SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Powell (re)*, 2021 NSSC 76

Date: 20210301
Docket: No. 40038
Registry: Halifax
Estate Number: 51-2114247

In the Matter of: The bankruptcy of Everett Steven Powell

Judge:	Raffi A. Balmanoukian, Registrar
Heard:	February 22, 2021, in Bridgewater, Nova Scotia
Counsel:	Edward A. MacDonald, for the Trustee, Grant Thornton Limited Everett Steven Powell, appearing by teleconference

Balmanoukian, Registrar:

[1] Everett Steven Powell was required to attend an official receiver's (OR) examination. He didn't. Apparently twice. What should the Court do about it?

[2] This is Mr. Powell's third bankruptcy. His first, in 1995, ended with an automatic discharge. His second in 2006 resulted in a discharge which was suspended, apparently briefly. This, his third from 2016, must come before the Court for disposition.

[3] It did, in 2018. At that time, the Trustee reported almost no compliance on the part of the bankrupt. Those defaults, as listed in the Trustee's s. 170 report, included omission of income and expense information, failure to fund the estate (costs of administration), failure to provide information necessary to file tax returns, failure to pay for a non-exempt asset, failure to attend a second counselling session, failure to provide updated contact information, and most significantly for our present purposes, failure to attend a scheduled official receiver's examination with the Office of the Superintendent of Bankruptcy (the OSB). In short, he had done little after filing and had dropped off the map.

[4] I adjourned the application *sine die*. That was then, this is now. If a similar application came before me today, in the absence of evidence of cognitive or other exculpatory difficulties, I would likely direct the Trustee to seek its discharge and advise creditors of the effect thereof if there was not substantial compliance within a brief period (see *Re Jewkes*, 2020 NSSC 287). I would particularly be so inclined here, given that this is not Mr. Powell's first rodeo.

[5] As it happened, the Trustee did indeed get its discharge, on July 17, 2019. There was no dividend. The taxes had not been filed. The only receipt of note was the repurchase of non-exempt tools of trade. The Trustee only charged for one counselling session, which tells me that the second remained outstanding to that time, as well.

[6] On July 18, 2020 – that is, almost exactly a year later – the Trustee swore an affidavit saying that the bankrupt "has recently contacted the trustee and wishes to fulfill his outstanding duties and apply for a discharge from bankruptcy." The Trustee was duly reappointed by order issued July 31, 2020, pursuant to s. 41 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA").

[7] More time passed, albeit during various levels of COVID-19 constraints. On February 4, 2021, the Trustee filed the within application, saying that the bankrupt

had – but for the OR exam – by then completed his duties. The Trustee recommended an absolute discharge, on the basis that (a) no further information would be obtained by the OR exam and (b) the OSB gave the Trustee leave to use "your professional discretion in determining an appropriate discharge term." That email from the OSB is dated October 15, 2020.

[8] At the hearing, the bankrupt appeared by teleconference. He said that at the relevant time, he was moving and this would explain the gap in communication, both by the written notice of examination sent by post, and the attempt to contact him by phone. To be fair to him, an email notice relating to the missed commitment bounced but it appears it, at least, contained an error in the address ("yahou" versus "yahoo"). If this was also in the emailed notice of examination, it would provide a rational explanation for its non-receipt.

[9] This does not change the fact, however, that the bankrupt failed in his duty to provide relevant contact information, which I will discuss in more detail. It begs credulity that he had any interest in being found, taken in context with his other defaults, when both phone and postal functions were not in place. Mr. Powell provided no explanation why mail was returned and why he had not made arrangements to have it forwarded. Although I have discussed a possible email

error above, the fact remains that the OSB asserts that the bankrupt missed not one, but two OR appointments. [1]

[10] The OSB's report of August 22, 2018 recites that when Mr. Powell did not appear as scheduled on November 23, 2016, it attempted to contact him through the Trustee. The phone and email that the Trustee provided came up snake-eyes. On follow-up, the Trustee confirmed to the OSB that its correspondence, too, "was also being returned and they did not have any up-to-date contact information for Mr. Powell."

[11] The OSB continued, "As of this date the Office of the Superintendent of Bankruptcy has received no response from Mr. Powell despite multiple attempts to contact him."

