SUPREME COURT OF NOVA SCOTIA
IN BANKRUPTCY AND INSOLVENCY

Citation: *Sorochan (Re)*, 2021 NSSC 200

Date: 20210608
Docket: No. 39785
Registry: Halifax
Estate Number: 51-2084294

In the Matter of: The bankruptcy of Paul Stephen Sorochan

Judge: Raffi A. Balmanoukian, Registrar

Heard: March 22, 2021, in Halifax, Nova Scotia

Counsel: Brenda Wood, for the Trustee, Salyzyn & Associates Limited
Paul Stephen Sorochan, appearing personally (by teleconference)

Balmanoukian, Registrar:

[1] In 1927, Oliver Wendell Holmes Jr. wrote that "taxes are what we pay for civilized society."[1] A decade later, President Roosevelt added that "too many individuals, however, want the civilization at a discount."

[2] Paul Stephen Sorochan, now 69, seeks a discharge from his fourth bankruptcy. His second and third were tax-driven. This, his fourth, cites "health/medical issues; business losses." However, even a cursory examination of his affairs make it clear that this, too, is a tax-driven bankruptcy. So much so, that s. 172.1 of the *Bankruptcy and Insolvency Act*, RSC 1985, c. B-3, as amended (the "BIA") is engaged. I am therefore mandated not only not to decline the Trustee's recommendation for an absolute discharge, but to consider the factors set out in that section in determining a just and proper disposition, for this particular debtor in his particular circumstances.

[3] At present, there appear only to be two written Nova Scotia decisions on s. 172.1 since its enactment in 2009: *Re Fretz*, 2011 NSSC 467 and *Re Sheard*, 2013

[1] *Compania General de Tabacos de Philipinas v. Collector of Internal Revenue* (1927), 275 US 87, in dissent on other grounds. This is sometimes rendered as "I like to pay taxes. With them I buy civilization."

NSSC 119.[2] The provision has, however, received detailed and extensive treatment elsewhere, notably in Ontario, British Columbia, and Saskatchewan. It is therefore appropriate and timely to embark on a detailed analysis in this jurisdiction, and to lay out some general principles this Court will bear in mind when disposing of s. 172.1 bankruptcies.

[4] I will lay out the legislative regime; then some issues which have arisen in the caselaw in the dozen years since s. 172.1 came into force; then some conclusions I have derived from them; and finally a discussion of how they relate and are applied to Mr. Sorochan.

[5] But first, I will emphasize that the BIA, in general, attempts to provide a rehabilitative framework for deserving debtors to have a "fresh start," within limits. Registrar Thompson, one of if not *the* most prolific jurists on s. 172.1, recently put it thus in *Re Zhao (sub. nom. R. v. BDO Canada Ltd.)*, 2020 SKQB 187:

> [14] The policy of the *BIA vis-à-vis* individual bankrupts is generally designed to promote the financial rehabilitation of the bankrupt through the discharge of his or her unsecured debts, unless the discharge might be construed as abuse of the bankruptcy system or some other more pressing policy objective outweighs the need for rehabilitation in a case.

[2] I also briefly discussed it in *Re Yeo*, 2020 NSSC 135, but while Mr. Yeo was also a fourth-time bankrupt, with repeat tax defaults, the section was not engaged in his instance.

[15] Gascon J. explains the purpose of the *BIA* with regard to bankruptcy discharge, as follows in paras. 32, 36, 37 of *Moloney*:

> 32 Parliament enacted the *BIA* pursuant to its jurisdiction over matters of bankruptcy and insolvency under s. 91(21) of the *Constitution Act, 1867* [(U.K.) 30 & 31 Vict, c 3, reprinted in RSC 1085, App II, No. 5]. The *BIA*, notably through the specific provisions discussed below, furthers two purposes: the equitable distribution of the bankrupt's assets among his or her creditors and the bankrupt's financial rehabilitation (*Husky Oil*, [*Husky Oil Operations Ltd. v Minister of National Revenue*, 1995 CanLII 69 (SCC), [1995] 3 SCR 453] at para. 7).
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> ...
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> 36 The second purpose of the *BIA*, the financial rehabilitation of the debtor, is achieved through the discharge of the debtor's outstanding debts at the end of the bankruptcy: *Husky Oil*, at para. 7. Section 178(2) of the *BIA* provides:
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> (2) Subject to subsection (1), an order of discharge releases the bankrupt from all claims provable in bankruptcy.
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> From the perspective of the creditors, the discharge means they are unable to enforce their provable claims: *Schreyer v. Schreyer*, 2011 SCC 35, [2011] 2 S.C.R. 605, at para. 21. This, in effect, gives the insolvent person a "fresh start", in that he or she is "freed from the burdens of pre-existing indebtedness": Wood, [Wood, Roderick J., *Bankruptcy and Insolvency Law*, Toronto: Irwin Law, 2009] at p. 273; see also *Industrial Acceptance Corp. v. Lalonde*, 1952 CanLII 2 (SCC), [1952] 2 S.C.R. 109 (S.C.C.), at p. 120. This fresh start is not only designed for the well-being of the bankrupt debtor and his or her family; rehabilitation helps the discharged bankrupt to reintegrate into economic life so he or she can become a productive member of society: Wood, at pp. 274-75; L. W. Houlden, G. B. Morawetz and J. Sarra, *Bankruptcy and Insolvency Law of Canada* (4th ed. (loose-leaf), at p. 6-283. In many cases of consumer bankruptcy, the debtor has very few or no assets to distribute to his or her creditors. **In those cases, rehabilitation becomes the primary objective of bankruptcy**: Wood, at p. 37.
>
> 37 Although it is an important purpose of the *BIA*, financial rehabilitation also has its limits. Section 178(1) of the *BIA* lists debts that are not released by discharge and that survive bankruptcy. Furthermore, **s. 172 provides that an order of discharge may be denied, suspended, or granted subject to conditions**. These provisions demonstrate **Parliament's attempt to balance financial rehabilitation with other policy objectives, such as confidence in the credit system, that require certain debts to survive bankruptcy**: Wood, at pp. 273 and 289. [emphasis that of Registrar Thompson]

[6] In the tax context (which I would extend to public debt in general), Registrar Nielsen said in *Re Perrier*, 2016 BCSC 912:

> [17] The courts have identified two underlying principles governing the discharge of a bankrupt. They are the rehabilitation of the bankrupt, as well as the integrity of the bankruptcy system. The principles governing were summarized by the B.C. Court of Appeal in *Westmore v. McAfee* (1988), 1988 CanLII 187 (BC CA), 67 C.B.R. (N.S.) 209 (B.C.C.A.), and they are quoted in *Zinkiew (Re)*, 2004 BCSC 1831 at para. 55:
>
> > 1. In considering the question of discharge, the court must have regard not only to the interest of the bankrupt and his creditors, but also to the interests of the public;
> >
> > 2. The Legislature has always recognised the interest that the State has in a debtor being released from the overwhelming pressure of his debts, and that it is undesirable that a citizen should be so weighed down by his debts as to be incapable of performing the ordinary duties of citizenship;
> >
> > 3. One of the objects of the *Bankruptcy Act* was to enable an honest debtor, who has been unfortunate in business, to secure a discharge so he might make a new start;
> >
> > 4. The bankruptcy courts should not be converted into a sort of clearing house for the liquidation of debts irrespective of the circumstances under which they were created;
> >
> > 5. The success or failure of any bankruptcy system depends upon the administration of the discharge provisions of the Act;
> >
> > 6. The Court is not to be regarded as a sort of charitable institution;
> >
> > 7. It is incumbent upon the court to guard against laxity in granting discharges so as not to offend against commercial morality. It is nevertheless the duty of the Court to administer the *Bankruptcy Act* in such a way as to assist honest debtors who have been unfortunate;
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> > 8. The discharge is not a matter of right.[3]

The Legislative Regime

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[3] Except for a provision dealing with arrears, an appeal was dismissed: *Perrier v. Canada Revenue Agency*, 2018 BCSC 463.

