "income" issues that may arise.

2. **Should I consider the potential existence of an exempt asset in determining what if any payment to order as a condition of discharge?**

This is an interesting question, and one that I have dealt with before.

In *Re Etter*(1997), File B20390 [Unreported], the bankrupt owned an exempt asset in the form of an R.R.S.P. This court declined to make a conditional order for payment based on the existence of that exempt asset.

In the case at bar, the question is further complicated by the fact that the exempt asset is not yet in existence, the "asset" being the ultimate award to be received by the bankrupt in her personal injury action for general damages for pain and suffering. I take it as beyond doubt that a claim for injury to the person does not pass to the trustee upon an assignment in bankruptcy and that in this sense the proceeds of such a claim constitute an exempt asset: *Wilson v. United Counties Bank*, [1920] 1 A.C. 102, 88 L.J.K.B. 1033, 122 L.T. 76.

In *Re Mackinnon* (1991) 3 C.B.R. (3d) 219 (N.S.S.C.) my predecessor as Registrar dealt with an exempt R.R.S.P. asset valued at $30,000.00. He commented (at p. 222):

> I find that the subject R.R.S.P. is an asset which is not available for division amongst Mr. MacKinnon's creditors, and, accordingly, I will consider it and give it proper weight in determining the appropriate type of discharge which should issue.

Notwithstanding this comment, the ultimate order was for monthly payments as a condition of discharge, which payments were almost exactly equal to the bankrupt's monthly "disposable" income.

The same registrar dealt with the issue again in *Re Rogers* (1993), 18 C.B.R. (3d) 239 (N.S.S.C.) and, while he cited his decision in *MacKinnon*, it is difficult to conclude

that it paid much if any part in the court's ultimate disposition of the case.

In *Re Kresse* (1997), 45 C.B.R. (3d) 36 (Sask.Q.B.) the court dealt with bankrupts who were not only dishonest but also blessed with income substantially over the Superintendent's Guidelines. The order made was justified simply on the basis of the excess income.

In *Nelson (Trustee of) v. Nelson* (1995), 33 C.B.R. (3d) 292 (Sask.Q.B.) the court ordered the bankrupt to pay $75,000.00 over three years. He had $180,000.00 in exempt R.R.S.P.s and the family homestead was exempt in the amount of $32,000.00. The bankrupt had the ability to raise the funds by mortgaging the homestead.

In *Re Larocque* (1982), 38 O.R. (2d) 385, 43 C.B.R. (N.S.) 24, [1982] I.L.R. 1-1576 (S.C.) the court commented (at p. 28 C.B.R.):

> It seems to me that, if the asset is not available for division amongst creditors, it should not necessarily be made available by imposing a condition on discharge. I consider that the discharge application shall be treated as all other applications and an effort made to balance the interest of the creditors and the bankrupt in light of all the circumstances. The bankrupt ought to be put in the position of being able to discharge his debts and start anew.

The asset in question was capable of liquidation and the court found some monetary contribution was appropriate.

As I noted in *Etter*, absent some compelling reason, a bankrupt should not be required to liquidate or otherwise make available for distribution to creditors an asset which by virtue of legislation is exempt. If Parliament has seen fit to exclude such assets from distribution it should not be the courts' function to circumvent that intention. The same may not apply where, as in this case, the asset in question is not normally considered by the courts to be divisible amongst creditors for policy reasons rather than as a result of an expressed legislative intent.

In this case I find that I need not consider whether or not compelling reasons exist to consider making the damage award available to creditors through a conditional order.

All the evidence before me indicates that such an award may be a long time in materializing, and there is no indication of the quantum. The asset is not now in existence, and may never exist. On this basis alone I should decline to consider its existence as a factor when determining whether a conditional order should be made.

3. Should I impose a conditional payment given the debt for income tax, and should such a condition be imposed not withstanding Dr. Cole's present inability to pay?

As noted by Houlden & Morawetz, *The 2001 Annotated bankruptcy and Insolvency Act*, at p.641, cases dealing with income tax arrears in bankruptcies prior to November 30, 1992 (the date when income tax debts ceased to have preferred status) should now be treated with caution. Nevertheless, the principles in those cases still have general merit where now, as was the case then, there is a strong argument in favour of a modified approach on discharge.

Where there is a very significant debt outstanding in respect to income tax it is my view the Court should always start from the guiding principal that a debt for income tax is a debt owed to all the members of the public of Canada. It should therefore be treated in a different category to other debts because of the nature of the income tax obligation, and because everyone in Canada must share the income tax burden. In my mind, the fact that Parliament has seen fit to amend the *Bankruptcy and Insolvency Act* so that debts for income tax are no longer preferred does not alter this fundamental proposition.

When considering what conditions, if any, to impose where there is a significant income tax debt, the Court should review a number of factors. These include:

> a. Whether the bankruptcy came about as a result of an unhappy "accident", or whether there has been a persistent ignoring of the income tax obligation: *Re Steward* (1991), 4 C.B.R. (3d) 240 (B.C.C.A.) ; *Re Kritzinger* (1991), 6 C.B.R. (3d) 157 (B.C.S.C.);
>
> b. Whether or not the purpose of the bankruptcy was to escape the income tax obligation: *Re Steward* (*supra*) ; *Re Kritzinger* (*supra*);
>
> c. The personal circumstances of the bankrupt at the time of discharge,

that is, the bankrupt's ability to contribute towards a conditional order: *Re Somers* (1994), 28 C.B.R. (3d) 140 (Ont. C.J.);

d. Whether the bankrupt's present lifestyle is such that the Court can conclude that the bankrupt is attempting to maintain a high standard of living at the expense of his or her creditors: *Re Somers* (*supra*)

I would also add that it is important to consider whether the bankrupt has since the bankruptcy continued to ignore the obligation to pay income tax, or whether the bankrupt has learned from the previous error and maintained his or her income tax obligation up to date.