[12] In short, this is not a case of notice slipping through the cracks. It is a case of Mr. Powell, either by omission or commission, leaving matters sit and stakeholders to their own devices until, as the Trustee put it in its affidavit, this third time bankrupt "wishes to fulfill his outstanding duties and apply for a discharge from bankruptcy."

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[1] Email from OSB to Trustee, October 15, 2020. I only have the November 23, 2016 date; it is unclear when the second scheduled examination was to have taken place. To be clear, although I have made repeated references to two missed exams, in the doubtful event that this is an error on the part of the OSB and there was but one appointment, my assessment and disposition in this case would be the same.

[13] For clarity, those duties include those listed by the Trustee in its 2018 report, cited above. They are encapsulated in s. 158 of the BIA. Although Mr. Powell's defaults were substantial in 2018, the ones that now remain relevant are:

> **158** A bankrupt shall
>
> **…**
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> **(c)** at such time and place as may be fixed by the official receiver, attend before the official receiver or before any other official receiver delegated by the official receiver for examination under oath with respect to his conduct, the causes of his bankruptcy and the disposition of his property;
>
> **…**
>
> **(j)** submit to such other examinations under oath with respect to his property or affairs as required;
>
> **…**
>
> **(p)** until his application for discharge has been disposed of and the administration of the estate completed, keep the trustee advised at all times of his place of residence or address.

[14] These admit of little or no ambiguity. It was incumbent on Mr. Powell to be able to be reached. The burden was on him. Even if I accept that he "didn't know" of at least one if not *two* separate OR examination appointments – which I find highly suspect in all of these circumstances and with all of these communication attempts[2] – Mr. Powell's ignorance through stealth is of his own creation. The Menendez brothers don't get mercy because they are orphans.

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[2] I note that the obligation under s. 158 is confined to "residence or address," not other means of communication; the evidence was that mail was returned and not forwarded; the extra steps to communicate are "over and above," and

[15] If any question remained, case law makes these defaults clear. As set out in para. H58 of Houlden, Morawetz, and Sarra, *The 2020-2021 Annotated Bankruptcy and Insolvency Act*:

> A bankrupt who fails to attend for examination by the official receiver as required by s. 158(c) has committed a fact under s. 173(1)(o): *Carle v. Magnan* (1926), 8 CBR 109 (Que. SC)
>
> …
>
> A bankrupt who fails to keep the trustee informed of his or her address as required by s. 158(p) has committed a fact under s. 173(1)(o): *Re Stafford* (1959), 37 CBR 206 (Ont. SC).

[16] So what am I to do? As alluded to in the quote above, I am to consider whether one or more "facts" under s. 173 of the BIA have been proven against the debtor and, if so, the appropriate disposition.

[17] It is clear that multiple s. 173 facts have been proven. In addition to the "50 cents on the dollar" applicable to most summary estates (s. 173(1)(a)), it is more important in this case to recognize the multiple bankruptcies (173(1)(j)), and the noted failure to perform duties (173(1)(o)).

[18] These are not mere technical omissions, or a loose end. Mr. Powell's omissions were substantial from 2016 through to 2019. Eventually he did most of

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speak to the efforts of the stakeholders to reach Mr. Powell. His failure to provide a working phone number is not a s. 158 default in the technical sense of the word, but it does speak to the circumstances as a whole when taken in context of the overall facts of this case.

what he had to. He now says that this is good enough, given his explanation of non-attendance at the OR exam(s), and that having said some version of "oops, sorry," it is time to move on. The Trustee cannot be blamed for wanting to move on as well.

[19] First, as the Trustee knows, when a s. 173 "act" is proven I cannot give an absolute discharge. I can make conditions nominal if I want to. But I don't.

[20] In my view, this is a case that calls for the Court to bring to bear to Mr. Powell specifically, and to stakeholders in general, the Court's role in ensuring system integrity and regulatory compliance. To say that nothing further would come out of an OR exam – in effect, an argument of "no harm, no foul" – is not an answer, even if true. This is especially so given Mr. Powell's other defaults and in the context of his third bankruptcy in 21 years. While I was pleasantly surprised to have the benefit of Mr. Powell's virtual attendance at this hearing (he had not appeared previously), I found his "oops, sorry" to have all the sincerity of a game show host. I believe he is indeed sorry…….sorry that he does not have his discharge, not for the reasons therefor.