[7] Section 168.1 of the BIA provides for a potential automatic discharge of most first or second time bankrupts. That default "autopilot" is not available to third or subsequent filings, or to any person to whom s. 172.1 applies. Both reflect the seriousness with which Parliament has elected to treat multiple filings, or (as defined) high tax debt situations.

[8] Section 173 sets out various "facts" by which, if proven, the Court is mandated not to grant an absolute discharge, either. The disposition may contain provisions nominal or substantial, up to and including outright refusal. It is a bespoke exercise, in light of the facts of the particular case.

[9] Section 172.1, on the other hand deals with the one and only type of debt which, in and of itself, precludes a potential automatic discharge for a first or second time filer. If triggered, the Court is mandated to consider four factors (along with any others which may be relevant) and to issue only certain types of dispositions – again ranging from the nominal to the onerous (or, in extreme cases, a refusal with or without leave to reapply).

[10] The section currently reads:

> **172.1 (1)** In the case of a bankrupt who has $200,000 or more of personal income tax debt and whose personal income tax debt represents 75% or more of the bankrupt's total unsecured proven claims, the hearing of an application for a discharge may not be held before the expiry of

(a) if the bankrupt has never before been bankrupt under the laws of Canada or of any prescribed jurisdiction,

(i) 9 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 9 months, or

(ii) 21 months after the date of bankruptcy, in any other case;

(b) if the bankrupt has been a bankrupt one time before under the laws of Canada or of any prescribed jurisdiction,

(i) 24 months after the date of bankruptcy if the bankrupt has not been required to make payments under section 68 to the estate of the bankrupt at any time during those 24 months, or

(ii) 36 months after the date of bankruptcy, in any other case; and

(c) in the case of any other bankrupt, 36 months after the date of the bankruptcy.

(2) Before proceeding to the trustee's discharge and before the first day that the hearing could be held in respect of a bankrupt referred to in subsection (1), the trustee must, on five days notice to the bankrupt, apply to the court for an appointment for a hearing of the application for the bankrupt's discharge.

(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.

(6) If, at any time after the expiry of one year after the day on which any order is made under this section, the bankrupt satisfies the court that there is no reasonable probability that he or she will be in a position to comply with the terms of the order, the court may modify the terms of the order or of any substituted order, in any manner and on any conditions that it thinks fit.

(7) The powers of suspending and of attaching conditions to the discharge of a bankrupt may be exercised concurrently.

(8) For the purpose of this section, ***personal income tax debt*** means the amount payable, within the meaning of subsection 223(1) of the *Income Tax Act* without reference to paragraphs (b) to (c), by an individual and the amount payable by an individual under any provincial legislation that imposes a tax similar in nature to the income tax imposed on individuals under the *Income Tax Act*, including, for greater certainty, the amount of any interest, penalties or fines imposed under the *Income Tax Act* or the provincial legislation. It does not include an amount payable by the individual if the individual is or was a director of a corporation and the amount relates to an obligation of the corporation for which the director is liable in their capacity as director.

[11] The following salient points can be derived:

1. An "early discharge" – that is, before the 9, 21, 24, or 36 month timeframes usually applicable to first or second time bankrupts, is not available;

2. The Court may not grant an absolute discharge; to repeat, the scope of conditions can range from the nominal to the onerous, depending on the circumstances;

3. The Court is directed to take into consideration the four factors noted in s. 172.1(4);

4. In the event of a suspension, the Court must order continued filing of the statements and returns of income noted in s. 172.1(5);

5. The power to modify the order under s. 172.1(6) is parallel to the general power under s. 172(3); that is, a year must elapse and the debtor – on whom lies the burden – must satisfy the Court that there is "no reasonable probability" of being "in a position to comply with the terms of the order;"

6. "Personal income tax debt" includes interest, penalties, and fines. However, as will appear, I consider the breakdown among principal, interest, penalties, and fines to be relevant to a proper disposition as it will at least partly reflect the debtor's income over time, their conduct while the debt accrued, and their ability to service the obligation. It also reflects, in part, how much the public has been deprived of what it would have received if the debtor had complied with their obligations in a timely fashion, and how much pertains to the interest, penalties, and fines that were triggered by the failure so to do.

Sections 172.1 and Section 173 are not mutually exclusive

[12] A person can be a high tax debtor and can also have 'facts' under s. 173. Indeed, it will usually be the case that a high tax debtor will run afoul of the "fifty cents on the dollar" provision in s. 173(1)(a). As I will develop further below, in

most instances such a debtor will not come within the "saving" provision in that provision, namely that the shortfall has not arisen "from circumstances for which the bankrupt cannot justly be held responsible." Tax obligations are, generally speaking, an epitome of a debt and circumstance for which the bankrupt should justly be held responsible. In addition, it is highly possible that a s. 172.1 debtor will have other s. 173(1) factors applicable to her or him, such as failure to maintain books and records, trading while insolvent, speculation, extravagant living, failure to comply with duties, and perhaps even fraud.

[13] Again, each case will be unique; the point is that one's status under s. 172.1 does not mean that it is the *only* provision applicable to the bankrupt, and in fact usually will not be. What s. 172.1 does is direct the Court (a) to turn its mind to the four factors noted in s. 172.1(4) and (b) issue an order that is not an absolute discharge, although the Court's wide discretion as to scope of remedies otherwise remains intact (subject only to the requirements under s. 172(6) if the order includes a suspension).

[14] In *Re Hover*, 2019 ONSC 6348, which was a s. 172.1 case, Master Kaufman put it this way:

> [3] In deciding what order to make on an application for discharge, the Court may consider, in addition to the conduct listed in sections 173(1) and 172.1 of

> the *Bankruptcy and Insolvency Act*, R.S.C. , 1985, c. B-3 ("BIA"), any other conduct or affairs that relate to the bankruptcy. The courts take a more lenient approach where the assignment into bankruptcy was not made to evade the payment of income taxes and results from other causes, such as unfortunate financial circumstances.

[15] Conversely, the factors set out in s. 172.1 can be considered even when the high tax debtor is not, by reason of amount or percentage, strictly subject to that provision. In *Re Chabot*, 2017 BCSC 1798, Master McDiarmid said:

> [9] Accordingly, the Orders that I make are pursuant to s. 172(2)(c) of the *BIA*. Despite that, it seems to me that requirements of s. 172.1(3)and the criteria set out in s. 172.1 are as a matter of common sense, something to guide me in my decision, despite the fact that there is now less than 75% of total debt attributable to income tax because of the fines levied for income tax evasion convictions.

[16] To summarize: When a person is subject to s. 172.1, the Court must consider the factors set out in s. 172.1(4); and they can be considered in other high tax cases. As well, the fact that s. 172.1 applies to a particular case does not preclude the Court from considering all other relevant factors, such as those set out in s. 173.

