

IN THE SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: Sheard (Re), 2013 NSSC 119

Date: April 5, 2013

Docket: B- 35337

Registry: Halifax

District of Nova Scotia
Division No. 01 - Halifax
Court No. 35337
Estate No. 51-1465773

IN THE MATTER OF THE BANKRUPTCY OF
PAUL MACKENZIE SHEARD

D E C I S I O N

Registrar: Richard W. Cregan, Q.C.

Heard: March 6, 2013

Counsel: Carl Holm, Q.C., representing the Bankrupt,
Paul MacKenzie Sheard

Deanna Frappier, representing Canada Revenue
Agency

Paul Goodman, representing the Trustee, BDO Canada
Limited

- [1] Dr. Paul MacKenzie Sheard made an assignment in bankruptcy on February 22, 2011. He is now applying for his discharge.
- [2] Dr. Sheard is a psychiatrist. In 1984 he and his wife immigrated from Scotland to Cape Breton where he practiced. In 1990, his family returned to Scotland, but he continued his practice in Cape Breton until 2010. In Cape Breton he was able to generate substantially more income than he would practicing in Scotland. This resulted in expenses for maintaining two residences and for commuting. With these extra expenses he fell behind in meeting his financial obligations. He made a proposal under the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (*BIA*) in 2001. The proposal was fully performed in September 2006.
- [3] In 2009 he purchased 382 units in Red Mile Resources Fund No. 6 Limited Partnership, a tax shelter, for \$410,650. This was financed by the delivery of a promissory note for that amount. In 2009 and 2010 he paid \$64,940 on account of this note. He claimed deductions from his income in 2008 and 2009 by way of exploration and development expenses of \$16,983.02 and \$106,987.00, respectively.

- [4] He was then in a state of arrears with respect to his income tax from 2007. From July 2008 to the end of 2010 he paid on account of his arrears through garnishment and voluntary payments \$349,991 to cover 2007 arrears of \$174,891 and, 2008 arrears of \$175,100. He then found it necessary to make an assignment in bankruptcy.
- [5] The Canada Revenue Agency (CRA) filed a proof of claim for \$76,333.15 representing the balance of 2009 tax and later filed an amended claim for \$263,593.08 which includes arrears from 2010.
- [6] His statement of affairs shows \$382,730 as owing on the Red Mile note. However, it has not filed a proof of claim.
- [7] Late in 2010 he closed his practice in Cape Breton and returned to Scotland where he is employed as a consultant in general adult psychiatry by the National Health Service Highland. His gross income per month in Canadian dollars is \$14,392 and net income, approximately \$9,000. He has been regularly paying surplus income of \$2,300 per month. Neither he nor his wife have any other source of income. He has no expectations of his income

from employment increasing. He has no Registered Retirement Savings Plan, pension or other savings.

[8] In summary regarding his situation, he says in his affidavit:

39. I believe I have made my best efforts to pay my income tax debt and have not made payments in respect of other debts while failing to make reasonable efforts to pay my personal income tax.

40. At age 58 and with salaries paid in Scotland I believe my future prospects are limited.

41. While decisions I have made were perhaps unwise, they were my decisions and I am responsible for them and their result. I do not believe, however, that any of my decisions were made with a view to avoiding my obligations to Revenue Canada or others. I am embarrassed to find myself in the position I am in, it has always been my desire to meet my obligations.

[9] His counsel, Mr. Holm, admits that Section 172.1 of the BIA applies, as CRA has filed a proof of claim for \$263,593.08 which represents more than 75% of his total unsecured proven claims. However, he submits it does not preclude the court from granting him an absolute discharge.

[10] I fail to see that a careful reading of Section 172.1 allows such. This is also the conclusion of the Cour d'appel du Quebec in *Canada (Attorney General) v Koch*, 2012 QCCA 2207.

[11] The Trustee, BDO Canada Limited, was obliged to oppose this application because of Section 172.1. Mr. Goodman speaking for the Trustee did not take any position on what the disposition should be. However, he reviewed Dr. Sheard's present situation and stated that the average of the results from two different approaches to calculate surplus income going forward was approximately \$2,550 per month. He also noted that Red Mile Resources Fund did not prove its claim. If it had, the income tax liability would only be about 31% of his total unsecured proven debt and Section 172.1 would not have applied.

[12] Ms. Frappier, counsel for CRA, submits that he be required to pay \$2,311 per month for 24 months for a total of \$55,464, he provide monthly income and expense statements, make required filing and payments of income tax for 2012, and be suspended until these conditions are met and the expiration of 24 months from the date of the discharge order.

[13] I must dispose of this application according to Subsections 172.1 (3), (4) and (5):

(3) On the hearing of an application for a discharge referred to in subsection (1), the court shall, subject to subsection (4),

- (a) refuse the discharge;
- (b) suspend the discharge for any period that the court thinks proper; or
- (c) require the bankrupt, as a condition of his or her discharge, to perform any acts, pay any moneys, consent to any judgments or comply with any other terms that the court may direct.

(4) In making a decision in respect of the application, the court must take into account

- (a) the circumstances of the bankrupt at the time the personal income tax debt was incurred;
 - (b) the efforts, if any, made by the bankrupt to pay the personal income tax debt;
 - (c) whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt; and
 - (d) the bankrupt's financial prospects for the future.
- (5) If the court makes an order suspending the discharge, the court shall, in the order, require the bankrupt to file income and expense statements with the trustee each month and to file all returns of income required by law to be filed.

[14] Let me consider the factors listed above.

[15] Circumstances at time Tax Debt Incurred .

