SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Yeo (Re)*, 2020 NSSC 135

Date: 20200414
Docket: No. 42216
Registry: Halifax
Estate Number: 51-2381347

In the Matter of: The bankruptcy of Robert John Yeo

Corrected Decision:	The text of the original decision has been corrected according to the attached erratum dated **June 5, 2020**.
Judge:	Raffi A. Balmanoukian, Registrar
Heard:	January 24, 2020, in Halifax, Nova Scotia
Final Written Submissions:	March 9, 2020
Counsel:	Edward A. MacDonald, for the Grant Thornton Limited, Trustee Robert John Yeo, appearing personally

Balmanoukian, Registrar:

[1] Robert John Yeo, now 56, applied on January 27, 2020 for a discharge from his fourth bankruptcy.

[2] He didn't get it.

[3] Instead, I ordered that his discharge be refused, with leave to re-apply no earlier than March 9, 2024. I further ordered that as at the date of any subsequent application, all of Mr. Yeo's relevant tax filings are to be up to date, assessed, and paid, and that proof of same be supplied to the Trustee.

[4] An historic narrative will assist in illustrating my reasons.

[5] Mr. Yeo's first bankruptcy filing was on February 24, 1989, when he was not quite 26. He received an absolute discharge fourteen years later, on June 24, 2003. I do not have that file, but the Trustee's s. 170 report for the current application cites the catch-all of "poor financial management" as the reason for that first assignment.

[6] About two weeks after receiving his first discharge, on July 9, 2003, Mr. Yeo effected his second filing.

[7] With apologies to Mr. Zimmerman, "you don't need a weatherman to know which way the wind blows." The impetus for seeking the first discharge was clearly to pave the way for the second assignment.

[8] That second file, B-25985, cites "failure to make tax remittances on self-employed income resulting in unmanageable tax liability." Mr. Yeo's only non-exempt declared assets were tools of trade over the (then) $1000 exemption.

[9] $51,300 of his declared $67,230 in unsecured debt was to CRA, for HST and income tax. Another $630 was to the Labour Standards Board. The Trustee recommended a payment of $4800 over 12 months at $400 per month, coupled with a three month concurrent suspension. Registrar Cregan ordered only the latter, resulting in a discharge effective August 24, 2004.

[10] Less than five years later, on February 23, 2009, Mr. Yeo filed a proposal, citing "[i]nexperience, fell behind on CRA debts and have attempted to work out a payment structure with them unsuccessfully. They have issued Requirements to Pay to numerous General Contractors which has limited my ability to earn income."

[11] Some $43,000 of the $79,000 in declared unsecured debts was to the Tax Man. The balance was to CIBC and to Canadian Tire Bank.

[12] The file (B-32206) does not indicate if the proposal was rejected, or went into default, but it became a bankruptcy on April 2, 2009.

[13] On February 24, 2010, the Trustee filed an application, returnable on March 12, 2010 recommending a conditional order – for the repurchase of non-exempt equity in certain assets, compliance with a voluntary fee agreement, provision of income and expense information (and remittance of any surplus income), and information sufficient for the filing of pre-and post-bankruptcy tax returns, together with a concurrent 24 month suspension of his discharge. A note purporting to be from Mr. Yeo dated March 10, 2010 indicates agreement with these recommendations.

[14] Registrar Cregan accepted these recommendations by order dated March 12, 2010.

[15] On March 6, 2015, the Trustee submitted its final statement of receipts and disbursements and swore that

> …the debtor has not responded to repeated reminders of overdue payment and the Trustee does not have sufficient information to effect service of an Order pursuant to Section 68;
>
> That the debtor has not responded to attempts by the Trustee to make contact;
>
> That the bankrupt has acknowledged receipt of Section 158 setting out the duties of a bankrupt and it is the Trustee's opinion that the bankrupt understands those obligations;

[16] There matters lay until July 2017. On July 26, 2017 the Trustee swore an affidavit that Mr. Yeo had, by then, met the terms of the Conditional Order. Registrar MacAdam issued an absolute order accordingly on July 28, 2017.

[17] And so we come to the present filing, effected ten months after Registrar MacAdam's absolute order. This fourth assignment is dated May 24, 2018. It cites "failure to make tax remittances on self-employment income resulting in an unmanageable liability; marital separation; health issues."

[18] About all I can say in Mr. Yeo's favour at that point is he did not have the audacity to repeat a claim of "inexperience."

[19] He did, however, repeat his tax habits. The total proven claim of just over $55,000 (including approximately $20,000 in interest and penalties) from various periods from 2010 through 2017 represents the lion's share of the declared $66,015 in debt (all unsecured).

[20] At the hearing on January 24, 2020, Mr. Yeo appeared and stated that he had no current source of income and is in poor health. I adjourned the matter pending the outcome of further medical consultations. That yielded limited information, but on March 9, 2020, the Estate Administrator replied to a solicitation from the Court. The Trustee said that Mr. Yeo had been in hospital, had chronic medical

issues that were serious (but different from what had been outlined by Mr. Yeo in Court), and that "[r]returning to any kind of employment seems unlikely."