High tax debt in general, and Section 172.1 in particular, gives rise to a rebuttable presumption against the bankrupt as an "honest but unfortunate debtor"

[17] Taxes, for the most part, are generated by earnings, or receipt or disposition of property. Generally, money or other value has flowed as a result.[4] As a consequence, in its simplest form, "if you have earned, you can pay."

[18] Most Canadians are subject to a "PAYE" regime – that is, pay as you earn. Employees are subject to statutory deductions which are meant to pay a good portion, if not all, of the income tax that arises from that particular employment. The self-employed, or those for whom statutory deductions are inadequate to pay most of their tax, are usually subject to self-remittance installment obligations. When a person fails to remit, or fails to file and remit, it can and often does snowball quickly and dangerously; what Registrar Short referred to in *Re Kinnaird* 2012 ONSC 4506 as an "ostrich strategy" of non-filing and/or non-remittance is not acceptable.

[19] In *Re McKee (sub nom R. v. BDO Canada Ltd.)* 2019 SKQB 270, Registrar Thompson said:

> [13] The common law has developed special considerations for courts dealing with high tax bankruptcy. Registrar Nettie reaffirmed that tax payment is the price of our membership in society and he observed that inequity that arises when some choose not to pay income tax at para. 37 of *Re Berenbaum*, 2011 ONSC 72, 73 CBR (5th) 1 explaining that:

[4] I am not ignoring the multitude of situations in which "deeming" or attribution provisions can give rise to a tax liability without actual generation of funds. I am speaking in generalities at this point; to the extent that a person is a high tax debtor under s. 172.1 (or has a substantial non-172.1 tax debt in their bankruptcy) as a result other than failing to pay taxes on cash-in-the-door earnings, it can be taken into account in formulating a proper disposition.

> 37 …As a society we have a right to expect that each and every one of us will pay our fair share and not foist an undue burden on the remainder of us, by not paying their fair share. …

[14] In *Re Toal* (1993), 1993 CanLII 7087 (AB QB), 20 CBR (3d) 120 (Alta QB), Registrar Funduk observed that a self-earner who files in bankruptcy to discharge personal income tax debt after failing to pay income tax on income as he has earned it, is abusing the system and ought to be discouraged. While rehabilitation is still a consideration, the high personal income tax cases attribute weight to the value of specific and general deterrence, as well as deterrence of those who might consider the bankruptcy system as a financial planning tool that allows them to evade personal income tax liability.

[20] Similarly, in *Re Newson*, 2014 SKQB 106, she said:

> **23** The cases on tax driven bankruptcy are consistent to the extent that each concludes that tax driven bankruptcy is to be treated more severely than bankruptcy involving other forms of unsecured claims. Taxes are the cost of civil society. We all benefit from taxes, which are used to pay for the construction and maintenance of our roads, schools and hospitals. Independent contractors, also referred to as 'self-earners', also benefit from the government's use of taxes. Independent contractors are different from other members of society because their income is not taxed at source and each independent contractor has the obligation to make tax remittances on his or her own behalf. As Registrar Funduk suggests, a bankrupt who has refused to pay his or her taxes does not automatically fit within the category of honest but unfortunate debtors the bankruptcy system was designed to protect. Moreover, as is clear from each of the foregoing cases, the need for rehabilitation must be balanced with the need to deter the bankrupt and everyone else from viewing the bankruptcy system as a convenient and relatively painless way to shed tax debt.

[21] And, in *Re Babkis*, 2019 SKQB 144, she rephrased it this way:

> [28] All Canadian residents are expected to pay income tax. It is the cost of civil society and the revenue from taxes are used to establish and maintain infrastructure such as roads, hospitals and schools that benefit all Canadians.
>
> [29] When an individual chooses not to pay his or her personal income taxes, it creates potential for disparity between Canadian taxpayers who cannot choose to make payments and those who choose not to pay. Those who choose not to pay continue to receive the benefit of tax-paid infrastructure, free, while also retaining the benefit of funds that they have chosen not to pay in personal income tax.

> [30] The case law and the legislation establish an assumption that an income tax debtor within the meaning of s. 172.1 of the *BIA* is not honest and unfortunate. Under the legislation, a s.172.1 bankrupt is not entitled to an automatic discharge from the bankruptcy process and must attend a hearing to provide the court with reasons to support his or her application for discharge.
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> [31] A failure to pay personal income tax is assumed to flow from a bankrupt's choice and not his misfortune because income tax is a debt that is incurred as income is earned. The funds required to pay the personal income tax debt are treated as funds that were in the hands of the debtor when the debt became due. It is not a situation where the bankrupt-debtor, through misfortune such as illness or accident outside of the debtor's control, was unable to come up with the money to pay off a loan; it is a situation where the debtor had control over the funds required to pay the debt but chose not to.
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> [32] The fact that he or she finds himself or herself, later, in a position where the personal income tax debt is past due and has become insurmountable due to accumulating interest and penalties is, therefore, generally considered to be the bankrupt's fault (see the comments of Registrar Funduk in paras. 14 and 15 of *Re Toal* (1993), 1993 CanLII 7087 (AB QB), 20 CBR (3d) 120) (Alta QB)).

[22] Accordingly, in a s. 172.1 hearing, or one in which there is substantial public debt, there is a reverse onus requiring the bankrupt to establish a lack of, or diminished, culpability. In *Zhao*, *supra*, Registrar Thompson put it this way:

> [23] Despite the legislative diversity concerning various forms of liability, it is of note that the Legislature has chosen not to render high personal income tax debt non-dischargeable. It does not appear alongside the s. 178 debts, but appears, instead along with the discharge provisions, in s. 172 of the *BIA*. There is no requirement for time to pass before a high tax debt is dischargeable. A tax bankrupt need not demonstrate undue hardship for his or her personal income tax debt to be discharged. At the same time a personal income tax debtor faces a reverse-onus that requires evidence rebutting a presumption of culpability pursuant to s. 172.1.
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> [24] As noted in the MNR's submissions, the Legislature turned its mind to high tax debt in 2009, when it incorporated principles from common law high tax bankruptcy discharge decisions and introduced a special process governing the treatment of these debts by the administrator and by the court. The process applies under s. 172.1 of the *BIA*, where the bankrupt's personal income tax liability is assessed to amount to $200,000 and it comprises 75% or more of the proven unsecured claims in the bankruptcy.

> [25] Section 172.1 restricts the court's process, requiring the court to apply a reverse onus when considering the bankrupt's conduct and prescribing four factors that the court must consider in coming to its disposition.
>
> [26] At common law, and pursuant to s. 172.1(3), the court must also render a deterrent measure in these cases, but its discretion remains broadly cast, presumably to give the court flexibility to adjust its order according to the relative severity of the bankrupt's conduct. The court can suspend discharge, condition discharge, suspend and condition discharge or refuse discharge. The limits on what the court can do must also comport with the jurisprudence.

[23] Put more bluntly, when there is high tax debt (whether or not within the meaning of s.172.1), there is rebuttable presumption that the bankrupt is not an "honest but unfortunate debtor." In *Re Reid*, 2020 ONSC 1726[5], Master Fortier said:

> [37] The following principles related to tax debts can be gleaned from the cases:
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> a) A tax avoider should not be able to use the bankruptcy system as a means to escape payment;
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> b) A bankrupt who does not pay taxes is not an honest and unfortunate debtor;
>
> c) The court should not permit a self-earner to run up an income tax liability and then go bankrupt;
>
> d) In considering what conditions to impose where the bankrupt has a significant tax debt, the court reviews:
>
> • whether the bankruptcy came about as a result of an accident or whether there was a persistent ignoring of the tax obligation;
>
> • the bankrupt's ability to contribute towards a conditional order;
>
> • whether the bankrupt has since the bankruptcy continued to ignore the obligation to pay income tax. [footnotes omitted]

[24] It should be stated, for clarity, that although there is this reverse onus, and considerable presumption, the presumption is rebuttable. In *Re Ebenal*, 2019

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[5] *Reid* was not a 172.1 case, but the principles were found to apply to tax-driven bankruptcies in general.