Applying those considerations to the present case I find:

a. Dr. Cole persistently ignored her income tax obligation. Her personal circumstances at the time provide some explanation if not excuse for this;

b. It is clear to me that the primary purpose of this assignment in bankruptcy was to escape the income tax obligation, she being quite unable because of her circumstances to ever meet the obligation;

c. The personal circumstances of Dr. Cole are such that she would be quite unlikely to be able to meet a conditional order for even modest payments;

d. There is no evidence before me that Dr. Cole has an extravagant lifestyle, and much evidence to indicate that her lifestyle is modest in the extreme;

e. There was no evidence to indicate that Dr. Cole is not paying whatever income tax is required on her present modest income.

Should I impose a conditional order notwithstanding Dr. Cole’s present inability to pay?

Conditional orders for discharge can and should be made where there is a present

ability on the part of the bankrupt to make a contribution to the estate. The cases are difficult to reconcile where the making of a conditional order would leave the bankrupt, if he or she complied with the order, with insufficient income to sustain his or her family.

In *Re McLeod* (1995), 37 C.B.R. (3d) 63 (Man.Q.B.) the Registrar commented (at p. 70, 71):

> I am not persuaded, however, that the court must apply the Superintendent's guidelines slavishly in determining an appropriate financial condition. I am satisfied that the court may exercise its discretion in the appropriate circumstances to impose a greater financial condition where the conduct of the bankrupt warrants it and similarly, the court may impose a lesser financial condition in the appropriate circumstances.
>
> (Emphasis added)

In *McLeod* a condition was imposed, the bankrupt not being characterized as being honest or unfortunate.

In *Lambert v. Prince Rupert Fishermans' Credit Union* (1991), 6 C.B.R. (3d) 136 (B.C.C.A.) the court imposed a substantial condition notwithstanding the bankrupt's modest income where:

> The condition proposed by the Respondent, i.e. a consent to judgment in the amount of $50,000.00 is onerous. But the Appellant's conduct was such that to fix a lesser sum would be to condone dishonesty (at p.140).
>
> (Emphasis added)

In *Re Rabbah* (1993), 17 C.B.R. (3d) 53 (Ont. C.J.) the court imposed a condition requiring the impecunious bankrupt to consent to a substantial judgment, commenting that to do otherwise would allow the public to conclude that the court "...has placed a imprimatur upon her deceitful conduct" (at p. 58).

Where a bankrupt is guilty of conduct worthy of sanction a court may impose a

substantial financial condition on an application for discharge even where the individual demonstrates no reasonable prospect of being able to pay in the future. In those circumstances the condition imposed usually involves giving the bankrupt the option of consenting to judgment, as to do otherwise would in many cases sentence the bankrupt to a life in bankruptcy. The conduct to be worthy of such a sanction must be capable of being characterized as wilfully wrong or dishonest. The bankrupt will be discharged on consenting to the judgment. The judgment may never be paid. The court has, however, imposed a sanction.

Where a court considers discharge orders it is well to have in mind the comment of the court in *Re Hoffman and Hoffman* (1984), 53 C.B.R. (N.S.) 146 (Ont.S.C.), at p. 148:

> I desire to add only in this connection that however much concern I have for the creditors, and I have much on every application such as this, on the evidence before me no order for payment could be made without reducing these bankrupts to a degree of penury which is not to be contemplated by the process of this court.

I will not impose a requirement that Dr. Cole make period payments as a condition of discharge as to do so would, if Dr. Cole complied with such an order, reduce her and her children to a state of poverty this court is not prepared to demand.

I cannot characterize Dr. Cole's prior conduct as wilfully wrong or dishonest. She allowed herself to be distracted from her obligation to pay income tax, but in circumstances which were certainly unusual and most unfortunate. She is to my mind the honest but unfortunate debtor the *Bankruptcy and Insolvency Act* is intended to aid. I will not impose an order requiring Dr. Coles to consent to a judgment as a condition of discharge.

It seems to me that the creditors may well still benefit from this estate when, and if, funds become available under section 68. Unfortunately that will be all that is available.

The application for discharge is granted, without conditions. I am satisfied that Dr. Cole has met the burden under section 173(1)(a) of the *Bankruptcy and Insolvency*

Act, and the discharge shall therefore be absolute. I would caution Dr. Cole and remind her that this is not the end of the matter. I have made it clear that the obligation under section 68 continues, and I remind her that this includes an obligation to report promptly to the trustee any income she receives attributable to either the pre-bankruptcy or post-bankruptcy period. I would also draw her attention to section 180(1) of the *Bankruptcy and Insolvency Act* and the ability of the court to revoke this order in appropriate circumstances.

Dated at Halifax, Nova Scotia this 27th day of August, 2001.

_____

Registrar in Bankruptcy