[21] So, we have a situation. An apparently ill and indigent debtor has used the insolvency process as what Justice Southin aptly termed a "fiscal carwash" (*Re Legault*, 1994 CanLii 2996 (BCCA)), with routine, repeated, and lengthy disregard for his obligations during insolvency. He has made good his defaults only when the time is nigh for yet another filing; and speaking globally, he has done so mostly and usually explicitly to excise himself of what are mostly tax obligations.

[22] In *Re Burns*, 2019 NSSC 155, I also dealt with a fourth time, ill bankrupt, significantly older than Mr. Yeo. Although I indulge myself by quoting from that case at length, there are two fundamental differences to which I shall return:

1. There was little indication in *Burns* of the multiple and egregious defaults and disregard for the obligations on the bankrupt as has been evident over Mr. Yeo's history; and
2. The series of creditors at issue in Mr. Burns' life were primarily private and consensual rather than public and involuntary.

[23] In *Burns*, I stated:

> [17] From this, I reiterate and summarize as follows:-

- Each case turns on its own facts and calls for a bespoke disposition.

- Once one is in a third or subsequent bankruptcy, the presumptive emphasis shifts from debtor rehabilitation to creditor protection and system integrity.

- A fourth or subsequent bankruptcy is a "very serious matter" (*Boivin, supra*) and calls for detailed inquiry, including an inquiry into the etymology of the prior insolvencies.

- *Mala fides*, misconduct, or turpitude are relevant in determining a proper disposition, but the lack of such elements do not in themselves entitle a third or subsequent bankrupt to token or no conditions as a prerequisite to their discharge.

[18] I would add the following:

- Repeat insolvencies of the same general nature, particularly overextension of consumer credit, call for a disposition which brings home to the debtor the need for responsibility going forward.

- As a general principle, I do not believe a third or subsequent bankruptcy should be any shorter than a second summary bankruptcy that has surplus income (that is, 36 months), whether or not that third (or subsequent) bankruptcy is one that itself has or is expected to have surplus income.

- When there *is* surplus income, I believe a "3+" bankruptcy should generally have a longer period in which that surplus is paid into and for the benefit of the estate. I believe that absent exigent circumstances, a 36 month insolvency period sends an incorrect message that a third (or fourth, or fifth) bankruptcy is "just like a second except that it has to go to Court." It isn't.

- While retirement may not be inevitable in today's world, ageing is. It is incumbent upon the debtor to realize that it is more likely than not that one's senior income, even without medical difficulties, will be lower than in one's peak years and to look to those days proactively rather than reactively. While one may have empathy for those who do not do so, age in itself does not get the debtor a "free pass" from the BIA's objects and principles, particularly in what *Willier, supra*, aptly termed a "recidivist" insolvency.

- That said, the debtor is not forgotten simply because s/he is a "third timer" or a "fourth timer." With their obligations still go rights, including the right to get on with their lives after performing the duties imposed by the Act and such additional obligations as may be appropriate to their particular fact situation.

- The statement by the debtor that "the Court is trying to penalise me because I filed bankruptcy 4 time" is wrong. Absent such misconduct as contained in certain (but

> not all) parts of s. 173(1), or culpable malfeasance under s. 168, 198, *etc.*, the BIA is not a penal statute, nor is it a punitive one; it is a commercial regime which sets out a regulatory framework for "the orderly liquidation of a bankrupt's estate and the distribution of the value of the assets of that estate to the bankrupt's creditors," and – to repeat the classic phrase – to permit "an honest debtor, who has been unfortunate, to secure a discharge so that he or she can make a fresh start and resume his or her place in the business community." Houlden, Morawetz, and Sarra, *The 2018-2019 Annotated Bankruptcy and Insolvency Act*, ss. A1 and A2.
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> - It is important that the Court, on a discharge application, has some indication of the debtor's path ahead (*Hiebert, supra*); either through evidence of the repeat debtor's recognition of her or his shortcomings and efforts to address them, or through the Court's own disposition, or a combination of both.

[24] I refer also to my comments on fourth (and fifth) time bankruptcies in *Re Ongo*, 2018 NSSC 326, and *Re Donaldson*, 2019 NSSC 33.

[25] As I stated in *Burns*, each case calls for a bespoke solution, bearing in mind the significance of a third or subsequent bankruptcy and the history and timeline that led to this point, and the situation in which the debtor finds him- or herself. Here, we have public obligations and private defaults remedied generally only when they became inconvenient to Mr. Yeo. His own health status is not to be ignored, but at this stage and on these facts it plays a secondary role.

[26] Mr. Yeo's current tax obligations began to accrue during his third bankruptcy and continued to accrue while he was undischarged (and during his near-total default in performance of duties during that third bankruptcy). What I have before me now are far from his first set of problems with the Tax Man,

problems for which he seems to believe he has a ready-made and convenient solution.

[27] That stops here. That stops now.