SKQB 67, the bankrupts had in effect been duped by their accountant and others in circumstances best described as Kafkaesque. Registrar Thompson found the presumption had been rebutted and "deterrence is not the primary consideration in this high income tax bankruptcy." [emphasis added]

[25] I also add that variations of "I was sloppy" or "I don't know anything about that stuff" may be relevant to a bankrupt's *bona fides*, but it is not a full answer or defence to a high tax debt bankruptcy analysis, and does not rebut the presumption. It is incumbent upon the businessperson or individual otherwise liable to pay tax to obtain the relevant tools either directly or through professional assistance. Much can be said about the level of financial literacy in the population at large; for current purposes, it is adequate to adopt the following comments from *Re Ricci*, 2017 SKQB 260:

> [38] The bankruptcy court cannot be used as an easy way to shed personal income tax debt. All business owners will have more complex tax obligations than T4 employees and it is incumbent on individuals who remit taxes on behalf of themselves and businesses to understand the tax laws and the consequence of failing to meet tax obligations. A new business owner should consider consulting an accountant before beginning operations so that he or she has a good understanding of what records to keep and how to keep them. Separate bank accounts for business and personal banking are also helpful, to ensure that a clear paper trail exists to demonstrate how much business income was earned and what it was used for, if CRA audits. [emphasis in original]

[26] When high tax debt is the trigger, or a major component, of a bankruptcy, the Court's disposition should take special care to ensure that all interests – debtor

rehabilitation, creditor protection, and system integrity – are properly balanced, and that in addition to other appropriate conditions, the debtor gets the go-forward message loud and clear that one of life's two certainties continue to be with them and the bankruptcy process is not an end run around it. The burden of proving that the debtor has "got the message," will "sin no more," and has conditions of their discharge no more onerous than necessary to balance stakeholders' interests, is on the debtor.

[27] In general, I have considered this to include a requirement that the debtor file, be assessed for, and pay all relevant post-bankruptcy returns for a given period – for how long and under what auspices will vary according to the facts of the case. I will return to this in my disposition.

[28] A concluding thought on this section. Lest my comments be misconstrued as besmirching self-earners who are in tax trouble without participation in the "underground economy" or other forms of tax evasion, let me be clear: I admire entrepreneurs greatly. I am proud to come from a family of them. I have been self-employed for almost 30 years, and still am. Creators and producers (primary and otherwise) of all forms and types form the backbone of Canadian economic society. Our nation deserves the global envy it receives, materially and socially. But the rich soil of the Canadian economic terrain requires care and nurture from

all of us. When either the employee or self-employed fails in their economic obligations to society, someone else has to pick up the slack through higher tax rates; or the money is borrowed and forms a charge upon the future; or someone goes without a resource that the tax dollar would have provided.

[29] For most employees, the tax obligation is discharged automatically, or mostly so, through payroll deductions and remittances. The self-earner is in a different position in that not only do they have to make their own remittances, but very often have in their trust other people's money in the form of those same payroll deductions and sales taxes. It is tempting to think of it as a source of cash flow. It isn't.

[30] It is also easy to fall into the abyss of tax debt through being consumed with one's own trade or profession, to the ignorance of business realities. I have had scores if not hundreds of highly talented bankrupts in my Court with tax debt. Some have been well-known names, titans in their profession. Many are highly intelligent, highly educated, highly respected for their talents, hard working. It is no reflection on those skills to be deficient in accounting or tax law; it is also no shame to recognize that not everyone is cut out to be a member of their trade or calling, and also a businessperson. In *Re Donaldson*, 2019 NSSC 33 I said:

> [11] The Donaldsons then took another crack at operating their own business, this time a private nursing home. Although the Official Receiver's examination identified "changes in public funding policy" as leading to Bankruptcy #3, I am more inclined to accept the statement of Mrs. Donaldson at the hearing before me that "we realized we weren't businesspeople."
>
> [12] Not everyone is. As much as I admire and respect entrepreneurship, and believe it to be one of the main catalysts of our economy, I quite agree with this couple's epiphany that by their fourth BIA experience (by which time they were approaching their senior years), perhaps being their own boss was not for them.

[31] Einstein is supposed to have said that the most difficult thing in the world to understand is income tax – and he was pretty good at math. That is no reflection on him or his other abilities. What IS a reflection upon the debtor is the failure to recognize the issue, get their arms around it, and obtain professional assistance if needed. The Tax Man doesn't go away, and this Court has a role in making sure that is known loud and clear.

The Section 172.1 inquiry is not to be used as a collateral attack on the assessment

[32] It is sometimes argued before me that the "tax bill isn't really the tax bill," and that the amount is excessive or otherwise incorrect. This is sometimes argued even when the Trustee has allowed the claim as filed.

[33] It is open to the Trustee to disallow a claim – s. 135 BIA. In practical terms, this disallowance may be rare to non-existent in high tax cases, as CRA would

likely remain the major creditor and/or any dividend would still be predominantly to CRA and inadequate to pay even a reduced claim. Nonetheless, the tool is there if the Trustee determines the claim or a part thereof is incorrect; and if the parties disagree, an appeal lies therefrom: s. 135(4) BIA.

[34] When the assessment is made and the claim allowed, and the assessment is not appealed (or the appeal dismissed, discontinued, or abandoned), it is not for this Court to embark on a collateral review of its correctness or fairness; this is not the Tax Court. In such cases, s. 152(8) of the *Income Tax Act* provides that the assessment is "valid and binding." In bankruptcy proceedings, that is the end of the inquiry.

[35] In *Re Fretz*, 2011 NSSC 467, Registrar Cregan questioned the veracity of the tax assessment at issue in the bankruptcy, dismissing it and the penalties therein as proof of misconduct. With respect, I must differ from that analysis (which was founded, at least in part, on the basis that the burden of proof *with regard to penalties* is on the Minister).

[36] First, as I discussed above, there is a rebuttable presumption that the high tax debtor is not "honest but unfortunate." The question on whom the burden lies of

proving the appropriateness of tax penalties is a *non-sequitur* to the question of the debtor proving that they are entitled to leniency.

[37] Second, the adjudicative function for the tax *liability* is not for this Court; it is only the adjudicative function of the *terms of discharge* that are under its rubric. For those purposes, s. 152(8) of the *Income Tax Act* is the last word, absent a tax appeal. See also *Re Meikle*, 2015 BCSC 1768 at para. 50; *Re Tjelta*, 2012 BCSC 984 at para. 9, and *Re Baran*, 2013 ONSC 7501 at para. 13.

[38] It is a different story if the assessment is under appeal: *Schnier v. Canada*, 2016 ONCA 5. Notably, the decision in *Schnier* was authored by Brown, JA who also decided *Baran, supra*. In *Schnier*, the Trustee allowed only a comparatively small amount as proven, and a balance which was under appeal was but a contingent liability; with the result that s. 172.1 BIA was not triggered.