Dr. Sheard came to Cape Breton with his family in 1984. It was in expectation that there would be a hospital practice in Victoria County. This did not materialize as expected. However, he had acquired a house and found practice in Sydney and elsewhere. For reasons not discussed in any

detail his wife and children returned to Scotland in 1990. I quote from his affidavit:

17. In 1990, my family returned to Scotland and from 1990 to 2010 I carried on my practise by commuting from Scotland to Cape Breton. I continued my practise in Cape Breton because by working very long hours while in Cape Breton I was able to generate substantially more income that I would have been able to practising in Scotland.

18. In part by reason of the expense of maintaining two residences and the costs of commuting, I fell behind in meeting my financial obligations and on March 29, 2001, made a proposal under the provisions of the *Bankruptcy and Insolvency Act*.

[16] He worked long hours, lived in humble circumstances in Sydney and received a good income from his practice. However, it is understandable that by commuting and maintaining two residences, compounded by the problems the investment in Red Mile caused him, he slipped into financial difficulty. The house was rented. That rent covered the mortgage. He did not have an automobile for a time. The only indulgence was a boat which he has since bought from the trustee. He carried on a pace which he realized would be unhealthy at his age.

[17] There is no suggestion that he or his family engaged in any extravagances. Obviously there was mismanagement which he admits. The investment in

Red Mile was imprudent. Commuting between two homes was expensive. It is not for one to question why he continued this arrangement for so long.

[18] Efforts to pay Tax Debt.

Some voluntary payments were not processed. However, directions to pay to his employer were successful in collecting \$217,563.81 in 2010 and 2011. This may well explain why the voluntary payments failed. Nevertheless from mid 2008 to the end of 2010 CRA received a total of \$349,991.00. He has been paying \$2,311 monthly into his estate, a significant part of which will be distributed to CRA.

[19] Payments in respect to other Debts.

The only evidence on this point is that he continued to hold the house in Victoria County and pay the mortgage on it. The house has been rented and the rent together with borrowings from Scotland was used to cover the mortgage, insurance and other expenses related to the house to the benefit of the estate. At the time of the hearing the Trustee was expecting to complete the sale of the property on terms advantageous to his estate.

[20] Financial prospects for the Future.

As mentioned above he currently nets about \$9,000 per month and has no retirement funds or other savings. He is 58. There is no specific evidence of his expenses, but I think in his circumstances there will not be much left over after allowing for a reasonable life style.

[21] Ms. Frappier has provided me with a number of cases. Every case is different as to facts, but the same legal principles generally apply. I shall only comment on two of the cases. They are the only cases based on Section 172.1.

[22] The first is *Re Hardtke*, 2012 ONSC 4662. The bankrupt was a 59 year old chiropractor. His tax debt was \$918,946. He had not given proper accounting for his property to his trustee. He was less than frank about his expenses and had resorted to several devices to artificially improve his position. He was required to pay \$75,000.

[23] The second is *Re Tjelta*, 2012 BCSC 984. The total owing for taxes was \$985,977.97. The bankrupt had a habit of late filing beginning in 1999

continuing until 2004 after which he made an assignment. He was a contractor. He attributed his tax problems to poor accounting for the expenses of his business. CRA asked for \$100,000, the trustee recommended \$10,000 and the court ordered \$50,000. The court considered he would have ability to pay this amount. His income was modest, he had children to support.

[24] I note that the discussion in these cases as to how much should be paid centers around the well established cases decided before Section 172.1 became law. The suggestion is that this new provision does not change the penalty, but rather assures that cases covered by it must come before the court and are disposed of as required in Subsection (3) and (4).

[25] Let me quote a submission regarding the cases cited by Ms. Frappier made by Mr. Holm in his brief:

In the cases cited, the Bankrupt had been found:

- to have failed to file tax returns
- to have failed to pay any taxes

- to have lived beyond his means and lavishly
- to have failed to keep proper books or records
- to have engaged in rash and hazardous speculation
- to have acted dishonestly, disposing of assets at less than fair market value while not paying taxes
- to accept no personal responsibility for his situation, but to blame others feeling no embarrassment or remorse
- a number of bankrupts were reassessed suggesting in the first instance they failed to properly report their income
- failed post-bankruptcy to make the required contribution of surplus income or to keep CRA current

[26] I do not think that Dr. Sheard can be accused in a material way of any of these faults.

[27] His situation, simply put, is that he had mismanaged his financial affairs. He admits to this. His life style had its complications and extra expenses. It was frugal, but with two residences and commuting, it is understandable that things could easily get ahead of him, as they did. His investment in Red Mile Resources Fund was unfortunate and no doubt contributed significantly to his difficulties. It was a legitimate investment with an attractive tax deferral. Such investments were heavily marketed to professionals and those

with high incomes. Like many of these investments, it was not successful.

On the whole I think Dr. Sheard's bankruptcy is characterized by the misfortune the *BIA* is intended to address.

[28] I am bound to follow Subsection 172.1(3) in disposing of this application.

Also, I cannot ignore the deterrence factor. I think more than a nominal payment should be required of him, but not anywhere near that submitted by Ms. Frappier.

[29] I see no reason why a lengthy suspension is required. He no longer lives in Canada. He does not have income in Canada and thus will not be liable for income tax in Canada.

[30] Considering his circumstances, I think that as a condition of his discharge he should be expected to make a significant contribution and thereby close out his income tax responsibilities in Canada. I set this amount at \$5,000. He shall remain suspended until this sum is paid to the Trustee. Subsection 172.1(5) requires that until the completion of his suspension he must continue to file with his trustee monthly income and expense statements and

file returns of income required by law. As he has no income in Canada there may be no need to make such filings.

R.

Halifax, Nova Scotia
April 5, 2013