[28] In my view, repeat or substantial tax defaults will generally call, as a condition of discharge, for the bankrupt to illustrate a pattern of performance in addition to such other conditions as may be just in the circumstances. That means filing accurate returns for all relevant taxation regimes, having them assessed, and paying any balance outstanding. The length of such pattern, before or as part of one's discharge, will depend on the circumstances of the case. These include, (but are not limited to and in no particular order), factors such as

1. Whether the tax liability has arisen as a result of inexperience, negligence, gross negligence, fraud, or otherwise;
2. The length of time over which the liability accrued – that is, whether there are long or multiple defaults;
3. The attempt, if any, to pay on or towards the liability, what those attempts consisted of, and the result of such attempts;
4. Whether there are repeat bankruptcy filings or proposals as a result of (or largely attributable to) tax liabilities;

5. The sum in issue, and whether it is primarily principal, interest, and/or penalties;

6. Whether the liability has arisen from the ordinary course of business or a special and insular event (such as a s. 160 *Income Tax Act* assessment);

7. Whether the liability is from a single or multiple accounts (e.g. HST, income tax, payroll, etc.);

8. The use to which the funds which should have been remitted were put – e.g. an attempt to continue operations as an "honest but unfortunate debtor" versus financing a lifestyle beyond the means of the debtor. In this, I also would also consider other liquidity constraints (e.g. bad debts, a bank calling its loans, employee dishonesty, etc.) where appropriate and in evidence;

9. Whether there was any legitimate dispute over the tax owing, and the pursuit and results of that dispute;

10. Whether – and I place significant weight on this – the unpaid tax arose from participation in the "underground economy," such as undeclared cash transactions, especially on a repeat or egregious basis;

11. What if any professional advice was received to determine and/or comply with one's tax obligations;

12. Whether there has been a pattern of failures to file versus failure to pay, and whether the liability has been determined by audit, arbitrary assessment, or otherwise, and what if any reason is advanced therefor;

13. The proportion of tax debt to other liabilities – this is a statutory feature for certain personal income tax debts (*Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, s. 172.1 ("BIA")) but I do not believe that a consideration of tax debts is limited to that section;

14. The prospects of the debtor;

15. The bankrupt's approach to, and compliance with, the insolvency process and the duties under the BIA, including those in s. 158;

16. Recommendations of the Trustee;

17. Generally, factors such as those contained in s. 173 of the BIA.

[29] Mr. Yeo falls short on almost all of these counts, and has for much of his life. He may or may not work again. In either case, his is a call in stark relief for the Court to say unequivocally that this Court is not a "fiscal carwash" and that it will not allow applicants such as he to give the public a bath.

[30] Against that, I must weigh what is realistic for this debtor. There is no reasonable prospect he will be able to make any meaningful contribution towards this estate. This must be, for him, a Kirkegaardian exercise in living life forward. I must also effect a resolution that has adequate flexibility for the limited medical evidence before me.

[31] I have a wide discretion, exercised judicially, under s. 172(2) BIA as to Mr. Yeo's financial future. Among other things, I can refuse the discharge; I can suspend it; and/or I can require him to "perform such acts" or "comply with such other conditions" as are just.

[32] I have stated on several occasions that I generally consider stand-alone suspensions to be without practical effect. This is not only the case here, but Mr. Yeo has previously had the benefit of that limited sanction. Twice. If those suspensions – one nominal, one significant - didn't embolden him to carry on with his ways, at least they did not discourage him. I also note that Mr. Yeo went for considerable periods as an undischarged bankrupt, apparently without consequence or edification.

[33] At the other end of the spectrum, a stand-alone refusal, without leave to re-apply, would be excessive for this debtor on this day. That is reserved for the most

egregious cases and while I have considered it, Mr. Yeo does not (quite) meet that threshold.

[34] Instead, I have decided that Mr. Yeo's application shall be refused with leave to re-apply in no less than four years from March 9, 2020 (the date on which I received the last submissions from the Trustee). At the time of any subsequent application, all of Mr. Yeo's tax filings, as applicable, shall be filed, assessed, and paid, and evidence of same shall be provided to the Trustee. This includes, as applicable, income tax, HST, and payroll. If Mr. Yeo did not have that pattern of conduct before, he will have to have it now, if he is to make his fourth exit from the BIA process.

[35] In saying so, I appreciate that Trustees are not auditors and are not being called upon to perform an audit function. They are to determine what returns should have been filed, and that these have been filed, assessed, and paid. This does not constrain the liberty of the Court to call for verification or further information, as and if deemed appropriate by the presiding jurist at the relevant time.

[36] I would warn Mr. Yeo, and those for whom I have made and will make similar dispositions, that should any filing upon which a discharge be obtained is

later reassessed adversely, he jeopardizes his discharge. A condition fraudulently performed, if that fraud is proven, is not performance at all. In such an event, the discharge may be annulled: BIA s. 180(2). I would not expect it would easily be re-obtained.

[37] Order accordingly.

Balmanoukian, R.

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ERRATUM June 5, 2020

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Erratum:

The word ‘four’ in paragraph 5 is changed to ‘fourteen’.