[39] To summarize, when a tax claim is proven, "the number is the number" for the purposes of this Court's disposition. The only exception is if there is a subsisting tax appeal. In such instance, the Court may in its discretion either adjudicate the discharge application on the information available to it, or adjourn the matter pending the outcome of the tax appeal.

Dispositions should generally be "something more" than normal duties under ss. 68 and 158

[40] In *McKee, supra*, Registrar Thompson said:

> [15] In cases where there is evidence of a bankrupt's indifference to tax obligations, the integrity of the bankruptcy system requires the court to consider imposing stringent conditions of discharge. (*Re Newson*, 2014 SKQB 106, 443 Sask R 72).
>
> [16] In cases where a reasonable person would be offended if the bankrupt were allowed to exit bankruptcy with significant exempt assets acquired while the bankrupt failed to pay his or her income tax liabilities, this Court has ordered a significant payment as a condition of discharge (*Re Hagerman*, 2014 SKQB 185, 448 Sask R 308).

[41] Similarly, in *Re Monaghan*, 2018 SKQB 210, she stated:

> [54] Mr. Monaghan is a 61 year old man in poor health. He testified that he no longer lives with his wife. Despite his health and marital issues, I have no doubt that a reasonable person would be offended by the idea that an individual can avoid tax obligations for 10 years and then turn around and claim bankruptcy, exiting the process with exempt assets in the amount of $765,786.00.

[42] I leave to another case the extent, if any, to which non-exempt assets are a consideration in setting conditions for a tax-driven (or other) bankruptcy, as they do not apply to the case at bar. However, I take the more general view for current purposes that if a "reasonable person would be offended" by a bankrupt being able to "skate away" from tax obligations through the bankruptcy process, the Court should give priority to system integrity and, at its core, the public good. This Court should not be a tool to achieve what a reasonable person would consider to

be FDR's "civilization at a discount." *Salus populi suprema lex esto* is as true today as it was for Cicero. What Master Young described as a "freeloader" in *Re Crischuk*, 2013 BCSC 1413, should not expect succor from this Court.

[43] While not wishing to be exhaustive, I would consider factors such as those set out in *Re Yeo*, 2020 NSSC 135, to be relevant to whether the particular debtor at bar would offend a reasonable and civic-minded fellow taxpayer. For current purposes, it is adequate to say that if a person has been cavalier in their declaration, reporting, and payment of tax obligations, the Court's disposition should be proportionate; and, in recognizing that such obligations will recur in the bankrupt's future, I consider bringing the repeat nature of such obligations to the mind of the debtor to be an integral part of the BIA's rehabilitative function as well.

[44] So what should those "stringent conditions" be? While again, every case turns on its own facts, I consider as a general principle that they should be conditions that are over and above those applicable to a non-s.172.1 bankrupt who is not otherwise eligible for an automatic discharge. To put their obligations on the same footing – for example, to purchase a non-exempt asset or to file missing financial information – would reward a s. 172.1 debtor who has not done those things, while punish a s. 172.1 debtor who has.

[45] How? Just this: suppose a s. 172.1 first or second time filer has done everything they have to do under ss. 68 and 158 of the BIA. They still have to come to Court and the Court cannot grant an absolute discharge. In contrast, another s. 172.1 first or second time filer who has outstanding s. 68/158 obligations comes to Court, and the Court's disposition is "do those things and then get your discharge." The first, compliant, debtor by definition has to do something more than the second, however nominal. That is unjust and penalizes diligence while rewarding indolence.

[46] The requirement for continued filing of income/expense information and filing of tax returns under s. 172.1(5) only applies when the Court imposes a suspension (whether alone or in conjunction with some other condition). In fact, that may be one of the very few cases in which a stand alone suspension is not "always meaningless" (*Re Crowley* (1984), 66 NSR (2d) 390 (SC, TD) at para. 69, a decision which pre-dated s. 172.1). It will be noted that the requirement is to file, not to file and pay.

[47] The Court may, but is not required to, order such filings in other cases. Indeed I frequently impose a requirement for the debtor to file, be assessed for, and pay post-bankruptcy returns as a condition of a discharge from a tax-driven bankruptcy.

[48] In my opinion, in the case of chronic non-filing or non-payment, it should be a standard condition of discharge that a high-tax bankrupt be required to file, be assessed for, *and pay* relevant returns for a period appropriate to the facts of that case. This is over and above the other s. 68, 158, and if applicable s. 172.1 requirements on the bankrupt. Whether there are additional financial obligations on the bankrupt will vary more widely, bearing in mind all relevant factors and especially (but not only) those in s. 172.1(4).

[49] In saying so, I find I must again respectfully part company with *Re Fretz*, *supra*. In that case, Registrar Cregan found that he was not bound by the CRA's assessments for discharge purposes, which as I have otherwise discussed is incorrect when a tax appeal has not been lodged or pursued. He went on to say that the bankrupts, having "paid enough and suffered enough," would be called upon to pay a nominal $100 each to comply with s. 172.1's prohibition against an absolute discharge. At best, I would describe *Fretz* as the absolute high water mark in which a high tax debtor would have nominal conditions for their discharge, and I consider it a telling factor that they were punctual and diligent in their post-bankruptcy filings for at least some three years.

[50] The only other reported Nova Scotia case on s. 172.1 is *Re Sheard*, 2013 NSSC 119. In that case, the middle-aged professional had left Canada after

incurring substantial tax debt. His lifestyle was modest, as were his future prospects; the Court was clearly impressed with him and concluded that "he had mismanaged his financial affairs." The Registrar concluded a $5,000 payment was adequate; the tax claim was for about $339,000 but the bankrupt had previously paid approximately $350,000 on pre-bankruptcy tax arrears. Again, *Sheard* is something of a high water mark in that the bankrupt had few if any of the negative hallmarks that arise, in some combination or permutation, in many high tax debt cases.

[51] I have discussed the reported Nova Scotia cases both due to their limited existence, and as something of a departure point. Since they were issued, the law has demonstrably evolved in other jurisdictions, to look at tax-driven bankruptcies in a more nuanced and less lenient manner. It is time for Nova Scotia to catch up.

[52] In *Re Hover, supra*, Master Kaufman said at para. 65 that a "condition of discharge cannot entail the payment of a lesser amount than the statutory regime requires." I generally agree; while I have had non-s. 172.1 cases before me in which the Trustee has recommended a deviation from the amount otherwise payable under s. 68, I have opined that I would only do so where appropriate and such occasions would be rare. They will be extraordinarily rare in s. 172.1 cases; while I would not go so far as the learned master in saying they "cannot" occur, it

would be only in the clearest of cases, such as permanent disability with no meaningful prospects or resources (as somewhat recognized by the s. 172.1(4)(d) factor of "financial prospects for the future").

[53] In general, in addition to consideration under s. 173(1)(n) whether the bankrupt could have made a viable proposal, I believe that the conditions applicable to a high-tax debtor should generally be at least those which could have been achieved under a reasonable proposal, in the circumstances known to the Court at the time of the discharge hearing.[6]

Section 172.1 dispositions should generally be significant but achievable – and is it appropriate for the Court to set a percentage range as guidance?

[54] Some jurisdictions have established apparent or *de facto* benchmarks for tax-debt discharge conditions. I conclude that these ranges, as I understand them, are too wide; it is more appropriate to adopt a temporal guideline reflective of what a particular debtor may be able to achieve over a reasonable period of time, while maintaining a reasonable lifestyle.