[21] No application was made after Mr. Powell's no-show for a warrant under s. 166 to "cause the bankrupt….so in default to be apprehended and brought up for

examination." No explanation was given why not. It may be that the stakeholders didn't think it worth their further effort, as evidenced by the email from the OSB above. I do think it could have brought the seriousness of the matter to Mr. Powell's conscience. Alas, failing same, it falls to the Court to take on the role of Jiminy Cricket and to convey that message.

[22] S. 172(2) of the BIA gives me a wide discretion. I can refuse the discharge. I can suspend it. Or I can require the bankrupt to "perform such acts, pay such moneys, consent to such judgments or comply with such other terms as the court may direct."

[23] That is a discretion I must exercise judicially, and in the context of this debtor.

[24] Mr. Powell is now 51. He is part of a three-person household. Although self-employed at the time of filing (diesel repair) and now still self-employed in a different industry (trucking), he reports no income – then, or at the time of the trustee's updated s. 170 report. Again this is difficult to accept, particularly at present. The other household income comes up a few hundred dollars short of the Superintendent's s. 68 income guidelines.

[25] I am convinced that a stand-alone suspension would, as is usually the case, be of no practical meaning to Mr. Powell. Nor would it appear he would much care, as he continues to carry on (albeit in a different vocation) during his bankruptcy; as a truck driver, I can surmise that he has or at least has access to some form of credit or other working capital, whether in his name or otherwise. I do not have the input of any creditor as to an appropriate disposition. This was a bankruptcy driven by business failure rather than certain other catalysts that may speak to an appropriate remedy.

[26] I have said repeatedly, and bear in mind now, that the BIA (with limited exceptions) is not a punitive or a penal statute. That said, I believe the only disposition that fairly balances system integrity with debtor rehabilitation is to exercise my discretion to require a payment of a sum certain into the estate. In these circumstances, in my opinion this is the only viable means by which it can be brought front-and-centre to Mr. Powell that the BIA is also not a statute of convenience, to be used whenever he feels like it, and with associated responsibilities to be discharged by him when ***or if*** he feels like it.

[27] Further, Mr. Powell has taken up an unreasonable amount of public and private resources. He has had to be taken kicking and screaming through the s. 158 obligations. He took up OSB time to no avail. The Trustee has now been to Court

three times. That does not come cheap to those stakeholders, and it should not come cheap to Mr. Powell.

[28] I have decided that a $5,000 payment to the estate will bring these points home to Mr. Powell, emphasize the public interest that he has so far sullied, and provide a rehabilitative message that the BIA seeks to put those who avail themselves of its protections "out the other side" wiser for the process. However, it is not so onerous as to cripple him or prevent his eventual discharge and unfettered return to economic society.

[29] I do not have any income information for Mr. Powell personally; I do not accept that his *net income* is exactly zero; however as he is self-employed I order that the $5,000 be payable in an amount of at least 10% of his *gross revenue*, payable monthly and no later than the 15th of the following month, until paid. Naturally, it may be prepaid without penalty or interest. He shall supply the Trustee with all necessary information, at least monthly, together with any verification required by the Trustee, to effect this calculation.

[30] I am also issuing, pursuant to s. 172, a garnishment order for this amount and on the same terms. I have that authority both under the provisions of s. 172(2)(c) quoted above, and s. 187(6) of the BIA.

[31] When the order is paid, and only then, Mr. Powell shall have his discharge.

[32] I add that although an OR examination must take place "before a bankrupt's discharge" (s. 161(1)), there is no such restriction on a trustee's examination under s. 163(1): See Houlden, Morawetz & Sarra, *supra*, at para. H9(2)(vii). In my view, a discharged bankrupt may also be examined, on application, under s. 163(2). I say this in fair warning to Mr. Powell that should a person with standing seek to use those provisions, his failure to rock up at the appointed time and place is unlikely to receive a receptive audience.

[33] The Trustee shall prepare the relevant order for my review.

Balmanoukian, R.