

CANADA  
PROVINCE OF NOVA SCOTIA  
COURT NO: 23070  
ESTATE NO: 087668

**IN THE SUPREME COURT OF NOVA SCOTIA  
IN BANKRUPTCY  
IN THE MATTER OF THE BANKRUPTCY OF**

**TYLER HUGH COLWELL**

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DECISION

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Cite as Colwell (Re), 2001 NSSC 205

HEARD BEFORE: Tim Hill  
Registrar in Bankruptcy

DATE HEARD: June 4, 2001

DECISION: July 16, 2001

COUNSEL: Paul Goodman, Goodman & Associates, Trustee  
Charles Ford, representing the Bankrupt  
Bruce Gillis, representing John Kelleher  
the objecting creditor.

This is an application for discharge. The bankrupt would have been entitled to an automatic discharge as a first-time bankrupt absent the opposition to discharge filed by a creditor, John P. Kelleher.

The grounds of opposition filed by Mr. Kelleher may be summarized as follows:

1. That the bankrupt misstated his assets and disposed of assets immediately prior to bankruptcy;
2. That the bankrupt failed to comply with undertakings to produce documents given at an examination pursuant to an order obtained under section 163(2) of the *Bankruptcy & Insolvency Act*, R.S.C. 1985, c. B-3.

At the hearing of the matter I had the benefit of the trustee's report filed pursuant to section 170 of the *Act*. As well, counsel for Mr. Kelleher examined the bankrupt.

I find that there is no evidence before me that would allow me to conclude that the bankrupt misstated his assets or disposed of assets immediately prior to bankruptcy. This leaves me with the issue of the undertakings.

I find that compliance with the one of the undertakings was imperfect or incomplete. I am satisfied that the bankrupt complied with the other undertakings insofar as he was able or they were relevant to the bankruptcy proceeding. The undertaking not complied with involved the provision of copies of the records of the bankrupt's sole proprietorship. These records should in any event have been supplied to the trustee and the bankrupt should now forward same to the trustee who will make them available to Mr. Kelleher for his review.

I digress to note that prior to the bankrupt's assignment he and one Aaron Colwell had been sued by Mr. Kelleher over a dispute involving logging on Mr. Kelleher's property. Apparently Mr. Kelleher and the bankrupt had at one time engaged in pugilism as they discussed their differences, no doubt to their mutual discomfort, and Mr. Kelleher in his suit claimed against the bankrupt for breach of contract, trespass, conversion and upon other grounds. This action was stayed by the bankruptcy.

It is fairly obvious that Mr. Kelleher feels that the bankrupt has misstated his assets and disposed of some of those assets, but I cannot act on conjecture but can only rest my decision on a foundation of fact. As I have indicated, there was no evidence before me that would allow me to conclude that the bankrupt misstated or disposed of assets.

The trustee's report, and the bankrupt's evidence, indicate that the bankrupt is a single person with a net income of approximately \$890.00 per month. Applying the Superintendent's Guidelines established pursuant to section 68(1) of the *Act* I see no justification to make a conditional order for payment. Given the imperfect compliance with the undertakings should I impose some other condition?

The question is in a sense moot as I must either impose a condition or suspend the discharge. The bankrupt failed to satisfy me that the fact that his assets did not equal fifty percent of his unsecured liabilities arose from circumstances for which he should not justly be held responsible: section 173(1)(a). An absolute discharge is therefor not

available: section 172(2).

In my view the failure to comply with the undertaking given at the section 163(2) examination constituted a failure to comply with an order of the court and thus section 173(1)(o) applies. On that basis also an absolute discharge is also not available. The order in question was made by Richard, J. on October 3, 2000. It included a requirement to produce the type of records in question. Having failed to produce those records at the actual examination the only way to comply with Justice Richard's order would be to undertake to produce and then make production. This last step being unfulfilled, the order has not been complied with.

In *Re Chomicki*(1971), 16 C.B.R.(N.S.) 250 (B.C.S.C.) the court commented (at p. 253):

The duties imposed upon bankrupts are set out in s.129. In my opinion the giving of false answers under examination - whatever else may be said about it - is not a failure to perform a duty imposed under this section or, indeed, under any other provision of the statute.

This is a startling notion. Section 158(j) of the *Act* requires a bankrupt to submit to examinations under oath as may be required. This is a clear duty. In my view, a failure to answer truthfully or in any way else to fully comply with that duty is a breach of the statutory obligation. I would therefor respectfully disagree with the view expressed by the court in *Chomicki*, preferring the broader view of a bankrupt's duties implicit in the Ontario decision *Re Henderson*(1997), 45 C.B.R.(3d) 146 (Ont.Gen. Div.) where the court opined that the fact a bankrupt failed to disclose records to a trustee was a provable fact under section 173(1). In short, if a duty exists full compliance is the rule. No records, false records or false testimony should never be considered sufficient to refute a finding of non-compliance. Here no records have been produced and thus the statutory duty to submit to examination has not been fully complied with.

It will be a condition of the bankrupt's discharge that he produce the records of his sole proprietorship. If there is any issue as to the adequacy of compliance the parties may apply to me to settle the question.

A conditional order of discharge shall issue.

Dated at Halifax, Nova Scotia this 16<sup>th</sup> day of July, 2001.

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Tim Hill  
Registrar in Bankruptcy