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[6] In saying this, I wish to add two points: first, I have seen many tax-driven bankruptcies in which CRA has voted against and in effect vetoed what appears to have been a greater recovery than in a bankruptcy. This is not to be encouraged, and CRA should not take this as a green light that "they will always do better in Court than under a proposal." Not so. Second, a debtor should not make a doomed-to-failure proposal that is unreasonable, and then use it as the proverbial "Exhibit A" to show the Court that they were perfectly willing to pay half a cent on the dollar, or something, and that this should be the condition of discharge from a tax-driven bankruptcy.

[55] I said above that an ostrich approach to filing and remittance is not acceptable; egregious use of the bankruptcy process as a unilateral tax cut is not acceptable either.

[56] In *Re Bhatti*, 2018 BCSC 213, Registrar Cameron said:

> [25] In setting the terms for discharge it is essential that the integrity of the bankruptcy system and the public perception of that integrity not be undermined. I refer to *Robb (Re)*, 2015 ABQB 34, at para. 14 as follows:
>
> > Very often bankrupts are called upon to pay a percentage of their tax obligation or total unsecured debt as a condition of discharge. The percentage varies depending on the circumstances but seldom is it more than 40%. The Courts have referred to these condition amounts as sufficient penalty to address the pre-bankruptcy behavior and often the improper conduct of the bankrupt during the course of the bankruptcy. The penalty is no penalty at all. The vast majority of Canadians file their returns and pay their taxes. If a dollar is owing that is what must be paid. However, if you totally disregard your legal obligations to file and pay taxes your "*punishment*" in bankruptcy is that you owe a dollar but may only pay perhaps as much as 40 cents. I am unable to accept that as a rationale or logical consequence. The "*punishment*" amounts to a reward. [italics in *Bhatti*]

[57] It is not realistic, in all but the most extreme cases, to expect or order a high tax debtor to pay all or even most of the pre-bankruptcy tax liability. Indeed, it will usually not even be practicable to order payment of the principal, much less the interest and penalties which have likely made the debt grow exponentially. However, it is important that the Court not be made into a tax discount agency, particularly for the dishonest or chronic offender.

[58] In *Babkis*, *supra*, Registrar Thompson said:

> [33] The case law reflects a range of fact driven outcomes that are designed to deter people from considering bankruptcy as a convenient, and relatively painless, way to evade personal income tax liability.
>
> [34] MNR's counsel cited cases reflecting a range of wrong-acting and a range of related consequences. I will briefly comment on each of these cases in relation to the circumstances of this bankruptcy. Overall, the court must take all unique circumstances into account when ascertaining the appropriate terms of discharge. Some of the more common factors include the bankrupt's age, reasonableness of his or her conduct before and during the bankruptcy and his earning potential.
>
> [35] Bankruptcy discharge is not a matter of right. The court has the authority to deny a discharge application in cases where the evidence demonstrates that the bankrupt has acted egregiously with regard to his or her debts or when he or she would pose a danger to future creditors.

[59] In *Re Saran*, 2018 ONSC 6045, Justice Kershman said:

> [157] *Baran (Re),* 2013 ONSC 7501, 7 C.B.R. (6th) 1 involved a s. 172.1 *BIA* bankruptcy. The bankrupt was 34 years of age. The CRA had conducted an audit of her business and assessed her for $854,518.28, inclusive of interest and penalties. At the discharge hearing. The bankrupt's discharge was suspended for one day. On appeal to the Ontario Superior Court, Brown J., as he then was, stated at para. 19, "[t]he survey of the case law filed by the applicant disclosed that in the last four years courts most usually imposed, as a condition of discharge, payment in the range of 5 to 15% of the tax debt, with only two cases resulting in payments of 50% or more of the tax debt". The Court held that the bankrupt was required to pay $8,000, or 1% of the tax debt principal.
>
> [158] The case of *Desai (Re),* 2014 ONSC 136, [2014] 3 C.T.C. 85 dealt with a second-time bankrupt who was in his late 40s. He owed the CRA over $800,000, of which $150,000 was for unpaid taxes, and the balance of which was for disallowance of tax shelters. The court required the bankrupt to pay 2% of the principal amount or $7,903.

[60] In British Columbia, the "range" appears to start somewhere in the 20% range, escalating to as high as 70%: *Re Tran*, 2016 YKSC 70:

> [23] CRA's counsel submits that it should be a condition of this discharge that the bankrupt first be required to pay $235,000 into the Estate, which is approximately 20% of the overall debt owing. She further submits that this percentage approach is the one

> commonly applied in British Columbia, as opposed to the approach in Ontario which focuses on the bankrupt's ability to pay. In this regard she referred to *Wagner (Re)*, unreported, Vernon B52887, a decision of Master Baker of the British Columbia Supreme Court, where he stated:
>
> > [16] The argument is made that this court should follow, essentially, the Ontario line of cases which, if I have it right, basically look to a party's ability to pay and fixes a condition in relation to their income or income-earning ability. Mr. Levine certainly takes a different tack and says those cases simply do not apply in British Columbia where the approach is to measure the tax debt itself and to factor a percentage and that there is a range, and I agree with him in this respect, that the B.C. cases reflect a range of 20 percent to 70 percent depending on the circumstances of the individual. [Emphasis in *Tran*]

[61] Put simply, in other jurisdictions the amount (if any) the bankrupt is called on to pay is all over the map, but rarely is the bulk or even a substantial portion of the tax debt to be paid.

[62] In my view, it is inadvisable to set down a range of amounts or percentages that should be paid as a condition of discharge. It is very much a bespoke exercise, with particular consideration of the "four factors" set out in s. 172.1(4), and such other considerations as may be applicable to the case at bar. The 40 year old professional who has lived a substantial lifestyle on their gross income and has many productive years ahead will be on a different footing from the indigent senior who has incurred a one-off tax bill through some deeming provision, who in turn will be different from the "cash on the dash" contractor on their third or fourth tax-driven filing.

[63] Instead of laying out a "percentage range," I believe the following comments in *Re Binning*, 2017 SKQB 207 are worthy of consideration:

> [15] Agrios J.'s decision was appealed as well, and Alberta's Court of Appeal agreed with Agrios J. in *Toal v Canada Revenue*, 1996 ABCA 84, 39 CBR (3d) 39 [*Toal #3*], acknowledging a reverse onus on the income tax bankrupt to demonstrate why he or she chose not to pay income tax and why he or she could not reasonably be expected to make payments over a four to six year period.
>
> [16] In *Toal #3* the Alberta Court of Appeal also acknowledged that there was no evidence suggesting that the bankrupt's health or future job prospects would impair his ability to earn an income comparable to that which he was earning at the time of his bankruptcy.
>
> [17] The Alberta Court of Appeal decision in *Toal #3* is of assistance in that it provides some guidance on how a s.172.1 bankrupt can rebut the presumption of misconduct. If a bankrupt can satisfy the court that there were circumstances to justify why he or she chose not to pay income tax, then the presumption of misconduct might be rebutted.
>
> [18] In reference to the conditions of discharge, the Court of Appeal in *Toal #3* confirms that a s.172.1 bankrupt will need to satisfy the court that it would be unreasonable in view of his or her financial circumstances to order payments over a four to six year period. In reference to reasonableness, the court in *Toal #3* considered the bankrupt's health, future job prospects and earning potential.

[64] I believe it is conscionable and appropriate to ask the question, "what <u>can</u> you do over the next four to six years, to contribute towards your pre-bankruptcy tax debt?" The answer will vary, from "not much" to "plenty." In my view, it balances the Ontario approach of "ability to pay" and the British Columbia approach of "you shouldn't get to walk," while maintaining the rehabilitative objectives of the BIA and public confidence in the system. It also balances the potentially competing consciences of "nobody gets a free ride" and "you shouldn't have to wear this forever." As a *presumptive* benchmark, a four-to-six year

projection will be adaptive to the circumstances of a particular case. Finally, it is a close cousin of the Court's requirement to consider "the bankrupt's financial prospects for the future" under s. 172.1(4)(d).

[65] I note that proposals typically are set for (and consumer proposals may not exceed) five years. It is a reasonable timeline for many – but, again, not all – circumstances.

[66] I have deliberately emphasized the "can" in "what can you do over the next four to six years?" Not "what is convenient" or "what do you feel like doing." The road to rehabilitation in a tax-driving BIA filing should not be a road to perdition; it should not be easy street, either. In high tax insolvencies, the conditions should recognize that the dollar unpaid is a dollar that is taken from someone else; borrowed from somewhere else; or unavailable for goods and services – including the roads, medical care, education, and other items available for the use of that self-same tax debtor.

What evidence should the Trustee or Bankrupt present at a s. 172.1 hearing?

[67] All stakeholders should, obviously, be prepared to address each of the four s. 172.1 factors. Simply answering 'yes' to the question in the s. 170 report that the bankrupt has high tax debt is inadequate.

[68] In the absence of evidence to the contrary, the presumption that the bankrupt is not "honest but unfortunate," and that the debt arose out of income or property from which the debtor could have but did not pay their just share will apply.

[69] If there was an appeal of the tax assessment, this and its outcome should be before the Court. This does not change the binding effect of the assessment under s.152(8) of the *Income Tax Act*, if applicable; however, it does in my view go to the "circumstances of the bankrupt" within the meaning of s. 172.1(4)(a). Similarly, if there was professional malfeasance or negligence, such as improper tax advice or misdirection, this too should be before the Court.

[70] I will generally want to know a breakdown of taxes by year, and how much consists of principal, interest, and penalties. A singular one-off event will be on a far different footing than chronic non-filing or non-payment. Similarly, as I said in *Yeo*, the participant in the "underground economy" can expect significant conditions attached to their discharge.

[71] In *Re Yeo, supra,* I said

> [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.

[72] I will generally, if not always, require the debtor's attendance. They should be conversant with s. 172.1(4) and be prepared to speak to those factors, as well as others which may be relevant.

[73] If there is an OR exam or a s. 163 exam, these should be in evidence.

Summary

[74] Tax-driven insolvencies, and for that matter those involving substantial public debt in other forms, are "not the same" as those involving mostly consensual creditors. This does not replace the rehabilitative aspects of the BIA, but calls for a more nuanced and balanced inquiry so as fairly to address all interests, including those of public equity and system integrity.

[75] Section 172.1 prohibits an automatic or absolute discharge when the debtor has "high tax debt" within the meaning of that section.

[76] The factors set out in s. 172.1(4) are mandatory considerations when s. 172.1 applies; they may be considered in other tax driven cases.

[77] Factors other than those set out in s. 172.1(4) may be considered if applicable.

[78] Repeat or especially egregious failures to file, or failures to file and pay, or cases of tax avoidance/evasion call for special consideration.

[79] Part of debtor rehabilitation includes inculcating the responsibility for and ongoing nature of tax filing and remittances. This may often include an order requiring the debtor, as a condition of discharge, to file, be assessed for, and/or pay relevant returns over and above the requirements of s. 172.1(5).

[80] A discharge is something that is earned; it is not an entitlement.

[81] There is a presumption – a rebuttable presumption – that a high tax debtor is not "honest but unfortunate." There is an additional rebuttable presumption that the tax debt does not come under the 'saving' provision of s.173(1)(a) that it is not a debt for which the debtor cannot justly be held responsible. The burden of rebutting those presumptions is on the bankrupt.

[82] The discharge hearing is not a substitute for a tax appeal.

[83] The Court should, pursuant to s. 172.1(4)(d) and by common law, direct its mind to the debtor's prospects over the medium term in formulating a s. 172.1 disposition.

[84] Conditions should generally be significant, but attainable over a reasonable period of time. They should not require the debtor to live in poverty, but also not permit a wholesale return to the debtor's old ways or old ways of life.

[85] Those conditions should generally be over and above the minima provided for in ss. 68 and 158 of the BIA. No hard-and-fast rule should be set as to a percentage of debt or timeline.

[86] The Court should have adequate evidence at hand to evaluate the specific matter at hand and to issue a bespoke disposition.

The s. 172.1(4) factors as applied to Mr. Sorochan

[87] Mr. Sorochan appeared, by teleconference, at his discharge hearing in March. He also presented a two-page letter outlining his state of affairs. Finally, I have the benefit of an official receiver's examination from November 2016.

[88] He is currently 69 years old. As will appear, his health is questionable. He is a pensioner, but does continue to work on 'gigs' which generates some additional income.

[89] As I noted at inception, this is his fourth bankruptcy.

[90] As summarized in the OR report, his first filing was in 1983 at the age of 31. He received an absolute discharge just over two years later. The listed creditor was a commercial bank and his filing was due to a business failure. By all standards, this is a dated and small bankruptcy, even by the standards of the day. I pay it limited weight, except in the context that we are now dealing with the very serious fact that this is Mr. Sorochan's fourth insolvency, in 33 years.

[91] The second filing came in 1992. The OR report states that it was primarily due to a marital breakup. However, the Trustee's report cites income tax debts.

[92] Round three came in 2003. This one is especially troublesome.

[93] First, it was tax driven in the sense that $77,208 of the $88,448 in unsecured liabilities was to the Tax Man. Second, his discharge obligations were limited, namely payment of $5,808 arising from surplus income. Third, he did not comply with that small item, and the trustee was discharged. A new trustee was appointed in 2011 – 8 years later. Then, and only then, did Mr. Sorochan make his third exit. The OR report states that, at the time of this filing, Mr. Sorochan had made "a real good income," but it went to "the drinking and the drugs," continuing on until 2008. He also gambled until 2006. That consumed funds which, in addition to those which should have been earmarked for taxes, did not go to more responsible

places. He cited in his third filing that "income insufficient to meet debt obligations as they became due, support payments and child care expenses."

[94] That prioritization is concerning, but would be of limited relevance now but for the facts that (a) it speaks to use of tax funds for other purposes and (b) it implies a lack of appreciation of and responsibility for his personal decisions at the expense of others.

[95] And so we come to filing number four, in 2016. Although the narrative above would suggest that the booze, the drugs, and the dice are all behind him, he did not stay ahead of the Tax Man. It is also somewhat contradicted by the OR's summary that

> When the bankrupt was asked what he thought was the cause of his fourth bankruptcy, Mr. Sorochan explained that it was a combination of dealing with depression which brought on drinking, drugs and gambling.

[96] If he stopped these things between 2006 and 2008, they would not have been issues in the 2016 filing.

[97] Nonetheless, by the time Mr. Sorochan filed in 2016, and after CRA's third party demands yielded an unspecified recovery, he owed $232,381.69 in personal income tax for the years 2005 through 2012; $37,294.76 in unremitted HST,

$3,643.20 in unremitted source deductions (unsecured) and $6,442.67 in “deemed trust” source deductions. There was no other creditor worthy of note.

[98] The estate realized $2,893.67 in receipts, of which apparently $2,000 was paid on filing.

[99] He shows no non-exempt, and only minor exempt, assets.

[100] There are therefore “facts” under s. 173(1), namely “fifty cents on the dollar” (173(1)(a)); prior bankruptcies (173(1)(j)), and at least potentially continuing to trade after being aware of insolvency (173(1)(c)). I am not prepared to make a finding as to gambling under 173(1)(e), although I have my suspicions and my order will reflect a “trust, but verify” element of that.

[101] I now pass to the four questions.

The circumstances of the bankrupt at the time the personal income tax debt was incurred

[102] Mr. Sorochan lists significant health problems, coupled with a breakdown of his second marriage. He says that this left him carrying two households, plus child support. He “started using the HST that I was able to collect to keep up with the mounting expenses, with the idea that things would turn around and that I would

get on top of it somehow." When that didn't happen, depression and stress followed, topped off by a heart attack. Later, he developed other medical problems requiring surgeries of various types. He found himself "couch surfing" until Community Services stepped in and assisted.

[103] It will be noted that Mr. Sorochan's medical and short-term financial needs were borne by the public purse. That is as it should be. We do not have wallet biopsies in Canada, and we do not couple one's health care with tax compliance. It would be derelict, however, not to point out that if everyone "started using the HST…..to keep up with the mounting expenses," those medical and social resources would be strained and constrained well beyond their current limits.

[104] Mr. Sorochan states that he does not know how third party payments garnished by CRA were allocated; I do not know how much was thus collected. Nor do I have a breakdown for any of the CRA accounts among principal, interest, and/or penalties. However, no matter how you slice it, he had to have been generating "real good income" to generate this type of multiple-source liability.

[105] In short, while I accept that health and marital difficulties played a meaningful role in the bankrupt's "personal circumstances," he has not rebutted the presumption that he simply reverted to prior delinquencies and defaults, and used

money that did not belong to him to fund his own expenses, whatever they may have been. In saying so, I reiterate the timeline disconnect between when he claims to have eschewed the bad habits noted above in 2006 to 2008, and this filing in 2016.

The efforts, if any, made by the bankrupt to pay the personal income tax debt

[106] Aside from the collection actions taken by CRA, there were no such apparent efforts. Mr. Sorochan indicated multiple meetings with CRA and "every meeting we set up agreements to make regular payments." He does not say he complied. He goes on to say that the third party demands followed, which while not conclusive, suggests to me that the "agreements" were either not adequate, or not fulfilled.

Whether the bankrupt made payments in respect of other debts while failing to make reasonable efforts to pay the personal income tax debt

[107] As noted, there are no other creditors worth talking about – a small credit card and a smaller utility bill. Although he does not appear to have spent the money on acquiring assets, and I again question the "lifestyle timeline," he does appear to have lived on his revenue (and HST, and source deductions) rather than

his net income. If there was any other debt incurred in the course of so doing, it was all or substantially all paid.

[108] Although the section directs me to consider "payments in respect of other debts," it is also appropriate to ask whether Mr. Sorochan did not incur other debt by virtue of using funds which should have been earmarked for the Tax Man as his working capital. By his own admission, this was the case for at least part of the time frame. It is a distinction without a difference to ask whether tax funds were used for his own expenses, or whether he ran up the credit card and then paid it with tax funds.

[109] I find it very difficult to accept that Mr. Sorochan has not used – one may go so far as to say "squandered" – tax funds over the years to fund his lifestyle choices. He may have nothing to show for it, but the OR's report and his own timeline leave very serious questions as to whether the "dice and vice" is firmly in his past. I will address this in my disposition.

The bankrupt's financial prospects for the future

[110] This is where things get tricky. Mr. Sorochan is beyond conventional retirement age. His declared income is limited to CPP and OAS (another public charge), and occasional "voice over" work. He estimates this would bring in about

$8400 a year ($700 a month); his budget for December 2018 also lists $300 per month for "live performance." His health issues are uncontradicted, although he says he is "more stable" and recovery is "slow." He spends $225 to $350 per month on alcohol and/or tobacco.

[111] By all accounts, it would appear that Mr. Sorochan's financial prospects going forward are limited; he finds himself in the unenviable position of entering his golden years bereft of gelt.

[112] There is no indication of whether he will receive future non-exempt property or income streams, such as by way of division of matrimonial property or spousal support, inheritance, intellectual property or performance royalties, or anything else.

[113] He does not appear, for his age and health, to be "underemployed," although clearly he has been professionally successful in the past.

[114] He testified that the voice-over work "comes and goes." I am also cognizant of Mr. Sorochan's advancing years and personal circumstances, as discussed. However, that does not outweigh the substantial need to address the facts that this is a fourth filing, a third tax-driven insolvency, a 172.1 tax debt filing, and CRA is the only notable creditor. I recount again that the debt to CRA covers three

accounts with taxes stretching back to 2005, while Mr. Sorochan was still in the midst of bankruptcy # 3. The deterrence message cannot be lost.

[115] I have decided that the best way to recognize this need, while still providing some flexibility and a roadmap for Mr. Sorochan to exit the process, is to order payment by way of a percentage of revenue, with a minimum amount, with ancillary provisions as to compliance. Based on current income and expense information, it will be less than he says he spends on alcohol and/or tobacco. On a related note, I am also going to make an order which addresses the questions of whether Mr. Sorochan continues to pursue choices which are inimical to his financial well-being, particularly given his apparently limited current resources. If they are not problematic, he should have no difficulty complying. If they are, it will be part of his rehabilitative process.

Disposition

[116] After considering all of the above, and in exercise of my discretion, I make the following conditional discharge order. Mr. Sorochan shall:

- Pay 10% of his gross revenue from all sources (other than HST) to the Trustee for the general benefit of creditors for a period of 4 years from the date hereof, no less frequently than quarterly, and in a total aggregate

amount of not less than $10,000; for clarity, this minimum amount shall be payable no later than four years from the date hereof;

- File, be assessed for, and pay all tax returns as and when required; this includes but is not limited to income tax, HST, and source deductions as applicable. He shall provide proof of these filings, assessments, and payments to the Trustee, who shall verify the payments set out above as against the amounts declared and assessed in these filings;

- Provide evidence satisfactory to the Court from a qualified medical practitioner or other person satisfactory to the Court, that use of drugs or alcohol (if any) does not pose a health or financial problem to himself;

- Enroll and remain enrolled in the voluntary exclusion program at Casino Nova Scotia;

- Deliver up to the trustee, for the general benefit of creditors, any property which is "property of the bankrupt" within the meaning of s. 67 of the BIA which he acquires prior to his discharge; this shall be over and above the payment requirement listed above.

[117] If the bankrupt is in default under any provisions of the above order for a period of more than 60 days, the Trustee shall advise the bankrupt in writing that it

will apply to the Court for its discharge unless the default is cured within 30 days. It shall forthwith do so thereafter if the default remains outstanding. In the event the Trustee is so discharged, it shall advise all creditors thereof and advise all creditors that the stay of proceedings has been lifted and that creditors may pursue their rights and remedies according to law.[7]

[118] I will issue a garnishment order, if necessary, for such amounts as would be payable under *Nova Scotia Civil Procedure Rule* 79, as per my authority under s. 187(6) of the BIA.

[119] The Trustee shall prepare the order, which shall include the provisions as to default, for my review.

Balmanoukian, R.

[7] For a similar example of an order in which the bankrupt was to remain current with his obligations, or risk the discharge of the trustee and removal of his protective stay of proceedings, see *Re Perrier*, 2018 BCSC 463 at para. 62.